If you pay someone for a day's work, you need this book.

JONATHAN T. HYMAN

THE EMPLOYER BILL OF RIGHTS

A MANAGER'S GUIDE TO WORKPLACE LAW

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Why I Am a

I am not so naive as to think that businesses only fire people for good reasons. Companies fire people for lots of reasons—good, indifferent, and unlawful reasons alike. In a perfect world, discrimination, retaliation, and harassment would not exist. But they do, and companies, even those with the best of intentions, run afoul of the complexities of our myriad employment laws. Every lawsuit, administrative charge, and internal complaint is an opportunity for a company to learn from a mistake, whether legal or interpersonal. It is an opportunity to train employers how to handle an employee relation problem better the next time.

In a perfect world, I would never get a call that a client has been sued. In a perfect world, companies would call me once a year to give their human resources practices a full review for compliance with the latest and greatest laws and court decisions. In a perfect world, companies would budget for proactive, preventative help and understand that a small amount of legal fees spent upfront would save a mess of headaches and a huge legal bill later.

Life, however, is far from perfect, and I often only receive calls after the summons arrives. While I love the thrill of the battle that litigation presents, it is the satisfaction I get from helping clients fix their problems so that they get it right the next time that motivates me to do my job every day.

This book explores the nature of the relationship between an employer and its employees. It is designed to serve as a comprehensive guide for business owners, human resources personnel, managers, and supervisors on the complex and confusing world of labor and employment law. It is not, however, a substitute for legal advice. Instead, it is a jumping-off point for your business to know where to start a conversation with your legal counsel when these issues arise. And while this book cannot—and should not—substitute for real-world legal advice, it will leave you more informed about the most important relationship people have besides that with their families, and, in God—the relationship between a worker and the people for

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CHAPTER

1

The Employer

I majored in history in college, I thought it makes sense to start with a

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English common law presumed that an employment contract was for a term of one year.[1] While the English rule was originally protected seasonal farm workers, with the advent of the Industrial Revolution in the nineteenth century, English courts expanded the rule also to protect factory workers.[2] Under this one-year rule, English courts "held an employer liable for breaching the employment contract if he terminated an employee at any time during the year without 'reasonable cause to do so.'"[3] "To uphold an employer's discharge of an employee without a showing of 'good cause,' the courts required a clear expression of a contrary intent as evidenced either on the face of the contract or by a clearly defined custom of the industry."[4]

The beginnings of American employment law borrowed from the English one-year rule. The late nineteenth century, however, brought the Second Industrial Revolution to the United States. "In apparent response to the economic changes sweeping the country, American courts abandoned the English rule

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[1] *Wagenseller v. Scottsdale Memorial Hosp.*, 710 P. 2d 1025, 1030 (Ariz. 1985), *superseded by statute as stated in Fallar v. Compuware Corp.,* 202 F. Supp. 2d 1067 (D. Ariz. 2002) (citing Murg & Scharman, *Employment at Will: Do the Exceptions Overwhelm the Rule?,* 23 B.C.L.Rev. 329, 332 (1982)).

[2] *Id.*

[3] *Id.* (quoting 1 *W. Blackstone, Commentaries*).

[4] *Id.* (citing Murg & Scharman, *supra,* at 332).

and adopted the employment-at-will doctrine."[5] Under this employment-at-will doctrine, employers have the employer freedom to terminate an at-will employee for any reason, good, bad, or indifferent.[6]

Historically, one can trace the roots of the at-will rule in the United States to an 1877 treatise by H.G. Wood, in which he wrote:

> *With us the rule is inflexible, that a general or indefinite hiring is prima facie a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. . . . [I]t is an indefinite hiring and is*
> [7]

.[8] Nevertheless, and no matter how

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.'"[10] Today, 49 out
.[11]

Because of the default status of the at-will nature of the employer/employee relationship, employee advocates argue that in this relationship, the employer holds all of the cards and has all of the rights. The reality, however, is that American employees are not at a lack for workplace rights.

Indeed, there exists a veritable alphabet soup of statutes that protect employees in the workplace:

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[5] *Id.* (citing Murg & Scharman, *supra,* at 334).

[6] *Id.*

[7] *Id.* (quoting *H.G. Wood, Law of Master and Servant* § 134 at 273 (1877)).

[8] *See, e.g., Toussaint v. Blue Cross & Blue Shield,* 292 N.W.2d 880, 886-87 & nn. 13-14 (Mich. 1980).

[9] *Wagenseller*, 710 P. 2d at 1030.

[10] *Id.* at 1031. (quoting Blades, *Employment at Will v. Individual Freedom: On Limiting the Abusive Exercise of Employer Power,* 67 Colum.L.Rev. 1404, 1405 (1967)).

[11] Montana is the lone wolf. In 1987, the Montana legislature passed the Wrongful Discharge from Employment Act (WDEA). Under the WDEA, a discharge is wrongful only if "it was in retaliation for the employee's refusal to violate public policy or for reporting a violation of public policy; the discharge was not for good cause and the employee had completed the employer's probationary period of employment; or the employer violated the express provisions of its own written personnel policy." Mont. Code. Ann. § 39-2-904 (2008). Thus, in Montana, an employer needs "good cause" to support a termination decision.

- Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991: discrimination based on race, color, religion, sex, and national origin[12]
- PDA (the Pregnancy Discrimination Act): pregnancy discrimination[13]
- ADEA (the Age Discrimination in Employment Act): age discrimination[14]
- ADA (the Americans with Disabilities Act): disability discrimination[15]
- EPA (the Equal Pay Act): discrimination on the basis of sex in payment of wages[16]
- GINA (the Genetic Information Nondiscrimination Act): genetic information[17]
- USERRA (the Uniformed Services Employment and Reemployment Rights Act): returning veterans[18]
- FMLA (the Family and Medical Leave Act): family leave[19]
- FLSA (the Fair Labor Standards Act): minimum wage, overtime, and child labor[20]
- ERISA (the Employee Retirement Income Security Act): benefits[21]
- OSHA (the Occupational Safety and Health Act): workplace safety[22]
- NLRA (the National Labor Relations Act): labor relations[23]

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[12] 42 U.S.C. §§ 2000e – 2000e-17.
[13] 42 U.S.C. § 2000e(k).
[14] 29 U.S.C. §§ 621 – 634.
[15] 42 U.S.C. §§ 12101 – 12213.
[16] 29 U.S.C. § 206(d).
[17] Pub.L. 110-233.
[18] 38 U.S.C. §§ 4301 – 4335.
[19] 29 U.S.C. §§ 2601 – 2654.
[20] 29 U.S.C. §§ 201 – 217, 255.
[21] 29 U.S.C. §§ 301 – 1441.
[22] 29 U.S.C. §§ 651 – 678.
[23] 29 U.S.C. §§ 151 – 169.

- FCRA (the Fair Credit Reporting Act): background checks[24]
- EPPA (the Employee Polygraph Protection Act): generally prohibiting the use of lie detector tests for pre-employment screening or during the course of employment[25]
- WARN (the Worker Adjustment and Retraining Notification Act): plant closings[26]

These statutes are the tip of the iceberg when it comes to exceptions to employment at-will. For example, 37 states (plus the District of Columbia) .[27] Under

. Moreover, 43 states (plus the District of Columbia)

.[28]

National Labor Relations Board is doing its best to go one . Earlier this summer, the NLRB ruled that the commonly used at-
handbooks could constitute a violation of the NLRA.

■ **Note:** There is much more about the National Labor Relations Board's intrusion into the employer/employee relationship later in this book.

When you jumble together all of these exceptions and carve-outs to employment at-will, one can only conclude that it is often the employer that seems to lack explicit workplace rights, leaving managers fearful of making

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[24] 15 U.S.C. §§ 1681 – 1681x.

[25] 29 U.S.C. §§ 2001 – 2009.

[26] 29 U.S.C. §§ 2101 – 2109.

[27] An implied contract is one created out of the conduct of the parties and from a written agreement. Courts enforce these implied contracts in circumstances in which it is reasonable to assume that a contract existed as the result of a tacit understanding between the parties. The 13 states that do not recognize this implied contract exception are Delaware, Florida, Georgia, Indiana, Louisiana, Massachusetts, Missouri, Montana, North Carolina, Pennsylvania, Rhode Island, Texas, and Virginia.

[28] The seven states that do not recognize this public policy exception are Alabama, Georgia, Louisiana, Maine, Nebraska, New York, and Rhode Island.

personnel decisions that might—and sometimes do—result in expensive lawsuits.

Employers, however, do not need to act, or react, in fear. Managers and business owners can assert their rights to protect their investment in people, operations, facilities, and other assets to ensure a more productive and profitable workplace.

Employers are the marginalized and the unprotected, living in fear of making any personnel decisions because they might result in expensive lawsuits. I feel your pain, and present the **Employer Bill of Rights**, each

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. Performance reviews are not attempts to support decisions

. Believe it or not, every employee we hire represents an investment by us. We want that investment to bear a substantial return and help you acquire new skills. Criticism is meant be a constructive attempt to help you improve, not a destructive set-up for you to fail.

3. The Right to Control Operations

We know how many people we need to employ, how many shifts we need to run, and how many facilities we need to operate. Most importantly, we know what we can afford in order to remain profitable. If we have to shutter or relocate a plant, lay people off, or furlough hours, it's not because we are discriminating against you; it's because it's necessary for us to remain open and able to employ anyone at all.

4. The Right to Set Sane Work Rules

We do not distribute handbooks and other policies because we like destroying trees. We do so because we think every relationship needs to be guided by a set of expectations under which each side is supposed to operate. All we ask is that you live up to your end of the bargain—and accept the consequences if you do not.

5. The Right to Be Told When There Is a Problem

We cannot fix workplace problems if the first we hear about them is when a lawsuit is served. Help us help you by letting us know if you think you're being discriminated against, retaliated against, paid incorrectly, or otherwise being

treated unfairly. If you're right, we'll fix it. Right or wrong, we won't hold it against you.

6. The Right to Receive an Honest Day's Work

When you are at work, we ask that you reasonably dedicate yourself to the tasks at hand. It's only fair; after all, we are paying you for your services.

7. The Right to Have Our Say Before You Form a Union

We recognize your right as employees to form a union if that's the collective
. Just hear us out and let us have our say on why it's
.

DA and the FMLA, for example)
. In

. It wreaks havoc with our
. We also ask that you understand that it's sometimes
.

We expect you will not share internal workplace issues with the outside world, whether they are our trade secrets or other proprietary information, or the day-to-day goings-on inside our company.

10. The Right to Be Treated with Respect

Businesses need respect too. We expect that you will demonstrate that respect to us and your fellow employees by showing up on time, not passing off to others that which you can (and should) do yourself, not waiting until the last minute to schedule your vacation, and generally treating others as you would want to be treated.

A WORD ABOUT FOOTNOTES AND LEGAL CITATIONS

Through this book, you will see footnotes appended to various statements. If you are not an attorney, or did not attend law school, many of these footnotes will contain what may appear to be a foreign language—the legal citation. We attorneys spend more hours than you can imagine learning how to write proper legal citations. Some of us even voluntarily serve on legal journals while in law school, where we spend endless hours just checking footnotes in articles for proper form. The sad part is that after we become practicing lawyers, we learn that most judges could care less about proper citation form, as long as they can locate the case, statute, article, or website cited. Nevertheless, many of these citations may not make any sense to you at all. Suffice it to say that these citations are necessary as support, and if you need to locate a case cited, Google Scholar (scholar.google.com) is a great, free resource you can use.

A WORD ABOUT OUR COURT SYSTEM

I should also take a moment to explain the structure of our court system, so you can understand the relative importance of cases discussed. Generally, we have state courts and federal courts. State courts are able hear most cases. Federal courts, however, have limited jurisdiction. They can only hear cases that arise under a federal statute or that are between a plaintiff and defendant from different states and in which the amount at issue in the case is more than $75,000. Most court systems have three levels—the trial court, the intermediate court of appeals, and the Supreme Court. All judicial opinions cited herein come from either of the latter two. Courts of appeals opinions only bind the same court of appeals in future cases. Other courts, however, use court of appeals opinions as guidance in how to rule in a particular case. State supreme court opinions are the law of that particular state, and opinions of the United States Supreme Court are the law of entire country.

CHAPTER

2

The Right to

Employers want to be able to hire the best and most qualified to staff every position. Yet the myriad equal employment opportunity (EEO) laws often intervene to roadblock these efforts. Affirmative action—requiring an employer to hire a qualified minority candidate instead of a similarly qualified nonminority candidate—remains in play for public employers and those with certain equal employment opportunity obligations pursuant to federal contracts. Even without affirmative action obligations, though, employers have a difficult time hiring the *best* person for a position. And the Equal Employment Opportunity Commission (EEOC) is making it increasingly difficult to make hiring decisions by taking away the types of legitimate information businesses can consider in the hiring process.

Illegal Job Interview Questions

Most businesses know that there are certain topics that simply are off limits during job interviews. Questions about race, sex, age, religion, disability, and marital and family status, for example, are EEO no-nos. Yet some illegal questions are not as obvious. "What year did you graduate high school?"

might seem like innocuous small talk, but such a question could lead to an illegal inference about a candidate's age.[1]

The fact is that many interview questions may seem innocuous enough yet create serious discrimination problems. The following is just a sample of the kinds of questions that are problematic, in contrast to legitimate questions to extract lawful information.

Age

X "When did you graduate high school/college?"

X "How old are you?"

X "How many years until you plan to retire?"

X "How many years seniority did you have at your prior company?"

in contrast to…

√ "Can you submit a birth certificate or other proof of age if you are hired?"

√ "Are you over 18?" [work eligibility]

National Origin

X "What country are you from?"

X "That is an interesting accent. Where were you born?"

X "Where were you or your parents born?"

in contrast to…

√ "Are you eligible to work in the United States?" [work eligibility]

Criminal Records

X "Have you ever been arrested?" [race]

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[1] *See Nieman v. Grange Mutual Casualty Co.*, Case No. No. 11-3404, 2012 U.S. Dist. LEXIS 59180 (C.D. Ill. Apr. 26, 2012) (concluding that the employer could have taken age into consideration in deciding not to hire the plaintiff, because the hiring manager viewed the plaintiff's LinkedIn profile, which included the year he graduated from college).

in contrast to…

√ "Have you ever been convicted of a crime?" [honesty, qualifications]

Sex/Gender

X "Are you comfortable traveling alone?"

X "Are you always this soft-spoken (to a man) / aggressive (to a woman)?"

X "How many children do you have living at home?"

X "What is your medical history?"

X "Do you have any medical conditions or disabilities?"

X "How often are your children ill?"

X "How will your apparent disability affect your future job performance?"

X "Have you ever filed a workers' comp claim?"

X "Do you have a history of alcohol or drug addiction?"

X "What medications are you taking?"

in contrast to…

√ "Do you need any accommodations to enable you to participate in the interviewing or hiring process?"

√ "How would you perform this particular job task?"

Some of these examples are more obvious than others. Educating interviewers about these issues—and training them on how to avoid discriminatory questions—will go a long way toward preventing unconscious biases from tainting an interview and making what could have been an otherwise lawful hiring decision appear unlawful.

These lists give some guideposts to avoid liability. They are not meant to be exhaustive. The general rule of thumb is, that unless you are absolutely sure that an interview question is 100% job-related, do not ask it. Stick to the job requirements and how a candidate's work-related background fits with those requirements.

Systemic Discrimination in Hiring Practices

Systemic cases are those that address a pattern, practice, or policy of alleged discrimination or class cases where the alleged discrimination has a broad impact on an industry, profession, company, or geographic area. The identification, investigation, and litigation of this category of cases are a "top priority" of the EEOC.

D *disparate treatment* and *disparate*
Systemic discrimination can occur with either.

D *intentional* discrimination because of one's protected
.

D
disproportionately impacts
. Under Title VII, unintentional employment discrimination

."[2]

The United States Supreme Court has devised a three-part burden-shifting test to determine whether an unlawful disparate impact exists in any particular case. First, the plaintiff must establish a prima facie case of discrimination—that an actual adverse impact has occurred. If the plaintiff succeeds, the employer must show that the protocol in question has a "business justification." If the employer shows business justification, the plaintiff must then show that other tests or selection protocols would serve the employer's interest without creating the undesirable discriminatory effect (i.e., that the proposed alternative is equally effective as the employer's procedure).[3]

For a plaintiff to satisfy its prima facie showing, the plaintiff must not only identify the specific challenged employment practice but must also demonstrate through relevant statistical analysis that the challenged practice has an adverse impact on a protected group. "Relevant" statistical analyses encompass both a standard deviation analysis and what is known as the "four-fifths test."

Under a standard deviation analysis, "if the difference between the expected value and the observed number is greater than two or three standard

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[2] 2 42 U.S.C. § 2000e-2(k)(1)(A)(I).

[3] *Wards Cove Packing Co., Inc. v. San Antonio*, 490 U.S. 642 (1989); I*sabel v. City of Memphis*, 404 F.3d 404, 411 (6th Cir. 2005).

deviations," then the hypothesis that the employment decision was made without regard to a protected characteristic would be suspect.[4] Thus, typically a difference of at least two standard deviations is necessary for a plaintiff to make out it prima facie case under this statistical test.

Under a four-fifths analysis, "a selection rate for any race, sex, or ethnic group which is less than four-fifths [80%] of the rate for the group with the highest rate will generally be regarded by the [EEOC] as evidence of adverse impact."[5] For example, assume that whites have a 75% pass rate for a test. For that exam not to have a presumptive disparate impact, the pass rate for minority

. Anything less would be a prima facie showing of disparate .[6]

. At

.[7] It is not

. The employer must "validate" the test via content validation, .[8] Regardless of the variety

test . . . its author . . . or causal reports of its validity be accepted in lieu of evidence of validity. Specifically ruled out are . . . nonempirical or anecdotal accounts of selection practices or selection outcomes."[9]

The EEOC's current attack on systemic discrimination focuses on unconscious discrimination. Company-wide policies that have the potential affect certain groups more than others on the EEOC's enforcement radar. What are some of these issues for employers to heed?

- Arrest and conviction records
- Credit histories
- Employment status
- Age

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[4] *Hazelwood School Dist. v. United States*, 433 U.S. 299, 308 (1977).

[5] 29 C.F.R. § 1607.4(D); *see also NAACP v. City of Mansfield*, 866 F.2d 162 (6th Cir. 1989).

[6] 29 C.F.R. § 1607.4(d).

[7] *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642, 659-60 (1989).

[8] 29 C.F.R. § 1607.5(A).

[9] 29 C.F.R. § 1607.9(A).

Arrest and Conviction Records

Conviction records have the potential to have a disparate impact on African Americans and Hispanics. Therefore, employers should only use them when "job related and consistent with business necessity." To ensure that applicants' criminal history information is used in a way that is consistent with Title VII, the EEOC recommends that employers limit criminal history inquiries to convictions that are related to the specific positions in question and that have taken place in the past seven years.

. For example, they are not persuasive evidence that the person

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I

. To account for the potential unreliability of arrest records, employers

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I EEOC announced its long waited—and, by employers, long *Enforcement Guidance on the Consideration of Arrest and Conviction* .[10] This Guidance flushes out the EEOC's prior positions on the use of conviction records and adds some hurdles for employers to overcome when using convictions as a hiring criterion.

For example, "as a best practice, and consistent with applicable laws," the EEOC "recommends that employers not ask about convictions on job applications." While I certainly appreciate the EEOC's recommendation, I'm not sure what "applicable laws" it references. This attempt to codify "ban the box" is one clear example where the EEOC is overreaching.

Perhaps the most controversial piece of the new Guidance is the EEOC's belief that to survive a potential disparate impact claim, employers must develop a *targeted screen* that considers at least the nature of the crime, the time elapsed, and the nature of the job, and then must provide an opportunity for an *individualized assessment* to determine if the policy as applied is job-related and consistent with business necessity.

In engaging in this individualized assessment, the EEOC directs employers to consider the following factors:

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[10] U.S. Equal Employment Opportunity Commission, "EEOC Enforcement Guidance," http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm, April 25, 2012.

- Individualized assessment generally means that an employer informs the individual that he may be excluded because of past criminal conduct; provides an opportunity to the individual to demonstrate that the exclusion does not properly apply to him; and considers whether the individual's additional information shows that the policy as applied is not job-related and consistent with business necessity.
- The individual's showing may include information that he was not correctly identified in the criminal record or that the record is otherwise inaccurate.

ther relevant individualized evidence for employers to consider includes:

- The facts or circumstances surrounding the offense or conduct;
- The number of offenses for which the individual was convicted;
- Older age at the time of conviction, or release from prison;
- Evidence that the individual performed the same type of work, post conviction, with the same or a different employer, with no known incidents of criminal conduct;
- The length and consistency of employment history before and after the offense or conduct;
- Rehabilitation efforts (e.g., education/training);
- Employment or character references and any other information regarding fitness for the particular position; and
- Whether the individual is bonded under a federal, state, or local bonding program.

There is no requirement under Title VII that requires an individualized assessment in all circumstances. In the EEOC's opinion, however, foregoing a screen that includes the individualized assessment will make it difficult, if not impossible, for an employer to justify a criminal background check as job-related and consistent with business necessity. Yet applying this individualized assessment for all applicants will impose a heavy burden on employers. And the greater an employer's attrition and hiring needs, the heavier that burden will become.

The EEOC concludes by suggesting some best practices for employers who consider criminal record information when making employment decisions:

- Develop a narrowly tailored written policy and procedure for screening applicants and employees for criminal conduct.
- The policy should identify essential job requirements and the actual circumstances under which the jobs are performed.
- The policy should also determine the specific offenses that may demonstrate unfitness for performing such jobs and the duration of exclusions for criminal conduct.
- Record the justification for the policy, procedures, and exclusions, including a record of consultations and research considered in crafting the policy and procedures.

  Train managers, hiring officials, and decision makers on how to implement the policy and procedures consistent with Title VII.

. The EEOC is
. Statistically,
African Americans and Latinos tend to have lower credit scores. Additionally, the EEOC disputes whether credit reports are an accurate way to measure an employee's qualifications.

Conversely, however, employers believe that credit histories are an important screening tool for employers, as they can reveal whether one is responsible. Additionally, depending on the position for which one is being considered, an employer may want to know before one is hired if one has an incentive to steal or otherwise commit fraud.

Blanket prohibitions on any practice are usually not a good idea. In this area, there are good reasons to allow the use of credit checks for job candidates. Consider the following:

- While 60% of employers use credit checks to vet job candidates, only 7.8% use them for all candidates.[11]
- Employers generally conduct credit checks when the information is relevant to the particular position: jobs with financial or fiduciary responsibilities (91% of employers),

[11] U.S. Equal Employment Opportunity Commission, "Statement of Christine V. Walters, MAS, JD, SPHR, Society for Human Resource Management," http://www.eeoc.gov/eeoc / meetings/10-20-10/walter.cfm, October 20, 2010.

senior executives (46%), and jobs with access to confidential employee information (34%).[12]

- Employers do not use credit checks to screen out applicants before they can even get in the door. 57% of businesses only initiate credit checks after a contingent offer, and another 30% only after the job interview.[13]
- Credit checks can help protect against employee theft and fraud. In 44.7% of cases of employee fraud, the perpetrators were experiencing financial difficulties, and in 44.6% of cases they were living beyond their means.[14]
- According to credit report provider Experian, employers never see credit scores. However, most of the research on the disparities in credit histories between racial groups is based on those scores. It is unfair to hold employers accountable for the scores they never see.[15]

espite the EEOC's efforts to limit the use of credit as a hiring criterion, it is

. There is an entire federal statute—Fair Credit Reporting Act—that provides myriad hoops for employers to jump through before and after using credit information. It also requires that employees *give their consent* before an employer can even request a credit history. And Title VII prohibits the discriminatory use of credit histories. The EEOC seems to be overreaching in its efforts to prohibit a practice that can prove relevant to many positions.

Employment Status

Another selection criterion under attack from the EEOC is employment status—that is, whether one currently is employed or unemployed. Increasingly, more and more employers are requiring as a condition of consideration for hiring that the candidate is currently employed. Indeed, many employers go so far as to write this requirement into the advertisement for a position.

As a management-side attorney, my natural inclination is to write this story off as the EEOC looking for another way to hamstring the ability of companies

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[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

to use their best judgment in making personnel decisions. Then I considered the data from the Bureau of Labor Statistics, which shows that blacks have an unemployment rate almost two times higher than that of whites, and Hispanics almost 50% higher that of whites.[16]

Given this disparity, can one argue in good faith that a disparate impact does not exist? I am not a statistician, but the impact of this data looks significant to me. Is the real question, then, not whether unemployment status has a disparate impact but whether using current employment status is job-related for the position in question and consistent with business necessity? I can

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Director of the Program on
R Ethnicity, and the Economy of the Economic Policy Institute, "any

."[17]

EEOC public hearing on this issue, two advocates for
Urban, an attorney with Jones Day, and Fernan Cepero, Vice
P Human Resources of the YMCA of Greater Rochester and representative of the Society for Human Resource Management, testified on the benefits of businesses using employment status as a hiring criterion.

Mr. Urban relied on his experience to cast doubt on the legitimacy of this issue as a real problem:

> *At end, under the widespread practice that I have seen employers follow, the simple fact that the applicant is or was unemployed does not operate to disqualify the applicant. The reason the employer may decline to hire the applicant will be the underlying reason the applicant became unemployed, and typically it is job-related. In sum, it is my experience and belief that there is not a widespread practice among employers to disqualify applicants on the basis of unemployment. I submit to you that the anecdotal examples contained in media reports over the past year or so regarding such circumstances are, when viewed in the broad scope, isolated incidents.*[18]

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[16] Bureau of Labor Statistics, Current Population Survey.

[17] U.S. Equal Employment Opportunity Commission, "Written Testimony of Algernon Austin Ph.D. Director of the Program on Race Ethnicity, and the Economy Economic Policy Institute," http://www.eeoc.gov/eeoc/meetings/2-16-11/austin.cfm, February 16, 2011.

[18] U.S. Equal Employment Opportunity Commission, "Written Testimony of James S. Urban, Partner, Jones Day," http://www.eeoc.gov/eeoc/meetings/2-16-11/urban.cfm, February 16, 2011.

Mr. Cepero elaborated further, asserting that the blanket exclusion of the unemployed is not good HR practice and runs contrary to the best interest of companies that simply look to fill jobs with the best people available:

> *Employers, in SHRM's experience, whether operating in the currently challenging economy or in more robust times, are focused on finding the right people for the job, regardless of whether or not they are currently employed. Our members recognize that any type of blanket exclusion raises concerns under Title VII. What's more, exclusionary policies are poor business practices because they prevent organizations from accessing some of the best available knowledge, skills and abilities in a given labor force.*[19]

EEOC is looking for systemic discrimination in
. Just because something might be bad business,
. Nevertheless, employers who

EEOC may be watching. Employers would be wise to document the job-

C appears on your doorstep.

The EEOC is also attacking age and recently held a public meeting debating the use of age as a selection criterion. EEOC Commissioner Stuart J. Ishimaru said, "The treatment of older workers is a matter of grave concern for the Commission. We must be vigilant that employers do not use the current economy as an excuse for discrimination against older workers."[20] Going forward, it is clear that the EEOC will target age discrimination as an enforcement priority. Any company that is either reducing ranks via layoffs or hiring to restaff as the economy rebounds should pay extra attention to age discrimination issues in light of this administrative enforcement.

The EEOC believes that the current economic climate is exacerbating this problem. At a minimum, it is increasing the number of employees who claim to be victims of age discrimination. Last year, the EEOC received 22,778 charges of age discrimination, which represented 24.4% of all charges filed, up from 16,548 charges and 21.8% in 2006.

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[19] U.S. Equal Employment Opportunity Commission, "Written Testimony of Fernan R. Cepero Vice President for Human Resources The YMCA of Greater Rochester," http: //www.eeoc.gov/eeoc/meetings/2-16-11/cepero.cfm, February 16, 2011.

[20] U.S. Equal Employment Opportunity Commission, "EEOC Explores Plight Of Older Workers In Current Economic Climate," http://eeoc.gov/eeoc/newsroom/release/11-17-10.cfm, November 17, 2010.

The EEOC heard the following testimony:

- William E. Spriggs, Ph.D., Assistant Secretary for Policy, U.S. Department of Labor, testified: "During a deep and long recession, the lengths of time that people remain unemployed increases. Older workers have been overwhelmed in this current recession and their numbers are high among the worst indicators. They are the slowest to be reintegrated from unemployment to employment, which indicates that their job search is longer and more challenging. This comes at the cost of human capital depreciation for older workers."[21]

  Mary Anne Sedey, plaintiff-side employment lawyer, claimed that older workers rarely litigate discriminatory hiring claims and urged the EEOC to investigate age discrimination in hiring. She cited three reasons: applicants lack information about why they were turned down; they are reluctant to file a claim based on a hunch; and they cannot find lawyers willing to take their claims.[22]

  Deborah Russell, Director of Workforce Issues in AARP's Education and Outreach Department, discussed some proactive steps employers in the healthcare industry have taken to meet the needs of the over-50 demographic.[23]

- Cornelia Gamlem, Society for Human Resource Management, discussed some suggested best practices for recruiting, retaining, and managing mature workers—including workplace flexibility, retention programs, targeted recruitment, and reductions in force management.[24]

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[21] U.S. Equal Employment Opportunity Commission, "Written Testimony of William E. Spriggs, Ph. D. Assistant Secretary for Policy U.S. Department of Labor," http://www.eeoc.gov/eeoc/meetings/11-17-10/spriggs.cfm, November 17, 2010.

[22] U.S. Equal Employment Opportunity Commission, "Written Testimony of Mary Anne Sedey Partner Sedey Harper P.C.," http://www.eeoc.gov/eeoc/meetings/11-17-10/ sedey.cfm, November 17, 2010.

[23] U.S. Equal Employment Opportunity Commission, "Written Testimony of Deborah Russell On Behalf Of AARP," http://www.eeoc.gov/eeoc/meetings/11-17-10/russell.cfm, November 17, 2010.

[24] U.S. Equal Employment Opportunity Commission, "Written Testimony of Cornelia Gamlem President GEMS Group and Society for Human Resource Management," http://www.eeoc.gov/eeoc/meetings/11-17-10/gamlem.cfm, November 17, 2010.

Social Media

Would you believe that 91% of employers use social media to aid in their decisions of who, and who not, to hire? An employer can learn a lot about a prospective employee from information that is publicly available via social media and other websites. For example, an employer can learn that a candidate lied about his or her qualifications, posted inappropriate comments, trashed a former employer, divulged corporate confidential information, or demonstrated poor communications skills—any one of which could legitimately disqualify a candidate from further consideration. Conversely, an employer can discover

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espite the legitimate information an employer can discover, these informal
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Internet is unreliable and unverifiable. An even

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. Jane Doe submits a job application to ABC
. The hiring manager types her name into the Facebook search bar. What happens if the search reveals that Ms. Doe belongs to a breast-cancer-survivor group? If ABC declines to interview Ms. Doe or hires another candidate, it is opening itself up to a claim that it failed to hire her because it regarded her as disabled or because of her genetic information. Now the company is placed in the unenviable position of having to defend its decision not to hire Ms. Doe from the imputation that it was based on its discovery of her medical information.

Another potential pitfall in using social media to screen job applicants is off-duty conduct laws. Twenty-nine states have laws that prohibit employers from taking an adverse action against an employee based on their lawful off-duty activities:

- 17 states have "smokers' rights" statutes, which prohibit discrimination against tobacco users. (Connecticut, Indiana, Kentucky, Louisiana, Maine, Mississippi, New Hampshire, New Jersey, New Mexico, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Virginia, West Virginia, and Wyoming)
- 8 states have statutes that protect the use of any lawful product (e.g., tobacco or alcohol) outside of the workplace.

(Illinois, Minnesota, Missouri, Montana, Nevada, North Carolina, Tennessee, and Wisconsin)

- 4 states have statutes that protect employees who engage in any lawful activity outside of work. (California, Colorado, New York, and North Dakota)

Despite all of these risks, Internet searches on job candidates hold real value for employers. They just have conduct done carefully and with certain built-in protections:

Consult with your employment attorney to develop policies, procedures, and guidelines for the gathering and use of Internet-based information without conflicting with discrimination and other laws.

Print a clear disclaimer on the job application that you may conduct an Internet search, including sites such as Facebook, LinkedIn, and Twitter, and general searches using search engines such as Google and Bing.

Only conduct the search after you have made the candidate a conditional job offer.

. Consider using a third party to do the searching, with instructions that any sensitive, protected, or EEO information not be disclosed back to you. This third party can either be a trained employee insulated from the hiring process or an outside vendor specializing in these types of background searches.

5. Do not limit yourself to Internet searches as the only form of background screening. Use this information as part of a larger, more comprehensive background-screening program.

Social media background checks are starting to receive legislative attention. In response to an alleged trend by employers requiring job applicants to turn over their Facebook passwords as part of the hiring process, United States senators have called for action to outlaw this supposed practice, Already three states—Maryland, Illinois, and California—have passed legislation banning this practice, while many others are considering similar legislative prohibitions.

Ohio's proposed legislation, for example, is similar to laws proposed or enacted in states nationwide. Ohio Senate Bill 351 would amend Ohio's employment discrimination statue to make it an "unlawful discriminatory practice" for employers to do any of the following:

- Ask or require an applicant or employee to disclose usernames or passwords associated with, or otherwise provide access to, a private electronic account of the applicant or employee;
- Fail or refuse to hire an applicant for employment, or discharge, discipline, threaten to discharge, discipline, or otherwise penalize an employee, if the applicant or employee refuses.

The bill defines "private electronic account" as "a collection of electronically

Internet web sites, in electronic mail, and on electronic
." It then broadly defines a "social media Internet web site" as "an
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- Construct a public or semipublic profile within a bounded system created by the service;
- Create a list of other users with whom the individual shares a connection within the system; or
- View and navigate the list of users with whom the individual shares a connection and those lists of users made by others within the system.

The bill does not prohibit an employer from monitoring the electronic accounts of employees or applicants on the employer's own email or Internet system.

As far as enforcement, the bill would permit aggrieved individuals to file a charge of discrimination with the Ohio Civil Rights Commission (OCRC) or a private cause of action in court. It also allows the OCRC to levy fines of up to $1,000 for the first violation and up to $2,000 for each subsequent violation.

Public outrage over the practice of requiring job applicants to hand over social media and other online passwords is so loud that Facebook itself officially weighed in on this issue via a post on its blog by its Chief Privacy Officer:

> *If you are a Facebook user, you should never have to share your password, let anyone access your account, or do anything that might jeopardize the security of your account or violate the privacy of your friends. . . . That's why we've made it a violation of Facebook's Statement of Rights and Responsibilities to share or solicit a Facebook password. We don't think employers should be asking prospective employees to provide their passwords.*

If you believe all of the outrage, you would think that this practice is rampant. In reality, I would be surprised if 0.01% of all employers have even considered

asking a job applicant for access to his or her Facebook account, let alone carried through on the thought by making it a hiring requirement. Simply, this problem does not need fixing.

These issues raise another, more fundamental, question—what type of employer do you want to be? Do you want to be viewed as Big Brother? Do you want a paranoid workforce? Do you want your employees to feel invaded and victimized as soon as they walk in the door, with no sense of personal space or privacy? Or do you value transparency? Do you want HR practices that engender honesty and openness and that recognize that employees are

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. But this tool has to be
. Requiring passwords is not smart.

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. The government is looking for opportunities to regulate social
. If a small minority of business continues pursuing this poor HR practice, legislatures will continue pursuing legislative solutions and calling for regulatory action. Do not provide the government the opportunity. Can we all just agree that requiring Facebook passwords is a bad idea, and move on?

The Fair Credit Reporting Act and Background Checks

When an employer obtains background information on an individual from a third party to make employment-related decisions, it must comply with the Fair Credit Reporting Act (FCRA) if the background information is either a "consumer report" or an "investigative consumer report" and the third party from whom the information is obtained is a "consumer reporting agency."

The FCRA defines a "consumer report" as any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for employment. Examples not only include credit reports, but also criminal background checks, workers' compensation histories, motor vehicle reports, reference checks, and verifications of education or past employment.

The FCRA defines an "investigative consumer report" as a report on an individual's character, general reputation, personal characteristics, or mode of living that is obtained through personal interviews with neighbors, friends, or associates of the individual.

The FCRA defines a "consumer reporting agency" as any person who regularly engages in the assembling or evaluating information for the purpose of furnishing consumer reports to third parties. In other words, it's anyone or any company that regularly engages in background screenings as its business.

If your business is using a third party to obtain background
FCRA likely applies. If

FCRA does not

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Employer Do to Comply
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■ **Note:** Beginning January 1, 2013, a newly created federal agency, the Consumer Financial Protection Bureau (CFPB), will take over enforcement of the FCRA from the Federal Trade Commission. The CFPB will issue all new forms for employers to use for compliance with the FCRA. If you are using forms that complied with the FCRA before January 1, 2013, you should contact your attorney, or your background search vendor, to ensure that you are using up-to-date and correct forms. Otherwise, you will likely be in violation of the FCRA, and subject to penalties and damages for the violations.

Before You Get a Consumer Report

Before you get a consumer report on an applicant or employee, you must:

- Tell the applicant or employee that you might use information in their consumer report for decisions related to their employment. This notice must be in writing and in a stand-alone format. The notice cannot be in an employment application. You can include some minor additional information in the notice, like a brief description of the nature of consumer

reports, but only if it does not confuse or detract from the notice.

- Get written permission from the applicant or employee. This can be part of the document you use to notify the person that you will get a consumer report. If you want the authorization to allow you to get consumer reports throughout the person's employment, make sure you say so clearly and conspicuously.

  Certify compliance to the company from which you are getting the applicant or employee's information. You must certify that you:

  - notified the applicant or employee and got their permission to get a consumer report;
  - complied with all of the FCRA requirements; and
  - will not discriminate against the applicant or employee or otherwise misuse the information, as provided by any applicable federal or state equal opportunity laws or regulations.

Before You Take an Adverse Action

Before you reject a job applicant, reassign or terminate an employee, deny a promotion, or take any other adverse employment action based on information in a consumer report, you must give the applicant or employee:

- a notice of your intention to take adverse action that includes a copy of the consumer report you relied on to make your decision; and
- a copy of *A Summary of Your Rights Under the Fair Credit Reporting Act*,[25] which the company that gave you the report should have given to you.

Giving the person the notice in advance gives the person the opportunity to review the report and tell you if it is correct or incorrect. You must then wait a reasonable amount of time (at least five days) before taking the adverse action based on information contained in the consumer report.

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[25] Federal Trade Commission, "A Summary of Your Rights Under the Fair Credit Reporting Act," http://www.ftc.gov/bcp/edu/pubs/consumer/credit/cre35.pdf.

After You Take an Adverse Action

If you take an adverse action based on information in a consumer report, you must give the applicant or employee a notice of that fact—orally, in writing, or electronically.

An adverse action notice tells people about their rights to see information being reported about them and to correct inaccurate information. The notice must include:

- the name, address, and phone number of the consumer reporting company that supplied the report;
- a statement that the company that supplied the report did not make the decision to take the unfavorable action and cannot give specific reasons for it; and
- a notice of the person's right to dispute the accuracy or completeness of any information the consumer reporting company furnished and to get an additional free report from the company if the person asks for it within 60 days.

Reports

Employers who use "investigative reports"—reports based on personal interviews concerning a person's character, general reputation, personal characteristics, and lifestyle—have additional obligations under the FCRA to provide to that person:

- A statement that the investigative consumer report may include information about the individual's character, general reputation, personal characteristics, or mode of living.
- A statement advising the individual of his or her right to make a written request to the employer for a complete and accurate disclosure of the nature and scope of the investigation requested by the employer.
- A statement that the employer is required to disclose the nature and scope of the investigation to the individual, in writing, within five days after the date the employer receives the individual's request for disclosure or the date the employer requests the investigative consumer report, whichever is later.
- A copy of the *A Summary of Your Rights Under the Fair Credit Reporting Act*.

What Information Must Be Excluded from a Report?

Employers also need to understand that the FCRA places limitations on the content of a consumer report or investigative consumer report, primarily based on the age of the record. The following information may not be included or requested in a consumer report:

- Bankruptcies older than 10 years.

  Civil lawsuits, civil judgment, and arrest records older than the longer of seven years or the governing statute of limitations.

  Paid tax liens older than seven years from the date of payment.

  Accounts placed for collection or charged to profit and loss older than seven years.

  Any other adverse items of information, other than records of convictions of crimes, older than seven years.

O Unique Hiring Issues

There are many other issues that could hamper employers' legitimate efforts to make the best hiring decisions. Two issues warrant further explanation: English-only requirements and preemployment personality tests.

English-Only Requirements

Immigration reform continues to be a hot button issue, and a rash of lawsuits and high-profile stories has fueled a debate over whether an English-only rule constitutes national origin discrimination.

The EEOC and federal appellate courts have issued differing interpretations as to whether an English-only rule constitutes national origin discrimination. The EEOC's stated position is that a "rule requiring employees to speak only English at all times in the workplace is a burdensome term and condition of employment" and presumptively "violates Title VII."[26] According to the EEOC, an "employer may have a rule requiring that employees speak only English at certain times where the employer can show that the rule is justified by business necessity."[27] At least one court has applied the EEOC guidelines.[28]

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[26] 29 C.F.R. § 1606.7(a).

[27] *Id.*

[28] *See EEOC v. Premier Operator Servs.*, 113 F.Supp.2d 1066 (N.D. Tex. Sept. 13, 2000).

The majority of federal courts, however, have shown a greater willingness to tolerate English-only rules despite the EEOC's regulations. Generally, courts will uphold an English-only rule if the employer can show a legitimate business justification for the requirement. Examples of legitimate business justifications that have been found to justify an English-only requirement are:

- Stemming hostility among employees.[29]
- Fostering politeness to customers.[30]
- Promoting the ability to communicate with customers, coworkers, or supervisors who only speak English.[31]
- Enabling employees to speak a common language to promote safety.[32]
- Where cooperative work assignments are necessary.[33]
- Facilitating a supervisor's ability monitor the performance of an employee.[34]
- Addressing employee complaints that they felt uncomfortable and intimidated when coworkers spoke to each other in Spanish.[35]
- Furthering interpersonal relations among employees.[36]

Employers should be careful, however, to limit the reach of an English-only requirement only as far as necessary to articulate the business rationale for the policy. For example, in *Garcia v. Gloor,*[37] the Fifth Circuit found that an employer's rule forbidding bilingual employees from speaking anything but English in public areas while on the job did not discriminate on the basis of national origin, where such policy was confined to the workplace and work hours and did not apply to conversations during breaks or other employee free time. In *Maldonado v. City of Altus,*[38] the Tenth Circuit struck down an English-only requirement as discriminatory where the policy "extended

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[29] *EEOC v. Sephora USA, LLC*., 419 F.Supp.2d 408 (S.D.N.Y. 2005).

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Prado v. L. Luria & Son*, 975 F. Supp. 1349 (S.D. Fla. 1997).

[35] *Barber v. Lovelace Sandia Health Sys*., 409 F.Supp.2d 1313 (D.N.M. 2005).

[36] *First Union Corp. of Va*., 894 F. Supp. 933, 944 (E.D. Va. 1995).

[37] 618 F.2d 264 (5th Cir. 1980).

[38] 433 F.3d 1294 (10th Cir. 2006).

beyond its written terms to include lunch hours, breaks, and even private telephone conversations, if non-Spanish-speaking coworkers were nearby." Court found there was no business necessity for the policy to reach that far, because "there was no written record of any communication problems, morale problems or safety problems resulting from the use of languages other than English prior to implementation of the policy." Moreover, in *EEOC v. Premier Operator Servs.*,[39] another federal court struck down an English-only policy despite the employer's articulation that it was necessary to foster interemployee communication. The court concluded that there was evidence

English-only policy. Furthermore,

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E . If you have a legitimate problem—such as safety, communication with customers, or communication among . If, however, you are enacting such a rule to discourage non-Americans from working at your place of

.), you should prepare yourself to unsuccessfully

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Personality Tests

One particular type of preemployment testing that can be particularly troublesome is preemployment personality tests. Indeed, according to one recent report, as many as 56% of companies do some form of personality testing before hiring an employee. Before you can conclude whether these tests help businesses make good hiring decisions, you have to answer a very important threshold question: Are they legal? These tests not only must pass muster under a disparate impact validation but also must likely pass muster as a lawful medical examination under the Americans with Disabilities Act (ADA).

The ADA has specific rules in place for medical examination of employees:

- When hiring, an employer may not ask any questions about disabilities or require medical exams until after a conditional job offer is made to the applicant.
- After making a job offer, but before the individual starts working, an employer may ask disability-related questions

[39] 113 F. Supp. 2d 1066 (D. Tex. 2000).

and require medical exams as long as it does so for all individuals entering the same job category.

- With respect to current employees, an employer may ask questions about disabilities or require medical exams only if doing so is job-related and consistent with business necessity. Examples of permissible inquiries of testing of current employees would be if the employer has a reasonable, objective belief that an employee cannot perform the job's essential functions or will pose a direct threat because of a medical condition or if an employee requests a reasonable accommodation.
- Reasonable accommodations must be made in any employment testing or screening to enable a qualified individual with a disability to take the test, unless such accommodation poses an undue hardship.
- All employee medical information must be kept confidential, maintained securely and separately from personnel files, and only disclosed to supervisory personnel on a need-to-know basis.

Despite the apparent widespread administration of preemployment personality tests, there is very little guidance available on their legality. *Karraker v. Rent-A-Center*[40] is the seminal case. As Karraker points out, the legality of a personality test by an employer hinges on whether it qualifies as a "medical examination" protected under the ADA. The Karraker court concluded that the ADA covered the Minnesota Multiphasic Personality Inventory (MMPI) as a protected medical exam.[41] In reaching its decision, the court drew a key distinction between psychological tests that are designed to identify a mental disorder or impairment (medical examinations) and psychological tests that measure personality traits such as honesty, preferences, and habits (not medical examinations). Because the MMPI revealed, in part, potential medical diagnoses such as paranoid personality disorder, the court concluded that it was a protected medical examination. Other personality tests may not dictate the same result, depending on the types of results provided.

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[40] 411 F. 3d 831(7th Cir. 2005).

[41] The MMPI is one of the most commonly used personality tests in mental health. It is used to assist in identifying personality structure and psychopathology. *See* Butcher, J. N., Dahlstrom, W. G., Graham, J. R., Tellegen, A, and Kaemmer, B., *The Minnesota Multiphasic Personality Inventory-2 (MMPI-2): Manual for administration and scoring* (Minneapolis, Minnesota: University of Minnesota Press, 1989).

Merely because something is a "medical examination" does not mean its use is illegal under the ADA. It merely means that the ADA places certain limits on its use, depending on when in the hiring cycle the MMPI is administered. Prior to an offer of employment, personality tests are prohibited. After an applicant is given a conditional job offer, but before he or she starts work, personality tests are permitted, regardless of whether they are related to the job, as long as the employer does so for all entering employees in the same job category. After employment begins, personality tests are permitted only if they are job-related and consistent with business necessity. There are no

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Thoughts: A Chocolate Other Name . . .

In July 2010, the EEOC settled a race and sex discrimination case against a Cleveland-area temporary agency. The EEOC alleged that the agency used code words to identify the race, color, and sex of candidates it placed with employers. For example, "hockey player" meant white male; "small hands" referred to females; "basketball player" equaled African American men; and "chocolate cupcake" meant a young African American woman. The temporary agency, according to the EEOC, would attach note cards containing the coded phrases to job applications submitted to employers. The settlement paid $650,000 to a nationwide class of 11,000 people.[42]

The easy lesson from this case is that businesses should never use code words as a proxy to identify protected characteristics such as race and sex. The deeper issue, however, is that discrimination comes in all shapes and sizes. It is incumbent upon businesses to self-regulate their hiring practices, to weed out both the intentionally and unintentionally discriminatory.

[42] WKYC.com, "Cleveland: Temp agency settles after profiling allegations," http://www .wkyc.com/news/news_article.aspx?storyid=141064, July 23, 2010.

CHAPTER

3

The Right to

Just as employers want to be able to hire on ability, they also want to be able to fire on performance. Yet there exist myriad laws that alter the at-will nature of the employment relationship and affect an employer's capacity to make firing decisions. Most notably, an employer cannot terminate an employee on account of their race, sex, religion, national origin, religion, age, or disability. Moreover, some states and localities impose additional restrictions, such as sexual orientation, gender identity, military status, and family status. Additionally, the common law of many states imposes additional restrictions on firing based on a given state's public policy.

This chapter discusses some of the more cutting-edge issues that confront businesses in the firing of employees.

Discrimination, Pretext, and Honest Beliefs

For the unfamiliar, the *McDonnell Douglas* test is an evidentiary framework used in discrimination cases, which lack direct evidence of discrimination, to determine whether an employee's claim should survive summary judgment and proceed to trial. It first asks whether the plaintiff can establish a prima facie case of discrimination—(i) s/he belongs to a protected class; (ii) s/he was

qualified for the position; (iii) though qualified, s/he suffered some adverse action; and (iv) the employer treated similarly situated people outside of his/her protected class differently. If the plaintiff satisfies this showing, the burden shifts to the employer to articulate a legitimate nondiscriminatory reason for the adverse action. Once the employer makes this articulation, the burden shifts again, back to the plaintiff to show that the employer's reason is a pretext for discrimination. This test is engrained in the hearts and minds of anyone who practices employment litigation.[1]

Despite *McDonnell Douglas*'s long-standing place in employment discrimination
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Coleman v. Donahoe, the Seventh Circuit (albeit in a concurring
McDonnell Douglas test is still meaningful:

> *she suffered the requisite adverse action (depending on her theory), and that a rational jury could conclude that the employer took that adverse action on account of her protected class, not for any non-invidious reason. Put differently, it seems to me that the time has come to collapse all these tests into one.*[2]

More recently, the Sixth Circuit, in *Donald v. Sybra, Inc.*,[3] helped prove the Seventh Circuit's point. Sybra, which owns Arby's franchises, terminated Gwendolyn Donald's employment after it concluded she had been intentionally mis-ringing customers' orders to steal from her cash register. Among other issues, she claimed that Sybra terminated her employment both in retaliation for, and to interfere with, her rights under the Family and Medical Leave Act (FMLA). After concluding that the *McDonnell Douglas* framework applied to

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[1] *McDonnell Douglas* is one of the three methods available to aggrieved employees to establish discrimination. Plaintiffs can also rely on direct evidence (a statement by a decision maker that the employee's protected characteristic was the reason for the adverse action), or a mixed-motive (that the employer was motivated both an illegitimate purpose, even if it also had a legitimate reason for the adverse action). These tests, however, are largely academic and of interest to the practitioner proving, or disproving, a discrimination. What is important to the business, though, is how it can properly terminate an employee without stepping in a mess of liability, regardless of the legal test involved.

[2] 667 F.3d 835, 863 (7th Cir. 2012) (Wood, concurring).

[3] 667 F.3d 757 (6th Cir. 2012).

both her retaliation and interference claims, the court ignored *McDonnell Douglas* and affirmed the district court's grant of summary judgment to the employer:

> *The district court effectively gave Donald the benefit of the doubt and assumed that she could establish both prima facie cases. This boon notwithstanding, the district court determined that Donald produced insufficient evidence to prove that Sybra's stated reasons, cash register and order irregularities, were pretextual . . . Donald's claims fundamentally rest on the timing of Sybra's decision to terminate her employment [the day after she returned from her FMLA leave], which, we admit, gives us pause. But that alone is not enough, and her other arguments are no more persuasive. Whether Sybra followed its own protocol, or its decision not to prosecute Donald, or even Donald's history of employment, provides neither us, nor a rational juror, with a basis to believe that Sybra's decision was improper. The district court therefore correctly dismissed Donald's FMLA claims.*[4]

I *McDonnell Douglas* test and go right to

McDonnell

remains useful? Instead, why can't we simply cut to the heart of the matter? In most discrimination cases, the heart of the matter comes down to pretext.t

Pretext

> *Pretext is a commonsense inquiry: did the employer fire the employee for the stated reason or not? This requires a court to ask whether the plaintiff has produced evidence that casts doubt on the employer's explanation, and, if so, how strong it is. One can distill the inquiry into a number of component parts, and it can be useful to do so. But that should not cause one to lose sight of the fact that at bottom the question is always whether the employer made up its stated reason to conceal intentional discrimination.*[5]

In 1964, U.S. Supreme Court Justice Potter Stewart famously nondefined obscenity as "I know it when I see it."[6] In employment litigation, we often get caught up in formal burdens of proof, legitimate nondiscriminatory reasons, pretext, and direct evidence. Yet, discrimination cases are usually decided

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[4] *Id.* at 762.

[5] *Chen v. Dow Chemical*, 580 F.3d 394, 400 n.4 (6th Cir. 2009).

[6] *Jacobellis v. Ohio*, 378 US 184, 197, 84 S. Ct. 1676, 12 L. Ed. 2d 793 (1964) (Stewart, J., concurring).

with the same informality laid out by Justice Stewart. If an employment decision looks discriminatory, then it probably is. The challenge for employers is to avoid the appearance of a made-up reason.

For a plaintiff to succeed in a discrimination case, he or she must show that the employer's stated reason for the challenged decisions was a pretext (i.e., a lie or a cover up) for discrimination. One of the easiest ways for a plaintiff to establish pretext is to show that the employer's explanation for the decision changed over time. Shifting reasons cast a cloud of doubt over the veracity of the explanation and the legitimacy of the decision. Once the fact finder has . As the U.S.

S *St. Mary's Honor Center v. Hicks,* "The fact finder's

. . . show intentional

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doom your defense.

For a textbook example of how shifting or changing rationales can sink your defense, consider *Cicero v. Borg-Warner Automotive, Inc.*[8] In that case, the employer provided three different reasons for the plaintiff's termination—one at the time of firing, another in answering interrogatories, and yet another in responding to Cicero's summary judgment motion. The court concluded that the changing explanations provided sufficient evidence of pretext from which a jury could infer discrimination:

> *An employer's changing rationale for making an adverse employment decision can be evidence of pretext. Shifting justifications over time calls the credibility of those justifications into question. By showing that the defendants' justification for firing him changed over time, Cicero shows a genuine issue of fact that the defendants' proffered reason was not only false, but that the falsity was a pretext for discrimination. While the Court does not question business decisions, the Court does question a defendant's proffered justification when it shifts over time. When the justification for an adverse employment action changes during litigation, that inconsistency raises an issue whether the proffered reason truly motivated the defendants' decision.*[9]

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[7] 509 US 502, 511, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993).

[8] 280 F.3d 579 (6th Cir. 2002).

[9] *Id.* at 592.

It is important to have your reason for the decision pinned down at the time the decision is made. Further, the reason must remain reasonably consistent for the lifespan of the case. You cannot offer the employee one reason, have another written in the personnel file, provide the EEOC another in the position statement, and have the decision maker tell yet another at deposition. At best, these shifting explanations will buy you a jury trial; at worst, they will result in a large jury verdict.

Honest Beliefs

> *As long as an employer has an honest belief in its proffered nondiscriminatory reason for discharging an employee, the employee cannot establish that the reason was pretextual simply because it is ultimately shown to be incorrect. An employer has an honest belief in its reason for discharging an employee where the employer reasonably relied on the particularized facts that were before it at the time the decision was made.*[10]

Consider *Brooks v. Davey Tree Expert Co.*,[11] in which the Sixth Circuit determined that an employer was not entitled to argue its honest belief in defense of an age discrimination claim.

According to the court in *Brooks*, the honest belief rule has limits:

> *[W]e do not require that the decisional process used by the employer be optimal or that it left no stone unturned. Rather, the key inquiry is whether the employer made a reasonably informed and considered decision before taking an adverse employment action. Although we will not "micro-manage the process used by employers in making their employment decisions," we also will not "blindly assume that an employer's description of its reasons is honest."*[12]

In *Brooks*, court concluded that the employer was not entitled to the benefit of the honest belief rule, because it could not "point to specific facts that it had at the time the decision was made which would justify its belief in the proffered reason."

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[10] Majewski v. Automatic Data Processing, Inc., 274 F.3d 1106, 1117 (6th Cir. 2001) (internal quotations and citations omitted).

[11] Case No. 11-5102, 2012 U.S. App. LEXIS 7770 (6th Cir. Apr. 17, 2012).

[12] *Id.* at *22-23 (quoting *Wright v. Murray Guard, Inc.*, 455 F.3d 702, 708 (6th Cir. 2006)).

Similarly, in *Denhof v. City of Grand Rapids*,[13] the issue was whether the Grand Rapids Chief of Police reasonably relied upon a psychological fitness for duty exam in refusing to permit the plaintiff to return to work. The Court found that the Chief's reliance on the medical opinion was unreasonable because the doctor's written opinion showed that he had a preordained opinion on Denhof's unfitness for duty:

> *In his January 11, 2002, letter recommending a fitness for duty examination for Patricia Denhof, Dr. Peterson employed language that, at a minimum, suggested his opinion had already been formed. For instance, he noted that in*

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According to the Court, the employer could not have an honest belief about Denhof's lack of fitness to return to work because the opinion of the doctor upon whom it was relying was predisposed. Thus, the decision could not have been bona fide.

Jones v. Nissan N. Am.[15] offers another example of an honest-belief defense gone wrong and illustrates that an employer's honest belief cannot coexist with a disregard of the cold, hard facts.

In *Jones*, the employer argued that it could not be liable for an ADA violation by refusing to return an injured employee to work because it held an honest belief that an order of the workers' compensation court prohibited the employee's return. The court disagreed:

> *Nissan's defense . . . was based on the premise that Nissan imposed unsubstantiated medical restrictions on Jones because it believed the chancellor's decision and order required it to do so. In the instant case, however, notwithstanding Nissan's arguments to the contrary, it is clear beyond peradventure that the chancellor's order did not direct Nissan to restrict Jones*

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[13] 494 F.3d 534 (6th Cir. 2007).

[14] *Id.* at 544-545.

[15] Case No. 09-5786, 2011 U.S. App. LEXIS 17412 (6th Cir. Aug. 18, 2011).

> *from continuing in the trim-fit position he was performing at the time of the workers' compensation trial. The order only directs Nissan to pay certain benefits. Most glaringly, Nissan concluded that Jones was restricted from using "hand tools," despite the fact that the chancellor did not make a single finding with regard to Jones's ability to use hand tools in his job.*[16,17]

Courts give wide latitude to employers who make informed decisions based on all available facts and circumstances. As this case illustrates, employers who ignore the facts—or fail to make a thorough investigation to uncover all reasonably available facts—do not fair so well. Strive to be the former; do not

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.[18] is one such case. It concerned a six-year

. Shonta Michael claimed that the discipline, including a very

. Caterpillar, on the other hand, claimed that any conflict and discipline was solely because of legitimate performance issues. The Court skirted the issue of whether the disciplinary action (a performance plan) constituted an "adverse employment action," finding that regardless Michael could not prove that the employer's actions were pretext for discrimination or retaliation. Caterpillar's investigation included interviews of all of Michael's coworkers, many of whom found her difficult to work with. Michael claimed that her disagreement with those facts established pretext. The Court disagreed:

> *Michael's disagreement with the facts uncovered in Caterpillar's investigation does not create a genuine issue of material fact that would defeat summary judgment "as long as an employer has an honest belief in its proffered nondiscriminatory reason." The key inquiry in assessing whether an employer holds such an honest belief is "whether the employer made a reasonably informed and considered decision before taking" the complained-of action. An employer has an honest belief in its rationale when it "reasonably relied on the particularized facts that were before it at the time the decision was made." "[W]e do not require that the decisional process used by the employer be optimal or that it left no stone unturned." . . . Caterpillar presented sound,*

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[16] *Id.* at *32-33.

[17] Case No. 09-5786, 2011 U.S. App. LEXIS 17412 (6th Cir. Aug. 18, 2011).

[18] 496 F.3d 584 (6th Cir. 2007).

> *nondiscriminatory reasons for the action that it took based on a reasonable investigation of events that occurred after Michael's favorable performance review.*[19]

Because Caterpillar had extensive documentation of its investigation, it could reasonably rely on its conclusions with no finding of pretext or retaliatory animus.

Seeger v. Cincinnati Bell Telephone Co.[20] is another textbook example of the honest belief rule at work for an employer. In that case, the Court used that

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Tom eeger took an approved leave of absence under the FMLA for a herniated . Four days after Seeger's doctor certified him as completely unable

Seeger's co-workers saw him
Oktoberfest. One of the
Seeger was collecting paid disability leave, reported his
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statements from the two employees who saw Seeger, reviewing Seeger's medical records, disability file, and employment history, and consulting with CBT's internal medical manager. Based on the inconsistency between Seeger's reported medical condition and his reported behavior at Oktoberfest, CBT terminated Seeger for "disability fraud" (overreporting his symptoms to avoid light duty and continue collecting disability payments).

Relying on the honest belief rule, the Court concluded that CBT's termination decision did not violate the FMLA:

> *CBT made a "reasonably informed and considered decision" before it terminated him, and Seeger has failed to show that CBT's decisionmaking process was "unworthy of credence." . . . The determinative question is not whether Seeger actually committed fraud, but whether CBT reasonably and honestly believed that he did. . . . CBT never disputed that Seeger suffered from a herniated disc. . . . Seeger's ability to walk unaided for ten blocks and remain at the crowded festival for ninety minutes understandably raised a red flag for CBT, giving it reason to suspect that Seeger was misrepresenting his medical condition in an attempt to defraud CBT's paid-leave policy.*[21]

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[19] *Id.* at 598-600.

[20] 681 F.3d 274 (6th Cir. 2012).

[21] *Id.* at 285-286.

This case has wide implications. There are many laws that entitle employees to take time off from work: FMLA, ADA, PDA, and Title VII, to name a few.[22] Many companies use surveillance to curb leave of absence abuses. I am not suggesting that you surveil every employee who takes leave from your workplace. Without a good faith belief supporting the surveillance, a court could conclude that your actions are unlawful. If, however, you have a good faith reason to test the legitimacy of an employee's leave via surveillance or other monitoring, *Seeger*'s invocation of the honest belief rule will offer you some protection if you misinterpret the results of your investigation.

Not—Sexual Orientation

Il does not, on its face, protect transgender workers from discrimination.

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Il's protections against sex-stereotyping-as-gender-discrimination, as U.S. Supreme Court in its landmark *Price* [23] decision:

> *In saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman. In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.*[24]

Recently, the EEOC made what might be the most significant pronouncement to date on the issue of the protection of transgender as gender discrimination. *Macy v. Holder*[25] involved a transgender woman, Mia Macy, who claimed that the Federal Bureau of Alcohol, Tobacco, Firearms denied her a job after she announced she was transitioning from male to female.

In reinstating Macy's Title VII claim, the EEOC concluded:

> *That Title VII's prohibition on sex discrimination proscribes gender discrimination, and not just discrimination on the basis of biological sex, is*

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[22] More on these accommodation rules in Chapter 8.

[23] 490 US 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989).

[24] *Id.* at 250.

[25] EEOC Agency No. ATF-2011-00751, Appeal No. 0120120821 (Apr. 20, 2012).

> *important. . . . Title VII prohibits discrimination based on sex whether motivated by hostility by a desire to protect people or a certain gender, by assumptions that disadvantage men, by gender stereotypes, or by the desire to accommodate other people's prejudices or discomfort. . . . Thus, we conclude that intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination "based on . . . sex," and such discrimination therefore violates Title VII.*[26]

While this opinion is not binding in courts, one cannot overstate the significance of the fact that the agency responsible for enforcing the federal EEO laws has made this broad pronouncement. Many employers operate

II lacks no facial prohibition. As

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M EEOC decision is in line with the decisions of some courts . The Sixth Circuit, for example, in Smith v.
S [27] reversed the district court's dismissal of a Title VII sex discrimination . It found that

> *impermissible discrimination, irrespective of the cause of that behavior; a label, such as "transsexual," is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity. . . . Having alleged that his failure to conform to sex stereotypes concerning how a man should look and behave was the driving force behind Defendants' actions, Smith has sufficiently pleaded claims of sex stereotyping and gender discrimination.*[28]

In *Barnes v. Cincinnati*,[29] the same court followed suit by affirming a jury verdict in favor of Phillip Barnes, a preoperative male-to-female transsexual who was denied a job in the Cincinnati Police Department.

In *Schroer v. Billington*,[30] the U.S. District Court for the District of Columbia reached the same conclusion. In that case, the Library of Congress had offer a position to David Schroer, until he told his future employer that he would be showing up at work as Diane. He sued for gender discrimination after the

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[26] *Id.* at pp. 6, 12, 14.

[27] 378 F.3d 566 (6th Cir. 2004).

[28] *Id.* at 572, 575.

[29] 401 F.3d 729 (6th Cir. 2005).

[30] 577 F.Supp.2d 293 (D.D.C. 2008).

Library rescinded the job offer. The trial judge ruled that the employer is liable for sex discrimination:

> *The evidence establishes that the Library was enthusiastic about hiring David Schroer—until she disclosed her transsexuality. . . . The Library revoked the offer when it learned that a man named David intended to become, legally, culturally, and physically, a woman named Diane. This was discrimination "because of . . . sex."*[31]

More recently, in *Koren v. The Ohio Bell Telephone Co.*,[32] an Ohio federal court

ll to cover "sexuality." The Ohio Bell Telephone

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Ohio Bell really fired him because he is homosexual and

. He sued for gender discrimination. Did the

Ohio Bell's motion for summary judgment because Title VII

ll does protect against the application of unlawful sex-based

Give yourself a prize if you answered "b":

> *"[A] plaintiff hoping to succeed on a claim of sex stereotyping [must] show that he fails to act and/or identify with his or her gender . . . as all homosexuals, by definition, fail to conform to traditional gender norms in their sexual practices." Koren's position is that changing his name upon marriage was a nonconforming "behavior" that supports his gender discrimination claim. Ohio Bell disagrees and attempts to frame Koren's claims as a simple attempt "to bootstrap protection for sexual orientation into Title VII." The Court agrees with Koren: homosexual males do not "by definition, fail to conform to the traditional gender norms" by changing their surname upon marriage. And here, Koren chose to take his spouse's surname—a "traditionally" feminine practice—and his co-workers and superiors observed that gender non-conformance when Koren requested to be called by his married name.*[33]

Nine out of the last 10 Congresses have tried to pass a version of the Employment Nondiscrimination Act, which among other things, would add "sexual orientation and gender identity" to the list of classes protected under Title VII. It has failed each time. Courts and the EEOC, however, continue to give the LGBT community that which the legislature has rejected.

Indeed, while Title VII lacks protections for sexual orientation or gender identity on its face, employers must check the laws of their individual states

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[31] *Id.* at 306.

[32] Case No. 1:11-CV-2674, 2012 U.S. Dist. LEXIS 114197 (N.D. Ohio Aug. 14, 2012).

[33] *Id.* at *13-15 (quoting *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 764 (6th Cir. 2006)).

and localities. Twenty-one states prohibit sexual orientation discrimination in employment, 16 of which also prohibit gender identity discrimination; another 140 cities and counties have similar laws.[34] Many companies have also made the private decision to prohibit this type of discrimination in their individual workplaces.

For the uncovered, this EEOC decision signals that the time is coming when this type of discrimination will no longer be an open issue. I suggest you get on the bandwagon now, and send a signal to all of your employees that you are a business of inclusion, not one of bigotry and exclusion.

T Reach of the Cat's Paw

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clever—and rather unscrupulous—monkey persuades an unsuspecting feline to snatch chestnuts from a fire. The cat burns her paw in the process while the monkey profits, gulping down the chestnuts one by one. As understood today, a cat's paw is a "tool" or "one used by another to accomplish his purposes." Webster's Third New International Dictionary (1976).[35]

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[34] Sixteen states and the District of Columbia have statutes that protect against both *sexual orientation and gender identity* discrimination in employment in the public and private sector: California, Colorado, Connecticut, Hawaii, Illinois, Iowa, Maine, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington.

The states that ban sexual orientation discrimination in employment by statute are California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington, and Wisconsin.

Four states have laws prohibiting sexual orientation discrimination in public employment only: Indiana, Michigan, Montana, and Pennsylvania.

Five states prohibit discrimination in public employment based on sexual orientation only: Alaska, Arizona, Missouri, Montana, and Ohio.

Five states have an executive order, administrative order, or personnel regulation prohibiting discrimination in public employment based on sexual orientation and gender identity: Indiana, Kansas, Kentucky, Michigan, and Pennsylvania.

Three states prohibit discrimination based on gender identity in public employment only: Delaware, Maryland, and New York.

[35] *Staub v. Proctor Hosp.*, 560 F.3d 647, 650 (7th Cir. 2009).

In discrimination cases, the "cat's paw" refers to a decision maker who lacks an unlawful bias but who bases the adverse employment decision on the influence of another with such a bias. The Seventh Circuit has described its interpretation of the cat's paw as follows:

> *[W]here an employee without formal authority to materially alter the terms and conditions of a plaintiff's employment nonetheless uses her "singular influence" over an employee who does have such power to harm the plaintiff for racial reasons, the actions of the employee without formal authority are imputed to the employer and the employer is in violation of Title VII. . . . [W] here a decision maker is not wholly dependent on a single source of information, but instead conducts its own investigation into the facts relevant to the decision, the employer is not liable for an employee's submission of misinformation to the decision maker.*[36]

. In *Staub v. Proctor Hosp.*,[37] the Supreme
. Briefly, Staub brought his claim under the
niformed Services Employment and Reemployment Rights Act (USERRA),

. Staub had been a long-time employee of Proctor Hospital before being called upon to serve in Iraq. Many at the hospital were critical of Staub's military service because of the strain it put on those who had to cover from him in his absence. When the Vice President of HR, who held no hostility towards Staub, terminated him, he sued, claiming that although the decision maker was not personally biased against his military service, she fired him based on the hostility of Staub's direct supervisors.

In a unanimous opinion, the Supreme Court concluded that Staub could proceed with his USERRA claim because the discriminatory animus of those critical of Staub could be imputed to the hospital's Vice President of HR:

> *We therefore hold that if a supervisor performs an act motivated by antimilitary animus that is intended by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under USERRA.*[38]

The Court also declined to immunize employers who undertake their own independent investigation of the circumstances leading to the adverse employment action. Instead, the Court only excuses reliance on the biased

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[36] *Brewer v. Board of Trustees of University of Illinois,* 479 F.3d 908, 917-18 (7th Cir. 2007).

[37] 562 US __, 131 S. Ct. 1186, 179 L. Ed. 2d 144 (2011).

[38] *Id.* at 1194.

report of a supervisor if the employer independently determines that the decision was entirely justified apart from the supervisor's input:

> *Thus, if the employer's investigation results in an adverse action for reasons unrelated to the supervisor's original biased action (by the terms of USERRA it is the employer's burden to establish that), then the employer will not be liable. But the supervisor's biased report may remain a causal factor if the independent investigation takes it into account without determining that the adverse action was, apart from the supervisor's recommendation, entirely justified.*[39]

USERRA, it pointed out that USERRA's
II."[40] Indeed,
Staub decision, the lower federal courts have

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F *Chattman v. Toho Tenax Am,*[41] in which the Sixth Circuit
Staub to reverse summary judgment in a race discrimination case.
HR director, Tullock, who recommended

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In support of this allegation of race-based animus, Chattman pointed to three separate incidents:

1. Tullock told a "joke" that O.J. Simpson was innocent and that Nicole Brown was killed by their son because O.J. Simpson responded to a question from his son by answering "go axe your mother."
2. Tullock responded to another employee's complaint that her son had gotten into trouble at school for fighting by saying, "You know what my grandmother always says about boys scuffling? That's how the nigger graveyard got full."
3. Tullock commented about then-Presidential candidate Barack Obama by saying, "Well, you better look close at Obama's running mate because Americans won't allow a nigger president."

Even though Tullock was not the decision maker, the court concluded that a jury question existed under the cat's paw theory:

> *Chattman has shown that a genuine issue of material fact exists regarding whether Tullock intended that Chattman be disciplined. There can be little*

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[39] *Id.* at 1193.

[40] *Id.* at 1191.

[41] 686 F.3d 339 (6th Cir. 2012)

doubt that Tullock desired Chattman's termination when he made his recommendation and fabricated the agreement of the other supervisors. . . . Chattman alleges that Tullock knew that white employees engaged in horseplay but never reported any of those incidents to upper management, instead reporting the only incident on record of a black employee engaging in horseplay. Tullock was the Human Resources manager, and he actively inserted himself in the decisionmaking process. He both misinformed and selectively informed . . . about the incident. A reasonable fact finder could find Tullock's actions were a proximate cause of the adverse decisions.[42]

.[43] provides another good example of the cat's
. In *Blount*, two former Ohio Bell employees claimed that their

A. They argued that their managers punished FMLA users more severely
. Ohio

. The Court, however, concluded that the plaintiffs presented enough

Moreover, even if the decision to punish and terminate resided higher in the supervisory chain, as Defendants argue, the animus of the Center Sales Managers can be inferred upwards where it had the effect of coloring the various adverse employment actions in this suit. See Staub v. Proctor Hospital *(holding that discriminatory animus can be inferred upwards where the employee who makes the ultimate decision to punish does so in reliance upon assessments or reports prepared by supervisors who possess such animus).*[44]

What is the practical takeaway for employers in handling the implications of the cat's paw? You must know who you have managing and supervising your employees. Companies do not make personnel decisions in a vacuum. Executives often rely on the front-line managers and supervisors for advice on who and when to discipline or fire. Yet, under *Staub*, businesses are on the hook for the discriminatory animus of these managers and supervisors, even if they have nothing to do with the ultimate decision. You never want a bigot managing your employees. The cat's paw, however, provides employers added incentive to purge them from your managerial ranks.

Moreover, if employers will be liable for the animus of managers and supervisors in all but the most unconnected of decisions, then businesses should get

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[42] *Id.* at 351-353.

[43] Case No. 1:10-CV-01439, 2011 U.S. Dist. LEXIS 24372 (N.D. Ohio Mar. 10, 2011).

[44] *Id.* at *17.

started training those managers and supervisors on their EEO responsibilities. If courts will hold you responsible for their actions, you want some peace of mind that you did everything you could to guide those actions.

Going forward, employers have to be very wary of the cat's paw. The *Staub* Court's holding hinges on ideals such as "intent" and "proximate cause," which are almost always fact-based inquiries. Because it is very difficult for an employer to win summary judgment on these issues, the Court has likely turned nearly every "cat's paw" case into a jury case—an expensive proposition for employers.

Responsibility Discrimination

In O *Working Mother* magazine named Novartis Pharmaceuticals

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Manhattan, all was not what it seemed at N . That jury found that Novartis had discriminated against women . The cost to Novartis was staggering—$3.3 million

in punitive damages to a class of 5,600 female sales representatives and entry-level managers. The allegation that perhaps led the jury to award more than a quarter billion dollars was this gem from a Novartis manager explaining his preference against hiring young women: "First comes love, then comes marriage, then comes flex time and a baby carriage." That statement has not only cost Novartis a whopping 2.6% of its annual revenue, but also its reputation as a great workplace for working moms.

Three years earlier, a Cuyahoga County, Ohio, jury, swayed by this same pro-family sentiment, awarded a former assistant manager for Kohl's Department Stores $2.1 million. The plaintiff, Teresa Lehman, claimed that Kohl's discriminated against her because of her parenting role for her two young children. According to the *Cleveland Plain Dealer*, the evidence at trial showed that in a "two-month period, five store-manager jobs went to less-experienced and less qualified men than Lehman, or to women with no children or women who assured their bosses that they would have no more children."[46] At the same time, Lehman, who had previously been told by her bosses that she was manager material and on track for a promotion, was passed over and transferred to less desirable stores. Witnesses testified at trial that Lehman's

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[45] Working Mother, "2009 Working Mother 100 Best Companies," http://www.workingmother.com/work-life-balance/2009/08/novartis-pharmaceuticals.

[46] Cleveland Plain Dealer, Karl Turner, "Akron woman wins discrimination case," http: //blog.cleveland .com/metro/2007/05/akron_woman_wins_discriminatio.html, May 25, 2007.

bosses asked her questions such as: "You're not going to get pregnant again, are you?" "Did you get your tubes tied?" "I thought you couldn't have any more kids?" "Are you breast feeding?" and "Are you having any more kids?"[47] In a lesson that all employers should take to heart, the *Cleveland Plain Dealer* quoted juror Linh Duong's explanation of the panel's sentiments: "I think she was very poorly treated because she was pregnant, because she wanted to have a family."[48]

Employers must take these issues seriously. Whether you call these issues work/life balance, or maternal profiling, or the glass ceiling, employers that

EEOC, and the court of public opinion.[49]

. Never-
EEOC's *Unlawful Disparate Treatment of Workers with*
, employers that disparately treat employees who
.[50]

EEOC, the Guidance is intended to address the connection
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"circumstances in which stereotyping or other forms of disparate treatment may violate Title VII or the prohibition under the ADA against discrimination based on a worker's association with an individual with a disability."

As examples of family responsibility discrimination, the EEOC provides a 27-page laundry list that should be HR 101 for all but the most myopic of employers:

- Asking female applicants, but not male applicants, if they have children (sex discrimination);
- Making derogatory comments about a female employee after she becomes pregnant (sex discrimination);

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[47] *Id.*

[48] *Id.*

[49] Indeed, the 2007, the *New York Times* listed "maternal profiling" as one of its buzzwords of the year. It defined the terms as, "Employment discrimination against a woman who has, or will have, children." The New York Times, G. Barrett, "All We are Saying," http://www . nytimes.com/2007/12/23/weekinreview/23buzzwords.html., December 23, 2007.

[50] Equal Employment Opportunity Commission, "Employer Best Practices for Workers with Caregiving Responsibilities," http://www.eeoc.gov/policy/docs/caregiver-best-practices.html.

- Quizzing a female job applicant on how she would handle her job and her family at the same time (sex discrimination);
- Forcing pregnant employees to take unpaid leaves of absence (sex/pregnancy discrimination);
- Refusing to permit a male employee to take permissible paternity leave or denying a request for part-time status to enable one's wife to return to work full-time, because it is not "masculine" (sex discrimination);

  Permitting a white employee time off to care for an ill child, but not a black employee (race discrimination);

  Failing to hire an employee who has to care for a disabled child (disability discrimination);

  Repeated negative comments about breastfeeding, motherhood, or pregnancy (sexual harassment).

EEOC published a best practice guide for employers. In its ,[51] the agency

family responsibility bias claims:

- Develop, disseminate, and enforce a strong EEO policy that provides examples of illegal conduct and identifies a contact person for questions or complaints.
- Ensure that managers at all levels are aware of, and comply with, the organization's policies.
- Respond to complaints of discrimination efficiently and effectively.
- Protect against retaliation.
- Focus on qualifications, not characteristics.
- Develop specific, job-related qualification standards for each position that reflect the duties, functions, and competencies of the position.
- Identify and remove barriers to re-entry for individuals who have taken leaves of absence from the workforce.

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[51] *Id.*

- Ensure that employment decisions are well-documented and transparent (to the extent feasible).
- Monitor compensation practices and performance appraisal systems for patterns of potential discrimination.
- Reassign job duties that employees are unable to perform because of pregnancy or other caregiving responsibilities.
- Provide reasonable personal or sick leave.

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ublic Policy

any states have recognized a common-law exception to the at-will nature of ."[52] In

a termination decision. If a termination jeopardizes or places at risk a public policy embodied in a statute or regulation that lacks a specific remedy for an aggrieved employee, the common law of most states will permit an employee to bring a common law claim challenging the discharge as wrongful.

These cases are often fact specific, and their outcome may depend on whether your particular state recognizes that the public policy at hand gives rise to such a claim. For example, in my home state, Ohio, a plaintiff must state with particularity the clear public policy placed in jeopardy by the termination or face summary dismissal of the lawsuit. In *Dohme v. Eurand Am., Inc.*,[53] the plaintiff merely claimed that his termination "jeopardized workplace safety." The appellate court saved his claim by articulating a public policy favoring workplace fire safety, supported by citations to various state and federal statutes and regulations. The Supreme Court, however, concluded that is not a court's job to engage in a search and rescue for a public policy to support a wrongful termination claim:

> *As the plaintiff, Dohme has the obligation to specify the sources of law that support the public policy he relies upon in his claim. Because Dohme did not back up his assertion of a public policy of workplace safety in his summary*

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[52] *Tameny v. Atlantic Richfield Co.*, 610 P.2d 1330, 1336 (Cal. 1980).

[53] 956 N.E.2d 825 (Ohio 2011).

> *judgment documents with specific sources of law, he has not articulated the clarity element with specificity. Unless the plaintiff asserts a public policy and identifies federal or state constitutional provisions, statutes, regulations, or common law that support the policy, a court . . . may not fill in the blanks on its own.*[54]

Examples of public policies that various state courts have concluded support a common law wrongful discharge claim include:

- Filing a workers' compensation claim.[55]

  Consulting with an attorney,[56] or threatening to consult with an attorney.[57]

  Complaining about product safety.[58]

  Serving on a jury contrary to an employer's wishes.[59]

  Refusing to take a polygraph test.[60]

  Refusing to alter state-mandated pollution control reports.[61]

  Refusing to commit perjury.[62]

  Refusing to engage in criminal activity.[63]

- Refusing to disclose confidential information.[64]

One universal point that is worth clarifying is that these claims are called wrongful *discharge* claims for a reason. The challenged decision must be a *discharge*. There is no such animal as a common law wrongful refusal to hire claim. In *Berrington v. Wal-Mart*,[65] the court considered the issue of whether a company could be liable for refusing to hire someone because he filed an

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[54] *Id.* at 830-31.

[55] *Sutton v. Tomco Machining, Inc.*, (Ohio 2011).

[56] *Chapman v. Adia Servs., Inc.*, (Ohio Ct. App. 1997).

[57] *Newcomb v. Hostetler Catering*, Case. No. 2006CA0040, 2007-Ohio-361 (Ohio Ct. App. Jan. 29, 2007).

[58] *Zajc v. Hycomp, Inc.* (Ohio Ct. App. 2007); *Harless v. First Nat'l Bank*, 246 S.E.2d 270 (W. Va. 1978).

[59] *Nees v. Hocks*, 536 P.2d 512 (Or. 1975).

[60] *Perks v. Firestone Tire & Rubber Co.*, 611 F.2d 1363 (3d Cir. 1979).

[61] *Trombetta v. Detroit, T. & I.R.R.*, 265 N.W.2d 385 (Mich. Ct. App. 1978).

[62] *Petermann v. International Bhd. of Teamsters*, 344 P.2d 25 (Cal. Ct. App. 1959).

[63] *Gabler v. Holder & Smith Inc.*, 11 P.3d 1269 (Okla. Civ. App. 2000).

[64] *Banaitis v. Mitsubishi Bank*, 879 P.2d 1288 (Or. Ct. App. 1994).

[65] Case No. 11-1988, 2012 U.S. App. LEXIS 18397 (6th Cir. Aug. 30, 2012).

unemployment claim. William Berrington claimed that a Kalamazoo, Michigan, Wal-Mart's refusal to rehire him after he filed an unemployment claim related to a prior termination wrongfully violated the state's public policy.

The Sixth Circuit disagreed. It ignored (more or less) the issue of the public policy at issue, and instead focused on the nature of the employment decision at hand—a refusal to hire.

> *Berrington's appeal presents us with the question of whether Michigan law recognizes a public policy cause of action for an employer's wrongful refusal to rehire because an individual claimed unemployment benefits…. The common denominator in all the recognized public policy exceptions to at-will employment is the existence of an employment relationship. An employee's right to be hired or rehired by an employer, on the other hand, has never been recognized as actionable, under common law on public policy grounds. . . . In fact, neither party has been able to provide a single decision from any jurisdiction enforcing a retaliatory failure to rehire claim in state common law or public policy, absent some other statutory basis.*[66]

Michigan law, it has implications beyond
. As the opinion points out, there exist no cases from any jurisdiction
.[67]

While you might not be presented with the issue of refusing to rehire an ex-employee who filed an unemployment claim, you may have other reasons not to hire someone. For example, you might decide that a potential employee is tainted because he or she filed a lawsuit against a previous employer. If the lawsuit raised issues protected by the employment discrimination statutes, for example, those same statutes' antiretaliation provisions likely protect the employee from failure to hire on that basis. What if, however, the prior lawsuit involved something other than protected activity in its own right (e.g., a common law tort such as invasion of privacy, defamation, or intentional infliction of emotional distress)? If a prospective employer locates the old lawsuit on the Internet and refuses to hire someone it perceives as a potential problem down the road, *Berrington* suggests that the employer might be off the hook for any potential liability stemming from the refusal to hire. If state common law does not recognize a failure to hire claim, as *Berrington* suggests,

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[66] *Id.* at *5 ,12.

[67] *See, e.g., Burris v. City of Phoenix*, 875 P.2d 1340, 1348 (Ariz. Ct. App. 1993); *Williams v. Dub Ross Co.*, 895 P.2d 1344, 1346-47 (Okla. Civ. App. 1995); *see also Mintz v. Bell Atl. Sys. Leasing Int'l,* 905 P.2d 559, 562 (Ariz. Ct. App. 1995) (no tort for wrongful failure to promote); *Welsh v. Commonwealth Edison Co.,* 713 N.E.2d 679, 682-83 (Ill. App. Ct. 1999) (refusing to recognize a tort claim for retaliatory demotion because the employment was not actually terminated).

then lawsuits against prior employers should be acceptable fodder for hiring decisions (the civil rights statutes notwithstanding).

Who You Gonna Call (When You Are Sued)?

This chapter has discussed how to follow the various laws when terminating an employee, Even if, however, you follow all of these guidelines, the odds are . Indeed, if I can make one guarantee (and, trust me,

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EEOC or its equivalent state agency. In fact,

employment discrimination statute (Title VII, ADA, ADEA, GINA), he or she *must* first file a charge with the EEOC, exhaust that administrative process, and receive what is called a "Right to Sue" letter from the agency. Without following this process, the federal claims are barred. Most states follow this same process.[69]

Suppose you have just received notice from the EEOC (or its state equivalent) that an employee has filed a charge of discrimination against you. What happens next is often confusing to businesses, and mistakes can have serious consequences in later lawsuits.

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[68] There were nearly 100,000 charges of discrimination filed with the EEOC in 2011 alone. Equal Employment Opportunity Commission, "Charge Statistics FY 1997 Through FY 2011," http://www1.eeoc.gov/eeoc/statistics/enforcement/charges.cfm.

[69] Ohio is one of the exceptions. In Ohio, employees can proceed straight to court without first engaging in any agency proceedings. And, as if this circumvention of the administrative process is not bad enough, employees have up to six years to file a lawsuit for any prohibited discrimination except age, which carries a 180-day limit. Compare this six-year limit to the 300 days an employee has to file a charge with EEOC, and you can begin to understand the difficulties employers can face predicting and accounting for lawsuits by ex-employees.

Starting with the Basics—What Happens When An Employee Files A Discrimination Charge?

EEOC charges of discrimination follow a predictable pattern.

1. The EEOC will notify you that a charge of discrimination has been filed against you. The charge packet will include the name and contact information of the investigator assigned to your case.
2. The charge will likely include an offer to submit the case to voluntary mediation. Mediation can be useful for two purposes—to see if you can resolve the charge early and cost-effectively, or to obtain some early fact gathering from the charging party.
3. Absent mediation, the case will proceed to an investigation. During the investigation, you will be required to submit a written statement of position. This document is your chance to tell your side of the story. It is the most critical piece of the agency investigation. More on this in a bit.
4. The investigation may also include a request for information (documents), a request for an onsite visit, or contact information for witness interviews of management and non-management personnel. Do not assume, however, that you have to turn documents over, open up your business, or make people available simply because the agency is asking. The requests still must comply with basic notions of relevancy and discoverability.
5. Once the investigator has completed the investigation, the EEOC will make a determination on the merits. If the agency determines that there is no reasonable cause to believe that discrimination occurred, the charging party will be issued a letter called a Dismissal and Notice of Rights. The letter tells the charging party of the right to file a lawsuit in federal court within 90 days from the date of receipt of the letter (with a copy to the employer).
6. If EEOC determines there is reasonable cause to believe discrimination has occurred, both parties will be issued a Letter of Determination stating that there is reason to believe that discrimination occurred and inviting the parties to resolve the charge through an informal conciliation process.

If conciliation fails, the EEOC has the authority to file a lawsuit in federal court or issue the same Notice of Right to Sue, releasing the employee to file his or her own lawsuit within 90 days. The process is different with the state agencies and varies from state to state.

There is an inclination within companies to go it alone in EEOC and other agency proceedings, believing that the expense of hiring an attorney is not justified at this early junction. I cannot more strongly caution against this urge.

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EEOC position

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Regardless of whether the case starts with an agency charge or a court complaint, there are other steps you should take immediately upon receiving notice.

1. A *litigation hold* should be put in place to preserve emails, other electronic records, and paper documents that could bear on the litigation. Key documents should be gathered and secured. Your attorney can help make sure that documents are not deleted or destroyed, a flub that could submarine your entire case. Employment lawsuits are not as document intensive as some other disputes in which businesses are involved. Nonetheless, the documents are crucial. They provide a roadmap to the justification for the termination or other employment action, and the reasonableness of the employer's actions. All key documents (personnel files, handbooks, other policies, investigative reports, emails, and other communications) should be gathered and set aside.
2. *Witnesses* should be identified and told that they should not communicate with anyone other than counsel about the case. If any employee is at risk for leaving your organization, potential testimony should be memorialized in an affidavit

while the employee is still on favorable terms and under your control.

3. If you have *employment practices liability insurance coverage*, you should put your carrier on notice so that coverage is not jeopardized and any defense costs are properly credited against your deductible. If you have purchased a rider that permits you to select counsel, make sure you enforce that right. If you have not purchased that protection, consider having a candid conversation with the insurance company about the counsel they will choose for you. Employment law is highly specialized. Retaining counsel that knows the ins and outs of this area of law is the best way to keep costs down as much as possible, while at the same time doing everything possible to defend the company aggressively.

. Is There Anything Else Doing?

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1. An *answer* or other response must be timely filed, which, in federal court, means you have 21 days from the date you receive the summons and complaint to file your response.[70] Your mileage under state rules of civil procedure might vary.[71] You could waive the right to file certain counterclaims and raise certain jurisdictional and other defenses by missing this critical deadline.

2. If you want to *remove* a case from state court to federal court, you have only 30 days to act.[72] For the uninitiated, removal is a legal process through which a defendant can take a case filed in state court to federal court if the plaintiff could have originally filed the action in federal court. This is a hard-and-fast deadline, with no extensions possible. Counsel needs to be involved early to analyze whether the case is removable and to prepare the necessary paperwork.

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[70] Fed. R. Civ. P. 12(a)(1)(A)(i).

[71] For example, under the rules of the state courts in which I primarily practice—Ohio—a defendant has 28 days to respond to a complaint. Ohio Civ. R. 12(A)(1).

[72] 28 U.S.C. § 1446(b)(1).

3. Depending on the size and notoriety of the case, you may want to get out of the blocks early with some public relations. That message has to be crafted and managed by counsel so that it does not hurt a successful defense.

Tripping on any one of these important early steps can have serious consequences on your overall defense. Resist the do-it-yourself urge and "lawyer up" as soon as you find out there is a claim against you.

Documents?

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. In other words, failing to implement a litigation hold is a quick way to focus your case away from the law and the facts and onto discovery issues.

The following are ten practical tips that should be included in any meaningful litigation hold during active or pending litigation. This document should be sent to *anyone* who you believe might have documents in his or her possession, control, or custody that are relevant to the claim. You should designate one company employee to be responsible for the dissemination of the hold, to answer any questions from employees about the litigation hold and their duties to preserve information and documents, and to collect any documents from employees.

1. Describe the pending claim, both by the parties involved and the general subject matter(s) alleged.
2. Identify the recipient of the hold letter as someone who may have personal knowledge regarding the matter or who may be in possession of or have access to information or documents potentially relevant to the matter.
3. Put your IT department (or other employees responsible for the maintenance of your network and computer systems) on notice of the litigation hold.

4. Order the suspension of any deletion, overwriting, or any other destruction of electronic information relevant to the matter that is under the recipient's control. This task will be much more daunting for an IT manager than an individual employee's workstation.
5. Broadly define the scope of covered information to include all documents, records or data of every kind residing or recorded (intentionally or unintentionally) in any medium or location other than within a person's memory: paper, magnetic tape, photographs, maps, diagrams, applications, databases, microfilm, microfiche, emails, intranet, instant messages, blogs, voicemails, metadata, and any other electronic means of communication that are created, stored or received on the company's computers or network systems or any other devices (phones, PDAs, applications or storage devices) or systems capable of storing electronic information.
6. Instruct that the recipient search all information for anything relevant or potentially relevant to the claim. Emails and other electronic information should be segregated in a PC or Outlook folder and all paper documents in a hard file.
7. Unlike what reality TV might suggest, at least in the context of pending or active litigation, hoarding is not a bad thing. Tell recipients to err on the side of oversaving.
8. Alert recipients to the risk to the company and its employee for failing to heed the litigation hold request.
9. Ensure that the recipient signs a verification signifying the receipt the litigation hold.
10. Periodically recirculate the litigation hold to ensure continuing compliance.

Concluding Thoughts: Document, Document, Document

The facts of *Weimer v. Honda of Am.*[73] are straightforward. James Weimer requested FMLA leave from Honda after injuring his head at work, which Honda approved. After Weimer returned to work, two of his neighbors reported to Honda that they had seen Weimer build a new front porch on his

[73] Case No. 08-4548, 2009 U.S. App. LEXIS 27377 (6th Cir. Dec, 14, 2009).

home while on leave. Honda conducted an investigation, which included surveillance video. During the investigation, Weimer admitted to working on his porch during his FMLA leave. Honda terminated him for misrepresenting his need for medical leave.

The Sixth Circuit held that the jury, which found in Honda's favor, was properly instructed that Honda could prevail if it was wrong as to its stated reason for discharge, but its belief was honestly held:

> *Weimer asserts that the only way the jury should have been able to decide own testimony at trial included contradictory statements about his activities that would lead a reasonable fact finder to question his credibility. There was sufficient evidence for the jury to conclude that Honda reasonably relied on the facts before it at the time its decision to terminate Weimer was made.*[74]

The takeaway for employers from the *Weimer* case is to make sure that all reasons in support of a termination are documented. Because Honda could prove that Weimer violated its conduct standards, it became irrelevant whether he had actually lied about his need for FMLA leave. All that matter is that Honda could backup its conclusion by its investigation. If you can verify the legitimacy of a termination rationale, a court is unlikely to second guess you, even if your judgment turns out to be incorrect after the fact.

Perhaps the best takeaway for employers is this passage, taken from *Abdulnour v. Campbell Soup Supply Company*,[75] a national origin discrimination case brought by an Iraqi national fired by Campbell Soup for job performance that was less than "M'mm M'mm Good."

> *As the record reflects, there was a myriad of problems with Plaintiff's job performance and treatment of his subordinates that justified Defendants' decision to fire Plaintiff. This, however, is not what Defendants told Plaintiff*

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[74] *Id.* at *16-18.

[75] 502 F.3d 496 (6th Cir. 2007).

> *during their final meeting. Defendants did not tell Plaintiff he was being fired for poor performance, but rather because of an unspecified "personality conflict." While the law does not specifically require an employer to list every reason or incident that motivates its decision to terminate an employee,* we are skeptical of undocumented accounts of employee conduct that may have been created post-termination. *Under the facts of this case, however, ample evidence exists that indicates that Plaintiff's performance was inadequate to meet his job requirements. In sum, Plaintiff has not put forth sufficient evidence for a jury reasonably to conclude that Defendants did not have an honest belief that Plaintiff performed his job duties poorly.*[76]

espite the lack of documentation, the Sixth Circuit upheld the trial court's

Soup did not honestly believe in the reasons proffered for his
. Clearly, however, as the quote above demonstrates, the appellate

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The lesson to be learned is basic but one that cannot be repeated enough. Any employer's greatest defense against a claim of discrimination is a well-documented history of performance problems to support the termination, coupled with comparable treatment of similarly situated employees. When in doubt, document all performance problems with all employees. If the discipline or counseling is oral only, document that fact also. Have all employees sign off on all such records, and if the employee refuses to signify the receipt of the discipline, document that failure as well. The Sixth Circuit in the *Abdulnour* case cannot be any clearer that when an employer relies on undocumented accounts of misconduct to support a termination, it is fair for the court and a jury to draw the inference that those accounts were created post-termination. The *Abdulnour* decision is the anomaly, and almost universally cases with poorly documented personnel files will not end well for the employer. Campbell Soup dodged a bullet; do not put your company in similar risk.

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[76] *Id.* at 503 (emphasis added).

CHAPTER

4

The Right to

Recent economic times have been tough. More Americans are out of work, for longer durations, than any time in recent history. Yet employers do not want to shutter their operations, lay off employees, or reduce their working hours. Reality being what it is, however, more and more businesses find themselves having to reduce their workforces, either through head count or work hours. Do you know what to do if you are forced to restructure your operations or your workforce? There exist a few key laws that you must follow, or you will find yourself faced with an expensive lawsuit that your business cannot afford.

First, reductions in force (RIF) provide a built-in protection for employers in discrimination cases. The legitimate nondiscrimination reason for the termination—the economic necessity for the workforce reduction—is established from the outset. Thus, employees challenging a RIF have a higher prima facie burden. When a termination arises as part of a workforce reduction, the plaintiff must provide "additional direct, circumstantial, or statistical evidence tending to indicate that the employer singled out the plaintiff for discharge for impermissible reasons."[1]

[1] *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 350 (6th Cir. 1998).

For example, in *Schoonmaker v. Spartan Graphics Leasing*,[2] the plaintiff claimed that the facts that her employer retained younger employees in her position and that her employer laid off the two oldest employees satisfied the "additional evidence" necessary to overcome the employer's economic justification for the RIF. The Sixth Circuit correctly rejected this assertion, and in doing so put a dagger through the heart of the use of bald statistics of small samples in RIF cases:

> *If the plaintiff's case-in-chief is viewed as satisfying the requirements for a*

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I RIFs with a small sample size, an employee will have to

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of employees affected across all key demographics, in addition to comparing the relative qualities and qualifications of the departing versus the remaining. In other words, the company should examine what its workforce looks like demographically (race, sex, age, and disability) before and after the workforce reduction, both company-wide and on a department-by-department basis. This way, the company can see whether or not its selection criteria have had a potential adverse impact on one or more protected groups and make an informed decision as to whether it wants to alter those chosen for the layoff.

Performing this diligence may not prevent a lawsuit from being filed (especially if the raw numbers appear to look discriminatory), but it will give you the necessary ammunition to defend any subsequent discrimination lawsuits that are filed.

By way of an example, consider *Blair v. Henry Filters, Inc.*[4] It is always refreshing when a court provides a nice, neat summary to explain its decision in a case. So, when you read the following introductory paragraph from *Blair*, you might be inclined to think there is no need to read any further:

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[2] 595 F.3d 261 (6th Cir. 2010).

[3] *Id.* at 266-267 (quoting *Sahadi v. Reynolds Chem.*, 636 F.2d 1116, 1118 (6th Cir. 1980) (per curiam)).

[4] 505 F.3d 517 (6th Cir. 2007).

> *When a fifty-seven-year-old's direct supervisor taunts him as "the old man on the sales force," removes him from a profitable account because he is "too old," and tells another employee he "needs to set up a younger sales force" before terminating the employee, can the employee's age discrimination claim survive summary judgment? We believe it can.*

The key facts in *Blair* are few. Blair, 57 years old at the time of his termination in August 2003, worked for Henry Filters, an industrial manufacturer, in 1986. In 2000, John Tsolis became Henry Filters' VP of Sales and Blair's immediate supervisor. Tsolis called himself "The Terminator," a self-referential nod to his . Blair claimed that in the years leading up to his

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. That reduction in force lacked a clear plan for its execution. The ." In August 2003,

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Henry Filters also terminated the employment of a 37-year-

. A few months prior, Tsolis was overheard saying that he needed to set up a younger sales force, although he had not referred to anyone by name. After Blair's departure, a 42-year-old current employee assumed his responsibilities for about four months, after which Henry Filters hired a man in his twenties for a sales position, although there was no evidence of whether than person took over any of Blair's former sales territories. The Court first concluded that the district court correctly concluded that Blair had not presented any direct evidence of age discrimination. The ageist comments he attributed to Tsolis were either not related to the termination decision or lacked a connection between Tsolis's desire for a younger workforce and Blair's termination.[5]

Notwithstanding the lack of direct evidence of age discrimination, the Court found that the trial court erred in dismissing the age claim. Even though the alleged ageist comments were attenuated in time from the termination decision and not directly tied to the decision to terminate Blair, the Court found that they nevertheless were sufficient circumstantial evidence the Henry Filters singled out Blair for discharge because of his age. The Court also relied heavily on the lack of an objective plan for the reduction in force, noting "a lack of evidence regarding a company's objective plan to carry out a reduction in force is a factor that might indicate that an alleged reduction in force is pretextual."

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[5] 505 F.3d 517 (6th Cir. 2007).

There are two key issues worth some discussion. First, there is no reconciliation by the Court of ageism, on the one hand, versus the inclusion of a 37-year-old comparable in the RIF. Secondly, the Court seems to blur the required showing for a prima facie case and pretext in a RIF context. The Court relies on the same exact evidence to conclude that a genuine issue of material fact exists for the fourth element of Blair's prima facie case (i.e., whether there is additional evidence tending to indicate that the employer singled out the plaintiff for discharge for an impermissible reason) and pretext. It appears that if a genuine issue of material fact exists on the fourth prima facie element, the . Thus, in RIF cases, the Court

. At the end of the day, it may not make a difference, since RIF case the employer's legitimate nondiscriminatory reason (the RIF

. In other words, the battlefront is whether the plaintiff was RIF, and it doesn't much matter through which .

The decision also importantly highlights the need for written objective . Ideally, an RIF should be carried out with severance payments in exchange for signed releases, but that is not always the case. Economic or other realities sometimes make severance payments impractical, and some employees would rather take their chances in court than sign a release. All RIFs should be designed and implemented with the understanding that the selection criteria may have to be defended in court. As *Blair* illustrates, that defense is more difficult without objective criteria as to who stays and who is let go. As always, these programs are best designed, or at a minimum reviewed, by employment counsel.

Layoffs and Releases of Federal Age Discrimination Claims: The Older Workers Benefit Protections Act

Employers also act at their own peril if they ignore severance packages and releases in mass layoffs. Because of the inherent risk of discrimination claims in any layoff or RIF, employers are best served paying the to-be-let-go employees some amount of severance pay and obtaining, in return, a signed agreement including a release of all liability against the company. If the layoff includes any employees 40 years or older, then any release agreements signed

by these older works must comply with the Older Workers Benefit Protection Act (OWBPA).[6]

The OWBPA "is designed to protect the rights and benefits of older workers."[7] It "imposes specific requirements for releases covering [Age Discrimination in Employment Act] claims" and "implements Congress' policy via a strict, unqualified statutory stricture on waivers."[8] "'An individual may not waive any right or claim under [the ADEA] unless the waiver is knowing and voluntary. . . . [A] waiver may not be considered knowing and voluntary unless at a minimum it satisfies certain enumerated requirements."[9] These enumerated

1. The release must be written in a manner calculated to be understood by the employee signing the release, or by the average individual eligible to participate;
2. The release must specifically refer to claims arising under the ADEA;
3. The release must not purport to encompass claims that may arise after the date of execution;
4. The employer must provide consideration for the waiver or release of ADEA claims above and beyond that to which the employee would otherwise already be entitled;
5. The employee must be advised in writing to consult with an attorney prior to executing the agreement;
6. The employee must be given at least 45 days to consider signing if the incentive is offered to a group;
7. The release must allow the employee to revoke the agreement up to 7 days after signing; and
8. If the release is offered in connection with an exit incentive or group termination program, the employer must provide information relating to the job titles and ages of those eligible for the program and the corresponding information relating to employees in the same job titles who were not eligible or not selected for the program.[10]

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[6] 29 U.S.C. § 626(f).

[7] *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 427, 118 S.Ct. 838, 139 L.Ed.2d 849 (1998).

[8] *Id.* at 424, 427.

[9] *Id.* at 426 (quoting 29 U.S.C. § 626(f)(1)).

[10] 29 U.S.C. § 626(f)(1)(A)-(H)).

"The statutory factors are not exclusive and other circumstances, outside the express statutory requirements, may impact whether a waiver under the OWBPA is knowing and voluntary."[11] The absence of even one of these factors invalidates the entire release as to the federal age discrimination claim.[12] The party asserting the validity of a waiver has the burden of proving that a waiver was knowing and voluntary.[13]

For group RIFs, the OWBPA includes an additional requirement for the release agreement to be deemed knowing and voluntary:

> *(i) any class, unit, or group of individuals covered by such program, any*
>
> *(ii) the job titles and ages of all individuals eligible or selected for the*
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> [14]

Courts have determined that the terms "job title," "job classification," and "organizational unit," which are not defined in the OWBPA, should be interpreted on a case-by-case basis, with an eye to the purposes of the OWBPA.[15] The purpose of the OWBPA, the Court noted, was to ensure that "workers who signed a waiver had a clear idea of what they were giving up, particularly that they had the ability to assess the value of the right to sue for a possibly valid discrimination claim."[16] "To evaluate their claims, employees need appropriate data to conduct meaningful statistical analyses. In the discrimination context, the data must permit employees and their attorneys to make meaningful comparisons to determine whether an employer engaged in age discrimination. The data must allow the appellees to consider whether anything suggests that older employees in their unit were unjustifiably terminated in favor of younger ones."[17] In other words, an employee cannot know if she or he is giving up a valid age discrimination claim unless the employee is comparing apples to apples.

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[11] *Kruchowski v. Weyerhaeuser Co.*, 446 F.3d 1090, 1093 (10th Cir. 2006).

[12] *Id.* at 1095.

[13] 29 U.S.C. § 626(f)(3).

[14] 29 U.S.C. § 626(f)(1)(H)(i).

[15] *Raczak v. Ameritech Corp.*, 103 F.3d 1257, 1262 (6th Cir. 1997).

[16] *Id.* at 1263.

[17] *Burlison v. McDonald's Corp.*, 455 F.3d 1242, 1247 (11th Cir. 2006).

The EEOC has promulgated regulations implementing the OWBPA, which further help define these terms.[18] "The scope of the terms 'class,' 'unit,' 'group,' 'job classification,' and 'organizational unit' is determined by examining the 'decisional unit' at issue."[19] The regulations define the term "decisional unit" as follows:

> *"[D]ecisional unit" is that portion of the employer's organizational structure from which the employer chose the persons who would be offered consideration for the signing of a waiver and those who would not be offered consideration for the signing of a waiver. The term "decisional unit" has been developed to reflect the process by which an employer chose certain employees for a program and ruled out others from that program.*[20]

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facility by exclusively considering a particular portion or subgroup of its operations at a facility, then the decisional unit would be that subgroup or portion of the workforce at the facility.[23] The decisional unit may be larger than one facility if an employer is attempting to combine operations from several facilities and considers employees in several facilities for termination.[24] Thus, a valid waiver under the OWBPA would include information—ages and job titles—of everyone in the decisional unit, whatever that decisional unit may be, and the status of each individual with respect to whether the employee was selected for termination or retention.

Courts recognize the difficulties a court will encounter in attempting to evaluate whether the information given by an employer meets the requirements of the OWBPA because it "is in the interest of a worker seeking to void a release to be dissatisfied with any methodology that the company used in

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[18] *See* 29 C.F.R. § 1625.22.

[19] 29 C.F.R. § 1625.22(f)(1)(iii)(C).

[20] 29 C.F.R. § 1625.22(f)(3)(i)(B).

[21] *Raczak*, 103 F.3d at 1262.

[22] 29 C.F.R. § 1625.22(f)(3)(ii)(C).

[23] *Id.*

[24] *Id.*

attempting to comply with clause (H)(ii);" while a company "may want to fiddle with the definition to mask the possible evidence of age discrimination."[25] In sum, the Court determined that "if the employer provided information that purports to comply with the statute, then the inquiry should move to the question of understandability."[26] That is, "whether the employer provided the required information in a form, whatever the exact nomenclature, that is understandable to the average worker in voluntarily deciding to give up the right to sue."[27]

Several recent federal appellate cases illustrate the key considerations for

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Nashville and

G . To help facilitate the RIF and determine which employees to keep and which to lay off, McDonald's charged each of its regional managers with the task of determining which employees to keep for the newly formed regions. William Lamar, the GM of the new Atlanta Region, selected 66 of his 208 employees for the reduction.[29]

McDonald's offered each released employee a severance package in exchange for a release of all claims. In its effort to comply with the OWBPA, McDonald's provided a region-specific information sheet with each severance agreement. That information sheet (1) listed the job titles and ages of all 208 employees in the three former regions; (2) identified which of those employees had been selected for the RIF; and (3) identified which of those employees were being retained.[30]

Each of the five plaintiffs (all of whom were over 40) signed the releases and accepted the severance packages. Two years later, however, they sued for age discrimination, claiming that the releases were void because they did not

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[25] *Raczak*, 103 F.3d at 1263.

[26] *Id.* at 1264.

[27] *Id.*

[28] 455 F.3d 1242 (11th Cir. 2006).

[29] *Id.* at 1244.

[30] *Id.*

comply with the OWBPA's informational requirements. Specifically, the plaintiffs argued that because McDonald's had engaged in a nationwide RIF, the OWBPA required that it provide them nationwide information, and not just information limited to the Atlanta region.[31] The nationwide data, the plaintiffs argued, would permit them to calculate the average age of persons fired company-wide, which might indicate that discrimination was afoot.[32] The district court agreed and granted the plaintiffs summary judgment.[33] The court of appeals, however, reversed.

The Eleventh Circuit Court of Appeals found that because the decisions as to *region* was the proper

> *Appellees were chosen for termination from the 208 employees in the Atlanta, Nashville, and Greenville regions. The facts further indicate that they were considered for employment only in the Atlanta region. Given that the relevant regulations define the appropriate decisional unit as those who were considered for jobs in the same process as the terminated employees, those 208 employees constitute the appropriate decisional unit, and our inquiry is complete.*[34]

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While the employees in the *Burlison* case were rebuked for arguing for a wide decisional unit, the employer in *Kruchowski v. Weyerhaeuser Co.*[35] was punished for selecting a unit that was too wide and did not appropriately reflect the actual scope of the RIF.

The *Kruchowski* plaintiffs were 16 of the 31 employees selected for a RIF at the defendant's mill in Valliant, Oklahoma. When the company notified the employees of their inclusion in the RIF, it provided them a group termination notice. That notice included (1) a list of employees selected for termination, by job title and age; (2) a list of employees not selected for termination, by job title and age; and (3) a notification that the decisional unit for the RIF was all salaried employees employed at the mill.[36] The district court granted the company's motion for summary judgment and dismissed the plaintiffs' age discrimination claims.[37] The court of appeals reversed, finding that waivers

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[31] *Id.* at 1248.

[32] *Id.*

[33] *Id.* at 1244.

[34] *Id.* at 1249.

[35] 446 F.3d 1090 (10th Cir. 2006).

[36] *Id.* at 1092, 1094.

[37] *Id.* at 1092.

were invalid because the group termination notice misidentified the decisional unit. While the notice identified the decisional unit as all salaried employees, the actual unit was all salaried employees who reported to the mill manager.[38] Fifteen salaried employees (HR, IT, and accounting personnel) did not report to the mill manager, yet were included in the group termination notice.[39] According to the appellate court: "Defendant itself ignored its structure and decision-making hierarchy when the notified plaintiffs of the 'decisional unit.'"[40] Because the decisional unit of which the plaintiffs were notified and the actual decisional unit were two separate groups, the waiver was void.

.[41] reinforces the key principle that the decisional

RIF. Following a merger, FirstEnergy conducted a RIF to eliminate .[42] The RIF covered multiple facilities . In conducting the RIF, FirstEnergy identified the decisional unit . The plaintiff, a 54-year-old

M Line Crew Supervisor, was one of the employees included. In suing for

M Line Crew Supervisor.[43] The district court disagreed:

> *The RIF included more than one facility and more than one job title or position. Accordingly, the decisional unit utilized by FirstEnergy in its RIF encompassed all of the employees that were considered for the RIF, that is all Centerior and CEI salaried employees in duplicative and overstaffed positions. FirstEnergy's selection of this decisional unit clearly fits within the parameters set forth in the regulations. The decisional unit utilized by FirstEnergy encompassed the portion of its organizational structure from which it chose the persons who would and would not be terminated and reflected its decisional process. Under these facts and given the size of this RIF, FirstEnergy's selection of this decisional unit was appropriate.[44]*

Because the decisional unit matched the decision-making process, the waiver was valid.

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[38] *Id.* at 1094.

[39] *Id.*

[40] *Id.* at 1095.

[41] Case No. 5:04CV2451, 2005 U.S. Dist. LEXIS 22558 (N.D. Ohio Oct. 5, 2005).

[42] *Id.* at *17.

[43] *Id.*

[44] *Id.* at *17-18.

In addition to the informational disclosures discussed above, the company must also provide to the affected employees the "eligibility factors" for the RIF and "any time limits applicable to such program."[45] "Eligibility factors" means the factors used to determine who is subject to a termination program.[46] It "refers to the factors used to analyze each individual employee in determining whether to retain or terminate."[47]

Plant Closings and Mass Layoffs: he WARN Act

Retraining Notification Act (more
RN Act) applies to any business that employs

.[48]

RN Act applies in two types of employee reductions: plant closings

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" is "the permanent or temporary shutdown of a single site of

of employment, if the shutdown results in an employment loss during any 30-day period for 50 or more employees excluding any part-time employees."[49]

A "mass layoff" is "a reduction in force which . . . results in an employment loss at the single site of employment during any 30-day period for at least 33 percent of the employees (excluding any part-time employees); and at least 50 employees (excluding any part-time employees); or at least 500 employees (excluding any part-time employees)."[50]

To determine basic WARN Act coverage, all full-time employees at all sites of work, including U.S. workers at foreign sites, are counted. The obligation to give notice, in contrast, only arises when terminations at a "single site of employment" exceeds the numerical thresholds. The WARN Act defines a "single site of employment" using a "geographical" test that looks at the workplace's physical layout so that separate offices can be a single site if they

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[45] 29 U.S.C. § 626(f)(1)(H)(ii).

[46] *Commonwealth v. Bull HN Info. Sys.*, 143 F. Supp. 2d 134, 147 n.29 (D. Mass. 2001).

[47] Merritt v. FirstEnergy Corp., Case No. 1:05CV00586, 2006 U.S. Dist. LEXIS 15089, *9 (N.D. Ohio Mar. 31, 2006), *citing Kruchowski v. Weyerhaeuser Co.*, 423 F.3d 1139 (10th Cir. 2005), *opinion withdrawn by Kruchowski v. Weyerhaeuser Co.*, 446 F.3d 1090 (10th Cir. 2006).

[48] 29 U.S.C. § 2101(a)(1).

[49] 29 U.S.C. § 2101(a)(2).

[50] 29 U.S.C. § 2101(3).

are in "reasonable proximity" and share the same staff and equipment.[51] Yet the test is applied practically.

Courts differ on whether employees working in the field can qualify as a single site of employment. For example, in *Ciarlante v. Brown & Williamson,* the Third Circuit concluded that the WARN Act applied to salespeople working in different geographical districts because the company's headquarters, from which the salespeople were based, constitutes a single site of employment.[52] But, the Ninth Circuit reached the opposite result in *Bader v. Northern Line Layers, Inc.*[53]:

> *authority to hire and fire construction employees as needed.*

Another critical component of the WARN Act calculus is the determination of which employees are counted for purposes of determining whether a plant closing or mass layoff has occurred. Only full-time employees are counted. Part-time employees (those who work less than 20 hours per week or who had not worked during six of the preceding 12 months) are not counted. Also not counted are temporary project employees, business partners, consultants, contract employees, and independent contractors. Yet workers on a temporary layoff or leave "who have a reasonable expectation of recall" are counted as employees for purposes of WARN Act coverage.[54]

Another difficult-to-understand aspect of the WARN Act's job-loss rules is its 90-day aggregation principles. 29 U.S.C. § 2102(d) provides:

> *[I]n determining whether a plant closing or mass layoff has occurred or will occur, employment losses for [two] or more groups at a single site of employment, each of which is less than the minimum number of employees*

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[51] 20 C.F.R. § 639.3(i)(3).

[52] 143 F.3d 139, 145-47 (3d Cir. 1998).

[53] 503 F.3d 813 (9th Cir. 2007).

[54] 29 C.F.R. § 639.3(1).

> *specified in [S]ection 2101(a)(2) or (3) . . . but which in the aggregate exceed that minimum number, and which occur within any 90-day period shall be considered to be a plant closing or mass layoff unless the employer demonstrates that the employment losses are the result of separate and distinct actions and causes and are not an attempt by the employer to evade the requirements of this chapter.*

Thus, employers trying to determine whether WARN Act notices are required must not only look at every 30-day period, but must also "[l]ook ahead 90 days and behind 90 days to determine whether employment actions both

RN Act coverage will, in the aggregate for any 90-day period, reach the

."[55]

RN Act is whether a potentially affected
." If an employee has not suffered
RN
. The WARN Act defines an "employment loss"

a reduction in hours of work of more than 50 percent during each month of any six-month period."[56] Critically, an employee does not suffer an "employment loss" if the plant closing or mass layoff results from the relocation or consolidation of part or all of the employer's business *and* the employer offers to transfer the employee to a different site of employment within reasonable commuting distance with no more than a six-month break in employment; or if the employee accepts an offer of transfer to any other site of employment regardless of distance with no more than a six-month break in employment and the employee.[57]

Most courts take a functional, real-world view of what qualifies as an "employment loss" under these rules. For example, in *Moore v. Warehouse Club, Inc.*,[58] after announcing the closing of one store, an employer invited its employees to apply for employment at its other stores. In determining whether at least fifty employees had suffered a job loss, the court considered the fact that all employees were offered reemployment, and that two employees accepted positions at another store and transferred without a

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[55] 20 C.F.R. § 639.5(a)(1).

[56] 29 U.S.C. § 2101(a)(6).

[57] 29 U.S.C. § 2101(b)(2).

[58] 992 F.2d 27 (3d Cir. 1993).

single lost day of work. Similarly, in *Gonzalez v. AMR Services Corp.*,[59] a different court reached a similar conclusion in a case in which 18 laid-off employees were placed in a different position within the organization without any lost time. According to the *Gonzalez* court, this issue requires a "practical, effects-driven analysis of whether a break in employment actually occurred."

Even if the WARN Act applies, there are some narrow exceptions that could save a financially distressed organization from its application. For example, notice does not have to be provided, or the time frame for providing notice is shortened, for the closure of "faltering companies," or for "unforeseen .'' These exceptions, however, are narrowly construed . To meet the "faltering company" exception, a closed

RN Act notice was required, 2) a realistic opportunity to obtain

.[60] To meet the

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Violations of the WARN Act can result in limited back pay liability. This liability is usually limited to payment for that which the employees would have earned during the 60-day period (although a small minority of courts apply a 60 calendar-day calculation). For this reason, back-pay liability is reduced by voluntary (i.e., not otherwise contractually obligated to be provided) severance or extra vacation pay given to employees during the WARN Act period. Employers also have the option of providing less than the required 60-day WARN Act notice and paying employees' wages and benefits for the remainder of the notice period.[62] For example, an employer might be concerned about violence or sabotage in the wake of a plant-closure notice, and decided that it is safer and more economical to pay its employees in lieu of the full 60-day notice.

Even if the federal WARN Act does not apply, 14 states have their own mini-WARN Acts, which apply to smaller employers or job losses.

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[59] 68 F.3d 1529 (2d Cir. 1995).

[60] 29 C.F.R. § 639.9(a).

[61] 29 C.F.R. 639.9(b).

[62] 29 USC §2104 (a)(3).

- California covers employers with 75 or more employees, with mass layoffs of 50 or more employees in a 30-day period.[63]
- Connecticut requires workplaces with 100 or more employees to continue terminated employees' existing health benefits for 120 days following a relocation or plant closing.[64]
- Hawaii mandates employers with 50 or more employees to provide a 60-day notice to state agencies and employees, and also provide severance pay to affected employees.[65]
- Illinois reduces the coverage threshold to employers with 75 employees that terminate 50 or more full-time employees in certain plant closings or mass layoffs.[66]
- Kansas requires employers in food production, clothes manufacturing, fuel mining, transportation, and public utilities to provide notice to its secretary of human services regarding a cessation of operations.[67]
- Maine requires companies with 100 or more employees to give 60 days' notice for plant closings and to provide severance pay of one week per year of employment to each effected employee.[68]
- Maryland encourages (but does not require) employers with 50 or more employees to provide 90 days' voluntary notice for plant closings and relocations.[69]
- Massachusetts encourages (but does not require) employers that receive state funds to provide "reasonable" notice of plant closing, in addition to 90 days' salary and health insurance.[70]
- Michigan encourages (but does not require) businesses with 25 of more employees considering a cessation or relocation

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[63] Calif. Labor Code § 1400 et seq.

[64] Conn. Gen. Stat. § 31-5n-o.

[65] Hawaii Rev. Stat. § 394B-9, 10.

[66] 820 ILCS 65/1 et seq.

[67] Kansas Stat. § 44-616.

[68] Maine Rev. Stat. T. 26 § 625-B.

[69] Maryland Labor & Emply. § § 11-301 to 11-304.

[70] Mass. Gen. Laws Ch. 151A § 71A to G and Ch. 149 § 182.

of operations to provide notice to the Michigan DOL and to the employees.[71]

- New Jersey requires notice to the state unemployment office and affected employees upon a mass layoff of 25 or more employees.[72]
- New York requires employers to provide notification to terminated employees upon the cancellation of their employee benefits.[73]

South Carolina mandates two weeks' notice of plant closure.[74]

Tennessee mandates notice to employees upon a workforce reduction of 50 or more employees for employers with at least 50 and no more than 99 employees.[75]

Wisconsin requires employers with 50 or more employees to provide 60 days' advance notice of a shutdown affecting the greater of 25 or more employees or 25% of the employer's workforce.[76]

for Furloughs and Other Modified Work Schedules

Layoffs and other reductions in your workplace's employee census are not the only tools available to employers to save payroll (and therefore operating expenses). One other option is the employee furlough.

A furlough is a reduced working schedule. It is a temporary unpaid leave of some employees due to special needs of a company. Furloughs can occur one day off per week, or a week at a time, or some combination. What distinguishes a furlough from a layoff is that workers remain employed, albeit on a reduced schedule.

Furloughs can either be voluntary: "Are there any volunteers who want to work a reduced schedule?" Or furloughs can be involuntary: "The following

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[71] Michigan Complied Laws § § 450.731 to 450.737.

[72] N.J. Admin. Code § 12:17-3.5.

[73] New York Labor Law §195.

[74] S.C. Code Ann. §41-1-40.

[75] Tenn. Code Ann. §50-1-601 to 602.

[76] Wis. Stat. Ann. §§109.07, 109.075.

employees (or departments or on a company-wide basis) will, until further notice, work the following reduced schedule . . ."

Furloughs, however, are not without their risks. First, foremost, and obviously, employers cannot single out specific protected groups for inclusion in a furlough. Less obvious, however, are the wage-and-hour issues raised by furloughs and reduced work schedules.

There are no wage-and-hour laws prohibiting or limiting the use of furloughs. Indeed, all the Fair Labor Standard Act[77] (FLSA) requires regarding hours

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FLSA is entirely silent on furloughs
. The hallmark of many of the FLSA's exemptions
FLSA's overtime requirements[78])
is that the exempt employees are paid on a salary basis. FLSA section 13(a)(1)[79] requires payment of at least $455 per week on a "salary" basis for those employed as exempt executive, administrative, or professional employees. A salary is defined as a predetermined amount intended to compensate the employee for all work performed during a week and which is not subject to any reductions because of variations in the quality or quantity of the work performed.

For an amount paid to qualify as a salary—and for the salaried employee to therefore qualify as exempt—the employer must pay the exempt employee the full, predetermined salary amount free and clear for any week in which the employee performs any work. *Free and clear* means that it must be paid without regard to the number of days or hours worked, provided that the employee performs some work during the week. An employer may not make any deductions from the employee's predetermined salary for absences occasioned by the employer or by the operating requirements of the business. If the employee is ready, willing, and able to work, deductions may not be made for time when work is not available. Salary deductions are generally not

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[77] More on this law in Chapter 7.

[78] Again, more on this issue in Chapter 6.

[79] 29 U.S.C. § 213(a)(1)

permissible if the employee works less than a full day. Except for certain limited exceptions, salary deductions result in loss of the exemption.[80]

An employer is permitted to substitute or reduce an exempt employee's accrued paid leave (vacation pay, or other paid time off) for the time an employee is absent from work, even if it is less than a full day and even if the absence is directed by the employer because of lack of work, without affecting the salary basis test, provided that the employee still receives payment equal to the employee's predetermined salary in any week in which any work is performed.

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. The change, though, must be bona fide and not being used by the employer as a subterfuge or sham to evade the salary basis requirements, and it must not reduce the employee's salary below $455 per week. Also, the change must truly be perspective. It cannot vary day-to-day or week-to-week based on the operational requirements of the business. In that case, the varying changes and the resulting deductions would constitute an impermissible deduction from the predetermined salary and would result in loss of the exemption. The difference between these two examples is that the former involves a prospective reduction in the predetermined pay to account for predicted future long term business needs, while the latter adjusts in the short term, based on day-to-day or week-to-week absences from scheduled work occasioned by the employer or its business operations.

The Rules Change (Somewhat) If You Have a Labor Union

If you operate within the confines of a collectively bargained relationship, you have two more obstacles to overcome if you are considering shuttering or relocating your operations.

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[80] Yet again, much more on this issue in Chapter 6.

First, you cannot do so for the express purpose of avoiding or ridding yourself of the union. It is unlawful to relocate bargaining unit work for the express purpose of avoiding the workforce's labor union (a so-called "runaway shop"). If antiunion animus were the motivating factor, the relocation would be unlawful under section 8(a)(3) of the National Labor Relations Act.[81]

Secondly, and perhaps more importantly, even if your closure or relocation is not a runaway shop and is supported by a legitimate business reason, the National Labor Relations Act (NLRA) will still impose upon you an absolute obligation to bargain in good faith with the labor union about the decision.

. When a union

Sections 8(a)(5) [82] and 8(b)(3)[83] of the NLRA impose on the employer

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Section 8(d)[84] of the NLRA generally requires the parties to bargain

A contains no detailed definition of the subjects about which the parties . If a matter is a mandatory subject of bargaining, then (1) absent a current collective bargaining agreement that covers the matter, each party must bargain with the other about the matter upon request; and (2) absent an impasse in negotiations, neither party may make unilateral changes respecting the matter.[85]

In *Dubuque Packing Co.*[86], the National Labor Relations Board (NLRB) considered an employer's decision to relocate and arrived at the following test:

> *Initially, the burden is on the General Counsel to establish that the employer's decision involved a relocation of unit work unaccompanied by a basic change in the nature of the employer's operation. If the General Counsel successfully carries his burden in this regard, he will have established prima facie that the employer's relocation decision is a mandatory subject of bargaining. At this juncture, the employer may produce evidence rebutting the prima facie case by establishing that the work performed at the new location varies significantly*

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[81] 29 U.S.C. § 158(a)(3). *See also Caguas Asphault*, 296 NLRB 785 (1989); *Lear-Siegler, Inc., No-Sag Prods. Div.*, 295 NLRB 857 (1989); *Middle Earth Graphics*, 283 NLRB 1049 (1987).

[82] 29 U.S.C. § 158(a)(5).

[83] 29 U.S.C. § 158(b)(3).

[84] 29 U.S.C. § 158(d).

[85] *See Rock-Tenn Co. v. NLRB*, 101 F.3d 1441 (D.C. Cir. 1996); *see also* 29 U.S.C. § 188(d).

[86] 303 NLRB 386, 391 (1991), *modified sub nom. UFCW Local 150-A v. NLRB*, 1 F.3d 24 (D.C. Cir. 1993), *cert. dismissed*, 511 U.S. 1138 (1994)

> *from the work performed at the former plant, establishing that the work performed at the former plant is to be discontinued entirely and not moved to the new location, or establishing that the employer's decision involves a change in the scope and direction of the enterprise. Alternatively, the employer may proffer a defense to show by a preponderance of the evidence: (1) that labor costs (direct and/or indirect) were not a factor in the decision or (2) that even if labor costs were a factor in the decision, the union could not have offered labor cost concessions that could have changed the employer's decision to relocate.*

. In other words, "[I]f the employer shows that labor costs

."[87] "Labor

e payments, and the size of the workforce.[88] Thus, *Dubuque Packing* calls for a multileveled analysis of the reasons behind the employer's decision to determine whether an employer has a duty to bargain over the decision to relocate its operations.

Concluding Thoughts: Layoffs versus Furloughs

If you are faced with the economic need to downsize your workforce, which method should you choose—a layoff or a furlough?

I prefer the furlough.

Layoffs crush morale. While a layoff does present the opportunity to cut some dead weight, it also inevitably results in letting go some good employees too. The employees who are left will be always looking over their shoulders, waiting for their pink slips to come. They will be working harder, for the same pay, and in constant fear that their numbers are up next. This combination does not make for a healthy and productive work environment.

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[87] *Dubuque Packing Co.,* 303 NLRB at 391.

[88] *See Eby-Brown Co. L.P.*, 328 NLRB 496 (1999).

A furlough, however, sends a different message. It tells employees that each of them has value and is valued. It tells employees that you are doing what you can to keep them employed. A furlough also enables you avoid the costly addition of severance pay to proactively stave off any posttermination lawsuits. Moreover, when your operational needs improve, a furlough is also easier from which to recover. Instead of facing the daunting prospect of restaffing through hiring new employees, you can simply undo the furlough, and bring everyone back to full-time status.

If you make it work, a furlough is the preferred means to reduce operational

CHAPTER

5

The Right to

1943 was only 70-odd years ago, which, in the grand scheme of things, is not *that* far off. Yet consider how far we have come in the last seven decades, not the least of which in the area of personal liberties and civil rights.

Case in point? The Walt Disney Family Museum recently released the 1943 Disney employee handbook, entitled "The Ropes at Disney." That handbook included several gems that make the skin of a modern management-side employment lawyer crawl. For example, Disney maintained what it called the "Penthouse Club," which is described in the handbook as: "Men only! Sorry gals . . ."

It should be obvious to everyone today that no personnel policy should ever differentiate employees by sex, race, age, disability, national origin, religion, genetic information, or any other protected category. There are many other policies that are less flagrantly objectionable in legal terms, yet should never be countenanced in your workplace. But they can still be found lurking in employee handbooks around the country.

Some of these polices simply defy common sense and decency. Consider, for example, the following "bathroom etiquette policy" of a major law firm, courtesy of the blog *Above the Law*:[1]

> *In urinals, keep your eyes up and ahead and avoid looking around as a mistaken glance in the wrong direction may be embarrassing and might even result in a confrontation. Also, keep as much distance between yourself and others in public restrooms. Always choose the urinal farthest away from other people if possible; this goes for stalls too.*

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. The absence of some policies, such as those concerning harassment and Medical Leave Act (FMLA), is a glaring oversight. The absence

alienating employees and stifling productivity gains.

This chapter will discuss the biggest mistakes employers make in drafting and implementing the most common (as well as some uncommon) personnel policies and how to fix mistakes that might have crept into your manual.

Prelude: A Rant about Forms

Generic employment forms and documents are not difficult to find. They are all over the Internet. There are handbooks, employment applications, harassment policies, severance agreements, and a myriad other employment and personnel-related documents. Many companies even have old forms or policies that an attorney prepared years ago, which they dust off when a situation warrants. Companies rely on these form documents to save a few dollars in legal costs. After all, why pay a lawyer several hundred dollars to draft a policy for a business when they are available for free? A lawyer must have reviewed it at some point, right? Not necessarily.

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[1] Christopher Danzig, "San Francisco Firm Sends Awesome Officewide 'Restroom Etiquette' Email," http://abovethelaw.com/2012/02/san-francisco-firm-sends-awesome-officewide-restroom-etiquette-email/2/, February 3, 2012.

Even if a lawyer reviewed a policy at some point, it may not be up to date, it may not have been reviewed for a specific state's particular employment laws, and it certainly was not reviewed for a specific legal situation. A form is just that—a clean slate that can be adapted to a situation, but not perfect for any or every situation. Each state has specific laws that impact a form's language. Moreover, the law itself is always in flux. New cases come out that give new spins to old laws. New laws are passed that create new legal obligations. Do you think a five-year-old EEO policy will include genetic information? Or do you think a decade-old handbook will include a policy covering the spate of

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he Common Handbook Mistakes (and Them)

mistakes most commonly found in employee handbooks. Frequently omitted are no-solicitation policies, at-will disclaimers, harassment policies, antismoking policies, and adequate FMLA language. Common mistakes and legal traps include illegal overtime policies, bans on salary discussion, alternative dispute resolution policies, and outmoded policies respecting probationary period, internal grievance and arbitration, and progressive discipline.

Illegal Overtime Policies

Consider the following policy: "All overtime must be authorized by a manager or supervisor, and the company will only pay authorized overtime." Such a policy is illegal if it is applied as written. All overtime, whether it is authorized or not, should be paid. A better rule to control unauthorized overtime is to prohibit unauthorized overtime and discipline those employees who violate the rule. If you want to deter (or stop altogether) unauthorized overtime, make an example out of your worst offender. I can almost guarantee that your employees will think long and hard about punching out late to game the system if they know you mean business.

Vague or Missing FMLA Language

If you are covered by the FMLA and have an employee handbook, the FMLA's regulations require that handbook to contain an FLMA policy:[2]

> *If an FMLA-covered employer has any eligible employees, it shall also provide this general notice to each employee by including the notice in employee handbooks or other written guidance to employees concerning employee benefits or leave rights, if such written materials exist, or by distributing a copy of the general notice to each new employee upon hiring. In either case,*

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FMLA policy.

The A is rife with other traps for employers who do not specify certain . For example, the FMLA permits four different ways

1. Based on a calendar year.
2. Based on some other defined and fixed 12-month period.
3. Based on the first day an employee uses FMLA leave.
4. A rolling 12-month period, measured backward from the date an employee uses any FMLA leave. (Don't worry—a detailed explanation of this method follows.)

Thom v. American Standard, Inc. illustrates why it is crucial for employers to communicate to employees which of the methods for calculating the 12-month period they are using. *Thom* involves an employee terminated either during his FMLA leave (if the employer was calculating his 12 weeks of leave using the "calendar year" method) or after his FMLA leave expired (if the employer was using the "rolling" method). The employer argued that it had always used the rolling method, which it formally published in its policies before employee Thom's FMLA leave and termination. The Court disagreed:

> *Although American Standard did internally amend its FMLA leave policy in March 2005 to indicate that it would now calculate employee leave according to the "rolling" method, it did not give Thom actual notice of this changed policy.*

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[2] 29 C.F.R. § 825.300(a)(3). Employers are free to use the model policy provided by the United States Department of Labor, which you can find at http://www.dol.gov/whd/regs / compliance/posters/fmlaen.pdf.

This case illustrates both the importance of designating your FMLA year *and* providing proper notice to your employees of that designation or any subsequent changes. In this case, the failure cost the employer $312,402.60: an expensive lesson.

In choosing among the four options, there is no doubt that the last option—the rolling 12-month period—is both the most administratively burdensome and the most advantageous.

Under this rolling 12-month period, each time the employee takes FMLA

. The FMLA's [3]

> *For example, if an employee has taken eight weeks of leave during the past 12 months, an additional four weeks of leave could be taken. If an employee used four weeks beginning February 1, 2008, four weeks beginning June 1, 2008, and four weeks beginning December 1, 2008, the employee would not be entitled to any additional leave until February 1, 2009. However, beginning on February 1, 2009, the employee would again be eligible to take FMLA leave, recouping the right to take the leave in the same manner and amounts in which it was used in the previous year. Thus, the employee would recoup (and be entitled to use) one additional day of FMLA leave each day for four weeks, commencing February 1, 2009. The employee would also begin to recoup additional days beginning on June 1, 2009, and additional days beginning on December 1, 2009. Accordingly, employers using the rolling 12-month period may need to calculate whether the employee is entitled to take FMLA leave each time that leave is requested, and employees taking FMLA leave on such a basis may fall in and out of FMLA protection based on their FMLA usage in the prior 12 months. For example, in the example above, if the employee needs six weeks of leave for a serious health condition commencing February 1, 2009, only the first four weeks of the leave would be FMLA-protected.*

Choosing the rolling 12-month period will add some administrative burden to your FMLA management, but you will be repaid by the fact that employees cannot double-dip by taking more than 12 weeks of contiguous leave because there would not be an overlap of leave years.

Bans on Salary Discussions

The National Labor Relations Board (NLRB) enforces the National Labor Relations Act (NRLA), the federal law that regulates the relationships between private-sector employers and labor unions in workplaces that are either

[3] 29 C.F.R. § 825.200

collectively bargained or in the process of being organized to collectively bargain. It is a common misconception, however, that the NLRB regulates *only* unionized workplaces. In the area of what is known as "protected concerted activity," the NLRB not only reaches the 7% of unionized employers, but also the 93% of non-unionized employers.

Section 7 of the NLRA guarantees employees, among other rights, "the right to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ."[4] Section 8(a)(1) of the NLRA, in turn, renders it an unfair labor practice for an employer "to interfere with, restrain, Section 7."[5]

Section 7 rights

In other words, an employer cannot interfere with, restrain, or coerce

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Section 8(a)(1) of the Act through the maintenance of

Section 7 rights."[6]

The B uses a two-step inquiry to determine if a work rule would have such an effect.[7] First, a rule is unlawful if it explicitly restricts Section 7 . If the rule does not explicitly restrict protected activities, it is unlawful only upon a showing that: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.

A policy that could be construed to prohibit discussions of wages or other terms and conditions of employment would violate the NLRA. For example, a union representing employees at a New York grocery chain has asked the NLRB to investigate whether the store's social media policy violates employees' rights to engage in protected concerted activity under the NLRA.[8] The policy in question "forbids employees from disclosing confidential information—including salaries—on social networking sites like Facebook or Twitter, and from discrediting the store's practices or products." A safer rule would limit confidentiality to information about corporate information and customers and would not interfere with disclosure of information about employees' terms and conditions of employment.

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[4] 29 U.S.C. § 157.

[5] 29 U.S.C. § 158(a)(1).

[6] *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999).

[7] *Lutheran Heritage Village–Livonia*, 343 NLRB 646, 647 (2004).

[8] http://www.abajournal.com/news/article/union_asks_nlrb_to_determine_if_grocery_ chains_ policy_on_social_media_use_v/.

Missing No-Solicitation Policies

These policies are necessary tools for limiting union solicitations in the workplace, but they may not be specifically directed at union activities. Instead, companies can draw any reasonable line, so long as the line drawn is not tied specifically to union solicitations.

For employers, nonsolicitation policies are always tricky. You have the latitude to draft and enforce such policies, even as to email communications, to bar all non work-related solicitations. You can also draw a reasonable line to permit .g., Girl Scout cookie sales), as long as

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Other Disclaimers

andbooks should clearly state that employees are at-will, that the handbook

. These simple measures will help protect against breach of contract . Indeed, the law of most states dictates that

an employee that the handbook creates a binding contract or other enforceable promise upon which an employee can rely.[9]

At a minimum, your disclaimer should contain the following:

1. A specific statement that employment is at-will, without exception.
2. An explanation, in plain English, of what "at-will employment" means.
3. A statement that no one can create a contract contradictory to the provisions of the handbook. Otherwise, you open your organization to a potential claim by an employee that a manager or supervisor said or did something that binds the company contrary to what is expressly stated in the handbook.
4. A statement that the handbook is merely a unilateral statement of rules and policies that creates no rights or obligations.
5. A statement that the handbook is not a contract and not intended to create an express or implied contract.

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[9] *See, e.g., Wing v. Anchor Media, Ltd.*, 570 N.E.2d 1095 (Ohio 1991).

6. A statement that the employer has the unilateral right to amend, revise, or eliminate policies and procedures as needed.
7. A statement that employees should not rely on any statement in the handbook as binding on the company.

Moreover, in litigation, a handbook is only as good as being able to prove that an employee received it on a certain date. The best proof is a signed, dated receipt in all employees' personnel files, with enough information in the receipt itself to link it to the handbook (such as a date for the issuance of the

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The NLRB is taking a hard look at whether at-will disclaimers violate federal labor laws.[10] There is much more on what is called "protected concerted activity" later in this chapter's

P Period Provisions

I cannot tell you how many handbooks I review that contain probationary periods. These policies say something such as: "Newly hired employees begin their employment on a 90-day probationary period, during which time their work performance is evaluated and during which they may be dismissed at any time for any reason."

Probationary periods are holdovers from union contracts, and have no place in a non-union setting. These policies are counterintuitive to the at-will nature of employment and could establish an unreasonable expectation of continued employment after the initial 90 days expire.

A better policy would simply reaffirm that all employees are at-will, that any can be terminated at any time for any reason, and that new employees will receive an initial performance review on or around the 90th day of employment. This compromise satisfies the need to ensure that new hires are on the right path and obtain any counseling they need to correct deficiencies or problems that become apparent during the first three months of employment, while protecting the sanctity of the at-will relationship.

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[10] *See Am. Red Cross Ariz. Blood Servs. Region*, Case No. 28-CA-23443, 2012 NLRB LEXIS 43, *66. (N.L.R.B. Feb. 1, 2012).

Internal Grievance and Arbitration Policies vs. the Open Door

Grievance and arbitration programs might be the hallmark of every collective bargaining agreement, but they have no place in any employee handbook. They establish expectations of due process that are an unneeded headache for any private-sector employer, noncollectively bargained employer. Instead, consider an Open Door Policy, which will achieve the same benefit—granting employees an important conduit to voice complaints and air grievances—

. Here's a good example, which I have developed over the years:

> *In an effort to guarantee that the Company treats employees fairly and reacts to valuable employee insights, The Company has adopted an "Open Door Policy." This policy guarantees that you will never be prevented from taking your questions, suggestions, or complaints to a higher level of management if you cannot obtain a satisfactory response from an immediate supervisor. Normally all problems should first be taken to your immediate supervisor. This usually will provide the quickest and most effective solution. However, if you feel the need, you may discuss your concern with any senior management employee of the Company. It is against company policy for any executive, manager, or supervisor to penalize or threaten any employee for speaking to any person in the chain-of-command. Employees are often closer to the source of problems than management. Therefore, employee opinions are very highly valued, and you should always feel free to express yourself.*

Here's another example of an Open Door Policy—Wal-Mart's—taken verbatim from a court decision:

> *If you have an idea or a problem, you can talk to your supervisor about it without fear of retaliation. Problems may be resolved faster if you go to your immediate supervisor first. However, if you feel your supervisor is the source of the problem, or if the problem has not been addressed satisfactorily, you can go to any level of management in the Company. But remember, while the Open Door promises that you will be heard, it cannot promise that your request will be granted or that your opinion will prevail.*[11]

Progressive Discipline Policy

Another holdover from collectively bargained relationships is the progressive discipline policy. Like probationary periods, and grievance and arbitration programs, progressive discipline is antithetical to at-will employment.

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[11] White v. Fabiniak, Case No. 2007-L-100, 2008-Ohio-2120 (Ohio Ct. App. May 2, 2008).

Progressive discipline is a stepped model of discipline, increasing in severity with the number or frequency of offenses by an employee. It usually includes some combination of counseling, oral warnings, written warnings, final warnings, suspensions, and finally termination.

Unfortunately, many of these policies are drafted as doctrine for managers and supervisors to follow, with no room for discretion based on a particular employee or particular situation. There is nothing *wrong* with establishing a stepped model of discipline based on categories or frequency of offenses. After all, no one is going to suggest that you should terminate an employee . Indeed, I have no empirical data to back me up, I would bet that employers who . They provide an early warning system to employees. Those who . They should state that the steps are advisory and that managers and . This important disclaimer disabuses due process to be followed in every case.

Missing Harassment Policy

In *Burlington Indus., Inc. v. Ellerth,*[12] and *Faragher v. City of Boca Raton,*[13] the Supreme Court issued simultaneous opinions establishing the limits on an employer's vicarious liability under Title VII for hostile environment harassment perpetrated by a supervisor. Under those limits, when no tangible employment action is taken against the employee plaintiff, the employer is entitled to assert an affirmative defense that "(a) that the employer exercised reasonable care to prevent and correct promptly any . . . harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."[14] For this reason, the existence of a harassment policy is crucial to every employer.

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[12] 524 U.S. 742, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998).

[13] 524 U.S. 775, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998).

[14] *Ellerth*, 524 U.S. at 765.

Merely having the policy, however, is not enough. Employers must take antiharassment obligations seriously. *EEOC v. Dave's Supermarkets*[15] illustrates the dangers that lurk for employers that choose to give their harassment policies lip service.

In *Dave's Supermarkets,* female employees complained that the store ignored their complaints when the meat department manager sexually harassed them. The court not only denied the employer's summary judgment motion as to most of the employees' harassment claims but also permitted their punitive damage claims to proceed to a jury trial.

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1. The antiharassment policy.
2. Appropriate training of all employees about that policy.
3. A consistent corporate culture that takes the policy and the company's antiharassment stance seriously.

Having a policy and enforcing it are two different animals. A policy is only as good as the people who execute it. Training and the right corporate culture are necessary to ensure that your antiharassment policy works as best as it should and as often as it is needed. Otherwise, you are left in the awkward (and expensive) position of having to explain to a jury why your actions did not match your policy.

Alternative Dispute Resolution Policies

Another policy often repeated in handbooks is an alternative dispute resolution, or arbitration, policy. Such a policy requires employees to submit disputes related to their employment to a neutral third-party arbitrator and prohibits litigation in court. Just because a handbook contains a policy, though, does not mean that courts have to enforce it. For example, in *Hergenreder v. Bickford Senior Living Group,*[16] the Sixth Circuit refused to enforce an arbitration clause contained within the pages of an employee handbook.

In that case, Bickford filed a motion to compel Hergenreder to arbitrate her disability discrimination case under an arbitration clause buried in its employee

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[15] Case No. 1:09 CV 2119, 2011 U.S. Dist. LEXIS 19881 (N.D. Ohio Mar. 1, 2011).

[16] 656 F. 3d 411 (6th Cir. 2011).

handbook. Section 12 of the 16-section handbook—for which Hergenreder had signed an acknowledgment that she had read and understood its terms—provided as follows: "*Dispute Resolution Process* Please refer to the Eby Companies Dispute Resolution Procedure (DRP) for details." The separate, 20-page DRP, in turn, required that employees submit all claims to arbitration. The employee testified that she never saw the DRP, let alone signed for it.

The court concluded that simple inclusion of a reference to the DRP in the handbook did not constitute a binding and enforceable contract between Hergenreder and Bickford to arbitrate all employment claims:

> *DRP available to Hergenreder.*[17]

If you are going to require employees to arbitrate their claims against you, do yourself a favor and at least have the employee *sign* a separate arbitration agreement. You might succeed on enforcing an alternative form of an alternative dispute resolution agreement (such as a handbook clause). But you will spend the money you perceive you are saving through arbitration by trying to enforce your right to arbitrate.

This discussion, however, begs the question of whether the arbitration of employment disputes makes sense in the first place. Companies and their lawyers often use mandatory arbitration of employment claims for two reasons: (1) as a cost-effective alternative to court; and (2) as an insurance policy against runaway jury verdicts.

In my experience, however, arbitration can prove just as costly as court. More and more arbitrators are allowing plaintiffs to engage in discovery that is nearly as expansive (and expensive) as what trial courts permit. Additionally, employers have to add into the equation the cost to file the claim, which the employer usually shares. With the American Arbitration Association, these fees can run anywhere from $950 to a cap of $65,000. These fees do not

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[17] *Id.* at 418-419.

include the arbitrators' time, which often exceeds $500 per hour, and includes all prehearing conferences, discovery and motion practice, the actual hearing time, and the drafting of the opinion. Indeed, one recent study concluded that employment arbitrations were 30% more expensive and last 25% longer than comparable cases litigated in the courts.[18]

It is not hard to see how in many cases the defense costs and time associated with arbitration outweigh the same in a traditional court proceeding. If arbitration is neither less expensive nor less time consuming, I suggest two alternatives to address and solve employers' other concern: runaway juries.

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Trial Waivers

. More than 20 years ago, *K.M.C. Co. v. Irving Trust Co.,*[19] the Sixth Circuit stated: "It is clear that the

. . . . [T]he constitutional right to jury trial may only be waived if done .''[20]

The contract should clearly and unambiguously advise the employee that by signing the agreement the employee is giving up any and all rights to have any claims related to his or her employment raised by a jury. The more broadly the waiver is drafted, the more likely it will cover an employment-related claim, provided it is otherwise knowing and voluntary.

Agreements to Shorten Statutes of Limitations

Employers can attempt to limit the amount of time employees have to assert employment claims. In *Thurman v. DaimlerChrysler, Inc.*[21], the Sixth Circuit held that a clause in an employment application limiting the statutory limitations period for filing a lawsuit against the employer was valid. In that case, Thurman's employment application with DaimlerChrysler contained a clause waiving any

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[18] Charles Coleman, *Is Mandatory Employment Arbitration Living up to Its Expectations? A View from the Employer's Perspective*, ABA Journal of Labor & Employment Law, Vol. 25, No. 2 (Winter 2010) (concluding that the average costs and fees in an employment arbitration were $102,338, as compared to $70,491 in litigation, while the average life cycle of an employment arbitration, from filing to decision, was 21 months, as compared to 17 months in litigation).

[19] 757 F. 2d 752 (6th Cir. 1985).

[20] *K.M.C. Co. v. Irving Trust Co.*, 757 F.2d 752, 755 (6th Cir. 1985).

[21] 397 F. 3d 352 (6th Cir. 2004); *see also Alonso v. Huron Valley Ambulance*, Case No. 09-1812, 375 Fed. Appx. 487 (6th Cir. Apr. 26, 2010).

statute of limitation and agreeing to an abbreviated limitations period in which to file suit against the employer. Specifically, the clause stated:

> READ CAREFULLY BEFORE SIGNING *I agree that any claim or lawsuit relating to my service with Chrysler Corporation or any of its subsidiaries must be filed no more than six (6) months after the date of the employment action that is the subject of the claim or lawsuit. I waive any statute of limitations to the contrary.*

The Court held that the abbreviated limitations period contained in the

DaimlerChrysler were time barred by the six-month limitations . The Court paid particular attention to the "read carefully before

. It also found the specific language used was clear

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1. Waivers should be obvious and conspicuous. Waivers should be set off by headings in all caps and bold type, letting the employees know what they were about to read was important and should be read with care before signing.
2. Employees should be given time to consider the waiver before signing it, should not be pressured or required to sign the waiver on the spot, and should not be denied the right to seek legal counsel before signing, if they choose.
3. Waivers should be understandable to those signing them, written plainly and without legalese. Also, employees should be provided waivers in their primary language or with the services of someone who can translate.

Antismoking Policies

It is no secret that health care costs in this country continue to rise faster than employers and employees can keep up with the annual insurance premium increases. One way employers are choosing to combat this annual dance with their medical insurers is to turn to employee wellness programs. One facet that appears in many of these wellness programs is reduced insurance rates for employees who do not smoke. Thus, the push is one to ban, or otherwise limit, employees who smoke.

Some employers have gone so far to issue prohibitions against the hiring of anyone who is smoking, either at work or at home:

> *More hospitals and medical businesses in many states are adopting strict policies that make smoking a reason to turn away job applicants, saying they want to increase worker productivity, reduce health care costs and encourage healthier living. The policies reflect a frustration that softer efforts—like banning smoking on company grounds, offering cessation programs and increasing health care premiums for smokers have not been powerful-enough incentives to quit.*[22]

.[23] Its web site even offers a good example

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Disabilities Act (ADA).

action against an employee based on their lawful off-duty activities (such as the ingestion of a legal substance like tobacco):

- Seventeen states have "smokers' rights" statutes, which prohibit discrimination against tobacco users (Connecticut, Indiana, Kentucky, Louisiana, Maine, Mississippi, New Hampshire, New Jersey, New Mexico, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Virginia, West Virginia, and Wyoming).
- Eight states have statutes that protect the use of any lawful product (e.g., tobacco or alcohol) outside of the workplace

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[22] A.G. Sulzberger, "Hospitals Shift Smoking Bans to Smoker Ban," New York Times, (Feb. 10, 2011) A1.

[23] Cleveland Clinic, "A Message About Smoking from Dr. Cosgrove," http://my.cleveland clinic.org/tobacco/a_message_about_smoking.aspx.

[24] Cleveland Clinic, "New Nonsmoking Hiring Policy at Cleveland Clinic," http://my.clevelandclinic.org/Documents/Urology/Non-Smoking_Hiring_Statement.pdf. In the spirit of "wellness," the Clinic has also banned from its campus the sale of any non-diet sodas. It has no problem, though, selling McDonalds, doughnuts, and hubcap-sized cookies (which, in my experience, are delicious) in its cafeteria. If anyone can explain this dichotomy to me, I would appreciate it.

(Illinois, Minnesota, Missouri, Montana, Nevada, North Carolina, Tennessee, and Wisconsin).

- Four states have statues that protect employees who engage in any lawful activity outside of work (California, Colorado, New York, and North Dakota).

Employers also have the ADA about which to worry. The ADA does not just protect employees' disabilities; it also protects employees who are "regarded as" having a physical or mental impairment. Critically, the ADA's "regarded as"

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and minor. Examples of such uncovered

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For this reason, employees can claim that antismoking policies violate the ADA. Addiction is a protected disability.[25] Diseases related to or caused by smoking (cancers, lung diseases, asthma, and other respiratory conditions, for example) are also protected disabilities. Employees will claim that an adverse action taken pursuant to an antismoking policy is being taken because the employer regards the employee as disabled. Adverse actions taken against employees because of smoking should now be viewed as potentially risky, at least until courts begin weighing in on this controversial issue.

Workplace Technology Policies

With the mindboggling advances in technology, a whole new category of workplace policies has become necessary.

[25] Whether or not a court will agree that "smoking" (or, more accurately, nicotine addiction) is a protected disability is very much an open issue. If, however, you operate in a state without an off-duty-conduct or smokers-rights law and you want to execute a workforce smoke-out, consider whether you want to be the test case under the ADA. If you are a large company with billions of dollars of assets at your disposal, eating a six (or even seven) figure lawsuit is tolerable to defend a policy about which you feel strongly. If, however, you are like most (almost all?) businesses, you will not want to eat the expense and exposure of such a lawsuit. Instead, the better practice is waiting until litigants willing and able to bear the risk of testing these theories in court and only adopt such a policy if, and when, courts give their blessings.

■ **Note:** The law is slow to evolve. Technology has advanced more quickly than the law can keep pace. These suggestions on workplace technology policies are practices based on educated guesses on where the law is likely heading. It will likely be years, if not a decade, before businesses obtain concrete and consistent judicial guidance on these issues upon which they can consistently and reasonably rely.

Electronic Communications Policies

. In *Stengart v. Loving Care Agency,*[26] however, the New Jersey Supreme

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I *Stengart*, a company issued an employee a company-owned laptop for . The company also maintained an electronic communication

- "The company reserves and will exercise the right to review, audit, intercept, access, and disclose all matters on the company's media systems and services at any time, with or without notice."
- "Email and voice mail messages, internet use and communication and computer files are considered part of the company's business and client records. Such communications are not to be considered private or personal to any individual employee."
- "The principal purpose of electronic mail (email) is for company business communications. Occasional personal use is permitted; however, the system should not be used to solicit for outside business ventures, charitable organizations, or for any political or religious purpose, unless authorized by the Director of Human Resources."[27]

The employee—who was not technologically savvy—did not realize that the computer's Internet browser automatically saved on to the hard drive a copy of each web page viewed. During her employment, the employee used the

[26] 990 A.2d 650 (N.J. 2010).

[27] *Id.* at 657.

computer to contact her attorney using her personal, web-based and password-protected Yahoo email account. She did not save her private login or password on the computer. After she quit and returned the laptop, she sued for discrimination. The employer forensically extracted the personal emails she sent to her attorney.

The employee claimed that attorney-client privilege protected the emails. The company, relying on its electronic communication policy, claimed that the employee had relinquished any expectation of privacy over the personal emails stored on the company-owned computer.

. The employee subjectively

. The expectation of privacy

. Moreover, by permitting occasional personal use, the policy created doubt over who owned the emails.

The Court, however, refused to go so far as to invalidate all workplace electronic communications policies or confiscate the rights of employers to monitor and regulate corporate-owned computers and their systems:

> *Companies can adopt lawful policies relating to computer use to protect the assets, reputation, and productivity of a business and to ensure compliance with legitimate corporate policies. And employers can enforce such policies. They may discipline employees and, when appropriate, terminate them, for violating proper workplace rules that are not inconsistent with a clear mandate of public policy. . . . For example, an employee who spends long stretches of the workday getting personal, confidential legal advice from a private lawyer may be disciplined for violating a policy permitting only occasional personal use of the Internet. But employers have no need or basis to read the specific contents of personal, privileged, attorney-client communications in order to enforce corporate policy.*[28]

In light of *Stengart*, consider the following when adopting an electronic communications policy for your business:

1. State whether your technology is limited to work-related use only or if you permit some personal non-work use.

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[28] *Id.* at 665.

2. Account for the handling of your business's trade secrets, confidential, and proprietary information, and remind employees that breaches of confidentiality are strictly prohibited.
3. Remind employees of their nonharassment obligations. Offensive, demeaning, or disruptive messages should always be prohibited, as should offensive, racist, discriminatory, or sexual content.
4. Warn employees that you monitor the use of all electronic resources and that they have no expectation of privacy in communications transmitted using company-owned resources or via the company network.
5. Explain to employees that copies of messages sent and received through a personal, web-based email account on a company-owned computer could be stored on that computer.
6. Inform employees that you have the discretion to review all communications sent or received via company-owned equipment, regardless whether a personal account is used, but subject to laws regarding attorney-client and other privileged communications.
7. Restrict employees from using any company technology to communicate with a personal attorney.
8. Disclose that violations of the policy—including the prohibition on communications with a personal attorney—will be punished by discipline up to and including termination.

Social Media Policies

According to recent a survey conducted by the Society for Human Resource Management, despite 68% of companies using social media to communicate with external audiences (current customers, potential customers, or potential employees), only 27% provide their employees any kind of training on the proper use of social media. This disconnect is disturbing. It is bad enough that employees are using social media to communicate without any guidance or training. It is astounding that nearly three-quarters of companies allow their employees to communicate with the public at large in this manner.

The lesson from these statistics is that you need a social media policy for your organization. The following are nine considerations that you must think through before implementing any for the social media policy in your workplace.

1. *How far do you want to reach?* Social media presents two concerns for employers—how employees spend their time at work and

how employees portray your company online when they are not at work. Any social networking policy must address both types of online use.

2. *Do you want to permit social media access at work at all?* It is not realistic to ban all social networking at work. For one thing, you will lose the benefit of business-related networking, such as LinkedIn. Without turning off Internet access or blocking certain sites, a blanket ban is also hard to monitor and enforce. For example, at least half of your employees likely have smartphones. If you ban social media sites, or otherwise restrict access, your employees will simply turn away from their desktops, turn on their iPhones, and post away.

3. *If you prohibit social media, how will you monitor it?* Turning off Internet access, installing software to block certain sites, or monitoring employees' use and disciplining offenders are all possibilities, depending on how aggressive you want to be and how much time you want to spend watching what your employees do online.

4. *If you permit employees to use social media at work, do you want to limit it to work-related conduct or permit limited personal use?* How you answer this question depends on how you balance productivity versus the marketing and engagement return you can expect from your employees blogging, Facebooking, and Tweeting.

5. *Do you want employees to identify with your business when networking online?* Employees need to understand that everything they write online is a potential reflection on your business. Employees should be made aware that if they post as an employee of your company, the company could hold them responsible for any negative portrayals that result. That responsibility carries over to employees' friends, followers, commenters, etc. For example, if an employee sees a post on his or her own Facebook wall trashing his or her employer, the employee should understand that it is his or her responsibility to delete that wall post. Above all else, social media is a tool in reputational management, both for the individual and your organization.

6. *How do you define "appropriate business behavior?"* Employees need to understand that what they post online is public, and they have no privacy rights in what they put out for the world to see. Anything in cyberspace is available as grounds to discipline

an employee, no matter whether the employee wrote it from work or outside of work. There should be consequences for any information that negatively reflects on your business. In other words, "Think before you click."

7. *How will social media intersect with your broader harassment, technology, and confidentiality policies?* Employment policies do not work in a vacuum. Employees' online presence, depending on what they are posting, can violate any number of other corporate policies. Drafting a social media policy is an excellent opportunity to revisit, update, and fine tune other policies. For example, do you tell your employees how ownership of social media accounts is handled postemployment? If not, you are exposing your business to uncertainty and potential litigation.

8. *Do you permit your employees to connect with each other?* There is no one-size-fits-all solution to the issues raised by coworkers connecting via social networks. Social sites such as Facebook and Twitter can be a powerful tool for added employee engagement and communication. Because of the added connectivity, however, they also present an added risk for problems such as harassment, retaliation, and invasions of privacy. You have five options to choose from in the level of connectivity to permit for your employees. Which answer you choose will depend on how you balance the benefit of the added communication versus the risk of potential problems. There are five options available: (i) Anything goes. Any employee can friend any other employee regarding of rank or position; (ii) Supervisors are prohibited from friending direct reports, but employees can friend their supervisors (who can choose whether to accept the request); (iii) Supervisors and their reports cannot be Facebook friends, regardless of who initiates the request; (iv) Employees are only permitted to be Facebook friends with their organizational peers; or (v) Employees are expressly prohibited from being Facebook friends with any co-workers, regardless of position.

9. *Recommendations?* One of LinkedIn's differentiating features is the ability to provide recommendations for your connections. Consider the following scenario. A supervisor, who is connected to one of his subordinates on LinkedIn, provides a recommendation for that employee describing her as the "greatest, most indispensible employee ever." Two weeks later, that employee (who happens to be a 55-year-old, female, wheelchair-bound, African American) is fired. You can bet that the supervisor's LinkedIn

> recommendation will be presented as "Exhibit A" during the supervisor's deposition in the soon-to-follow age/sex/race/disability discrimination lawsuit. Is this scenario likely? Probably not. Is it possible? You bet. I will let you decide if you would be better served with a policy that prohibits employees from providing online recommendations, and instead requiring employees to stick to annual performance reviews and other official channels.

Do not mistake this discussion of these legal issues for my belief that employers . To the contrary,

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Facebook from work than a pay raise. Because different employees

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- Is an employee making inappropriate postings? Treat it as you would any other employee disparaging your business or its employees.
- Is an employee divulging company confidences? Treat it as you would any other employee leaking or misappropriating confidential or proprietary information.
- Is an employee using social media to harass, discriminate, or retaliate against another employee? Treat it as you would any alleged violation of your workplace discrimination or harassment policy.
- Is an employee spending too much time on social media at work? Treat it as you would any employee productivity issue.

In other words, these issues are not new. What is new is the technology though which these issues are being filtered in your workplace. The sooner you realize that these issues

A Cautionary Word about Social Media Policies

The NLRB's rules construing whether a work rule or policy unreasonably chills employees rights to engage in protected concerted activity are not new. [29] What is new, however, is how the NLRB is applying them to the wide range of social media, electronic communications, and more general employee communication policies.

The first case to publicize these issues was *American Medical Response*, a Hartford, Connecticut, ambulance company. The NLRB Office of General

, which prohibited employees from making disparaging

Internet, without

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NLRB's Office of General Counsel considered and opined on all three [30]

- The first challenged portion of the policy prohibited employees from posting pictures of themselves in any media, including the Internet, which depict the company in any way, including a company uniform, corporate logo, or an ambulance. That language violated Section 8(a)(1) because it would prohibit an employee from engaging in protected activity, such as posting a picture of employees carrying a picket sign depicting the company's name, or wear a t-shirt portraying the company's logo in connection with a protest involving terms and conditions of employment.
- The second challenged portion of the policy prohibited employees from making disparaging comments when discussing the company or the employee's superiors, coworkers, and competitors. Because the rule contained no limiting language to inform employees that it did not apply to Section 7 activity, it violated the NLRA.
- The last challenge was to the employer's standards-of-conduct policy, which prohibited the use of language or action that was inappropriate or of a general offensive nature and rude or discourteous behavior to a client or coworker.

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[29] See the discussion regarding workplace bans on salary discussion earlier in this chapter.

[30] National Labor Relations Board Office of the Acting General Counsel, *Report of the Acting General Counsel Concerning Social Media Cases*, Memorandum OM 11-74(Aug. 18, 2011).

> Because the prohibition of "offensive conduct" and "rude or discourteous behavior" proscribed a broad spectrum of conduct and contained no limiting language to remove the rule's ambiguity in prohibiting Section 7 activity, it also was found to have violated the NLRA.

Karl Knauz Motors, Inc.[31] was the very first decision by an NLRB Administrative Law Judge (ALJ) to address the issue of how far employers' policies can go in trying to restrict employees' online speech. The ALJ concluded that the following conduct policies in the automobile dealership's handbook were

> *Courtesy*: Courtesy is the responsibility of every employee. Everyone is expected to be courteous, polite and friendly to our customers, vendors and suppliers, as well as to their fellow employees. No one should be disrespectful or use profanity or any other language that injures the image or reputation of the Dealership.
>
> *Unauthorized Interviews*: As a means of protecting yourself and the Dealership, no unauthorized interviews are permitted to be conducted by individuals representing themselves as attorneys, peace officers, investigators, reporters, or someone who wants to "ask a few questions."

- *Outside Inquiries Concerning Employees*: All inquiries concerning employees from outside sources should be directed to the Human Resource Department. No information should be given regarding any employee by any other employee or manager to an outside source.

According to the ALJ:

> *If employees complied with the dictates of these restrictions, they would not be able to discuss their working conditions with union representatives, lawyers, or Board agents.*

While none of the at-issue policies was a "social media" policy, employers need to understand that the NLRB could take issue with any policy that might infringe on employees' rights to engage in protected, concerted activities. This means that businesses must walk a fine legal line in drafting social media and other communication policies, which must be narrowly drafted to ensure that employees cannot reasonably perceive that they are limited in how they

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[31] Case No. 13-CA-46452, 2011 NLRB LEXIS 554 (N.L.R.B. Sept. 28, 2011).

can discuss their terms and conditions of employment. In simpler terms, employers need to think twice before painting employee communication restrictions with a broad brush.

In its second report on social media in the workplace,[32] the NLRB examined more than a dozen pending cases alleging that the employer had an overly broad and overly restrictive policy regulating social media or electronic communications. In reality, in a mere 35 pages, the NLRB appeared to have ripped the guts out of the ability of employers to regulate any kind of online communications between employees. The NLRB found the following facially

- A provision in a social media policy which provided that employees should generally avoid identifying themselves as the employer's employees unless discussing terms and conditions of employment in an appropriate manner.
- Work rules that simply prohibited "disrespectful conduct" and "inappropriate conversations."
- A social media policy that prohibited employees from using social media to engage in unprofessional communication that could negatively impact the employer's reputation or interfere with either its mission or unprofessional/inappropriate communication regarding members of its community.
- A communications systems policy that prohibited employees from disclosing or communicating information of a confidential, sensitive, or non-public information concerning the company on or through company property to anyone outside the company without prior approval of senior management or the law department.
- A communications systems policy that prohibited use of the company's name or service marks outside the course of business without prior approval of the law department.
- A communications systems policy that required that social networking site communications be made in an honest, professional, and appropriate manner, without defamatory or inflammatory comments.

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[32] National Labor Relations Board Office of the Acting General Counsel, *Report of the Acting General Counsel Concerning Social Media Cases*, Memorandum OM 12-31 (Jan. 24, 2012).

- A communications systems policy which required that employees state as part of posts on social media sites that their opinions are their own and not their employer's.
- A social media policy that prohibited discriminatory, defamatory, or harassing web entries about specific employees, work environment, or work-related issues on social media sites.

What policies did the NLRB conclude were lawful? A policy that limited its

." The NLRB also concluded as lawful policies that expressly

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P U.S. Chamber of Commerce sums it up best (excuse me while I . The Chamber examined 129 NLRB cases . In its published report *Survey of Social Media Issues* [33] the Chamber reached the following conclusions:

> *The issues most commonly raised in the cases before the Board allege that an employer has overbroad policies restricting employee use of social media or that an employer unlawfully discharged or disciplined one or more employees over contents of social media posts.*
>
> *With respect to employer policies restricting employee use of social media, our review of cases found many specific policies alleged to be overbroad, including those that restrict discussion of wages, corrective actions and discharge of co-workers, employment investigations, and disparagement of the company or its management. The context in which the policy was adopted and even the issue of whether a rule or policy has been actually adopted is also important in these cases.*

What about disclaimers? Some believe employers can save themselves from the NLRB's wrath simply by carving out Section 7 rights from any social media policy. Can they save an otherwise overly broad social media policy? Consider the opinion of the Division of Advice discussing a social media policy promulgated by Sears Holdings.

In 2009, the International Brotherhood of Electrical Workers filed an unfair labor practice charge claiming that the Sears Holdings Social Media Policy

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[33] Michael J. Eastman, U.S. Chamber of Commerce, A Survey of Social Media Issues Before the NLRB,, (Aug. 5, 2011).

violated 8(a)(1) because it might chill employee participation in union organizing activities. As often happens in cases that raise new or novel legal questions, the NLRB Regional Director submitted the issue to the agency's Division of Advice for direction on whether to issue a complaint.

The policy stated:

> *[I]n order to ensure that the Company and its associates adhere to their ethical and legal obligations, associates are required to comply with the Company's Social Media Policy. The intent of this Policy is not to restrict the flow of useful and appropriate information, but to minimize the risk to the Company and its associates.*
>
> Prohibited Subjects *In order to maintain the Company's reputation and legal standing, the following subjects may not be discussed by associates in any form of social media:*
>
> - *Company confidential or proprietary information*
> - *Confidential or proprietary information of clients, partners, vendors, and suppliers*
> - *Embargoed information such as launch dates, release dates, and pending reorganizations*
> - *Company intellectual property such as drawings, designs, software, ideas and innovation*
> - *Disparagement of company's or competitors' products, services, executive leadership, employees, strategy, and business prospects*
> - *Explicit sexual references*
> - *Reference to illegal drugs*
> - *Obscenity or profanity*
> - *Disparagement of any race, religion, gender, sexual orientation, disability or national origin*

The Division of Advice opined that the Sears Holdings Social Media Policy did not violate the NLRA. It noted:

> *While the ban on "[d]isparagement of company's . . . executive leadership, employees, [or] strategy . . ." could chill the exercise of Section 7 rights if read in isolation, the Policy as a whole provides sufficient context to preclude a reasonable employee from construing the rule as a limit on Section 7 conduct. The Policy covers a list of proscribed activities, the vast majority of which are clearly not protected by Section 7.*

The Division of Advice therefore concluded that the Regional Director should not issue a complaint.

Yet, the NLRB acting general counsel's third memo would suggest that employers not read too much into the Sears Holding advice memo.[34] Indeed, in one case on which the NLRB recently opined, the Office of General Counsel even took issue with a "savings clause" in which the employer expressly told its employees that it would not interpret or apply its policy "to interfere with employee rights to self-organize, form, join, or assist labor organizations, to bargain collectively through representatives of their choosing,

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I NLRB wants to head

. In *Costco Wholesale Corp.*,[35] the NLRB invalidated the shopping

. Costco's policy stated:

> *should be aware that statements posted electronically (such as [to]online message boards or discussion groups) that damage the Company, defame any individual or damage any person's reputation, or violate the policies outlined in the Costco Employee Agreement, may be subject to discipline, up to and including termination of employment.*[36]

The NLRB concluded that this rule violates the NLRA's prohibitions against work rules that unreasonably infringe on employees' rights to engage in protected concerted activity:

> *In these circumstances, employees would reasonably conclude that the rule requires them to refrain from engaging in certain protected communications…. [T]he Respondent's rule does not present accompanying language that would tend to restrict its application. It therefore allows employees to reasonably assume that it pertains to—among other things—certain protected concerted activities, such as communications that are critical of the Respondent's treatment of its employees.*[37]

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[34] National Labor Relations Board Office of the Acting General Counsel, *Report of the Acting General Counsel Concerning Social Media Cases*, Memorandum OM 12-59 (May 30, 2012).

[35] 358 NLRB No. 106 (N.L.R.B. 2012).

[36] *Id.* at p. 1.

[37] *Id.* at p. 3.

Under the guise of "protected concerted activity," the NLRB is making it next to impossible for employers to maintain any work rules that regulate what employees cannot say or do. If I apply a tortured interpretation to any work rule, I can reach some far-fetched conclusion that it could deter employees from engaging in protected concerted activity. The NLRA only is supposed to concern itself with work rules that *reasonably* tend to chill employees. Yet, these tortured interpretations go well beyond the realm of what is reasonable.

I will leave you with two additional observations on this issue, from which you *may* be able to take solace.

Many were outraged when the NLRB's Office of General Counsel

A. Employers should hold out hope that the federal court will take a

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these issues remain very unsettled and continue to evolve. One opinion
LJ is nowhere close to a conclusive interpretation of the law.

Note: The NLRB is divided into 32 regional offices. Cases are litigated at the regional level, with decisions written by ALJs. A party dissatisfied with the decision of an ALJ has the right to appeal a decision to the NLRB itself, a traditionally five-member bipartisan panel that sits in Washington, D.C. Appeals from the NLRB go the federal circuit courts and, from there, to the U.S. Supreme Court.

Ultimately, the federal circuit courts and the Supreme Court will have to weigh in on these issues. But that guidance is years away. Until then, move very cautiously if trying to regulate social media in your workplace and not without the advice of labor and employment counsel well-versed in these delicate and still-evolving issues.

Mobile Device Policies

Social media is not the only twenty-first century technology for which your workplace policies need to account. For example, do you have a policy that addresses mobile devices? According to a recent survey,[38] there are 324.3

[38] CTIA Consumer Info, "U.S. Wireless Quick Facts," http://www.ctia.org /consumer_info/index.cfm/AID/10323.

million mobile devices in the United States. Let that number sink in. It equates to 1.025 mobile devices per American. And, according to another recent survey,[39] 46% of all American mobile devices are smartphones. This number does not even account for the number of iPads and other tablets.

In other words, your employees are connected all the time, both at and away from work. It also means you need to have a policy to account for this penetration of mobile devices. And this policy needs to account for all of the various permutations of mobile devices used by in your workplace and out of your workplace.

YOD, or "Bring

Y wn Device."

■ BYOD might be *the* corporate buzzword for 2012. It is a corporate mobile technology

was mobile device of corporate America. Once iOS and Android started supporting email via

device and a personal device. In short, they wanted their email and Angry Birds wrapped up in one tidy mobile package. Thus, the birth of BYOD. Today, Blackberry is going the way of Betamax, and BYOD is here to stay. I call it the iPhone-ification of corporate America.

Employers also have to account for the personal use of work devices inside and outside of work. Mobile devices have become indispensible to today's worker, and companies act at their own peril if they do not provide sufficient guidance to employees on their rights and responsibility in respect to these key distinctions between work time versus off-duty time, and work-related information versus personal information. The following are 10 questions for you to think about in drafting (or revising) your mobile device policy:

1. Do you allow for your employees to connect personal devices to your network? Or do you limit network connectivity to employer-provided devices? And where is the data stored, on the device itself, or remotely? If you allow employees to BYOD, does BYOD mean *any* device, or does it simply mean iPhones or Androids? What about iPads or other tablets? Employee-owned laptops? Stick drives and other portable memory? The answer to

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[39] Nielsen Wire, "More US Consumers Choosing Smartphones as Apple Closes the Gap on Android," http://blog.nielsen.com/nielsenwire/consumer/more-us-consumers-choosing-smartphones-as-apple-closes-the-gap-on-android/., January 18, 2012.

these questions will not only impact the security of your network but also dictate which mobile devices and OSs your company will support.

2. Do you permit employees to use mobile devices in the workplace? It is difficult to require employees to check their devices at the door. But if you have safety-sensitive positions, you should consider protecting these employees from the distractions mobile devices cause.

3. Who pays for the device, not just at its inception, but also if it is lost or broken and needs to be replaced? If you require your employees to reimburse for lost phones, state wage payment laws may limit your ability to recoup via a paycheck deduction.

4. Do employees have an expectation of privacy as to data transmitted by or stored on the device? Do you tell employees that their expectation of privacy is limited or nonexistent? Are you tracking employees via GPS, and, if so, are you telling them? If your workplace encourages BYOD, do you differentiate this expectation of privacy based on whether the information accessed or stored is work-related or personal?

5. For nonexempt employees, do you permit mobile devices to be used for business purposes, and if so, do you prohibit their use during nonworking hours? Otherwise, you might be opening your organization up to a costly wage-and-hour claim.

6. Do employees know what to do if a device is lost or stolen? Do you have the ability to remote wipe a lost or stolen device? Even if you have the ability to remote wipe a device (and if you do not, you should), your employees will prevent a remote wipe if their first call upon losing a device is to a mobile carrier (which will deactivate the phone) instead of your IT department. Employees should be told that if they lose a mobile device, their first call should be to IT so that the device can be wiped of any corporate data.

7. Do you prohibit employees from jailbreaking their iPhones or rooting their Androids? These practices void the phone's warranty. Also, consider banning the installation of apps other than from the official iTunes App Store or Google Play. It will limit the risk of the installation of viruses, malware, and other malicious code on the devices.

8. Are devices required to be password protected? Employees generally resist having to enter a four-digit pin code every time they turn on their iPhones. Your IT, legal, and risk management departments, however, should require them, since they make it that much harder for someone to access data on a lost or stolen device. If your organization deals in confidential information (e.g., doctors, lawyers, etc.), this requirement is that much more important (and might be mandated by law). Also, your policy should reference any other policies that address the handling of confidential and proprietary information.

9. Do you forbid employees from using their mobile devices while driving? Thirty-five states (and growing) have laws that ban some type of mobile device use while driving. Even if your state is not included, do the right thing by suggesting your employees be safe while operating their vehicles.

   How does your policy interact with other policies already in existence? Your mobile device policy should cross-reference your harassment, confidentiality, and trade secrets policies, all of which are implicated by the use of mobile technology.

Any successful mobile device and technology program results from a synergy among the C-suite, legal, IT, HR, and risk management. Businesses must involve all of these departments to make sure that your program is successful, and addresses all necessary technology, work, and security issues.

Concluding Thoughts: The Importance of Clarity

Lang v. Quality Mold[40] provides an excellent example to conclude this discussion of workplace policies and the traps they hold for unwary employers.

Quality Mold had a handbook policy under which an employee would forfeit unused vacation upon a termination for "gross misconduct." The handbook, however, did not ascribe a definition to "gross misconduct." Quality Mold administered drug tests to its supervisors after receiving a tip from an employee's mother that one supervisor was furnishing drugs to her son. John Lang tested positive for cocaine and marijuana. Quality Mold terminated him and refused to pay him for his unused vacation time, determining that a failed drug test constituted gross misconduct.

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[40] 2008-Ohio-4560 (Ohio Ct. App. Sept. 10, 2008).

The Court of Appeals disagreed:

> *Quality Mold has argued that "gross" means "[g]laringly, obvious, [or] flagrant." As the magistrate noted, there was no evidence that Mr. Lang distributed illegal drugs to other employees. There was also no evidence that Mr. Lang's drug use had impaired his performance, that he had endangered other workers, that he had any absenteeism or disciplinary problems, or that he had caused harm to Quality Mold's other employees or property. Under these circumstances, this Court concludes that the trial court's finding that Mr. Lang had not committed gross misconduct was supported by the record.*[41]

n first blush, this opinion seems to defy common sense. As the concurring

." However, as the concurring opinion also points out,

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. A policy should clearly state what it means and the conduct it regulates. Do not trust that judges or juries will see things your way when you have to argue an ambiguity after the fact.

[41] *Id.* at ¶ 11.

CHAPTER

6

The Right to

Harassment and Retaliation

Unless employers know a problem exists, they cannot correct it. There is one area, however, in which employers have an absolute legal obligation to take in, investigate, and remedy employee complaints—namely, unlawful discrimination and harassment. Additionally, whenever employees complain about illegal activities, they enjoy a right to continued employment free from retaliation. These two issues, taken together, present one of the most dangerous employees an employer will face—the complainer.

Harassment

Let's start with the basics. Harassment only becomes unlawful if it is harassment "because of" or "based on" some protected characteristic, such as sex. Indeed, while we commonly think of harassment as "sexual harassment," and most workplace harassment policies are called "sexual harassment policies," sexual harassment is not the only type of unlawful harassment. The law also protects against harassment based on any characteristic protected by the equal employment opportunity laws (e.g., race, religion, national origin, disability, and age). And the harassment must be objectively and subjectively

severe or pervasive. In other words, Title VII and the other EEO laws are not a workplace civility code and do not prohibit generalized workplace bullying unrelated to a protected EEO classification:

> *The American workplace would be a seething cauldron if workers could with impunity pepper their employer and eventually the EEOC and the courts with complaints of being offended by remarks and behaviors unrelated to the complainant except for his having overheard, or heard of, them. The pluralism of our society is mirrored in the workplace, creating endless occasions for offense. Civilized people refrain from words and conduct that offend the people*

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. To satisfy the "based on" element, a plaintiff must essentially

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etc.) based comments or conduct and common workplace swearing and *Passananti v. Cook County*,[2] the answer is "it depends."

After losing her job as a deputy director with the Cook County Sheriff's Department, Kimberly Passananti sued, claiming that her director had subjected her to sexual harassment by calling her a "bitch" on "numerous occasions" over a "progressive period of time." A jury awarded Passananti $4.2 million in damages, of which $70,000 was compensation for the sexual harassment. The trial court set aside the entire verdict. The 7th Circuit reinstated the verdict on the sexual harassment claim.

The Court started its analysis of whether the use of the word "bitch" constitutes sex-based harassment by dismissing any argument that its common use has neutered the word:

> *We recognize that the use of the word "bitch" has become all too common in American society, and its use has permeated many workplaces. Common use, however, has not neutralized the word as a matter of law.*[3]

The Court concluded that even though "bitch" is sexually based, its use must be examined in context to determine whether it constitutes harassment "because of sex."

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[1] *Yukins v. First Student, Inc*., 481 F.3d 552, 556 (7th Cir. 2007) (emphasis added).

[2] Case No. 11-1182, 2012 U.S. App. LEXIS 14875 (7th Cir. Ill. July 20, 2012).

[3] *Id.* at *22.

> *We do not hold that use of the word "bitch" is harassment "because of sex" always and in every context. . . . [T]he use of the word in the workplace must be viewed in context. . . . But we do reject the idea that a female plaintiff who has been subjected to repeated and hostile use of the word "bitch" must produce evidence beyond the word itself to allow a jury to infer that its use was derogatory towards women. The word is gender-specific, and it can reasonably be considered evidence of sexual harassment. . . .Whether its use is sufficient evidence of actionable sexual harassment is, of course, another matter. As with so many other things, when gender-specific language is used in the workplace, these cases and others recognize that context is key. We must proceed with "[c]ommon sense, and an appropriate sensitivity" to that context to distinguish between general vulgarity and discriminatory conduct or language "which a reasonable person in the plaintiff's position would find severely hostile or abusive."*[4]

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employee a "bitch" is actionable *sexual* harassment. If an employee complains that he or she is being called vulgarities or other offensive names, you have only one option—investigate and take appropriate corrective action.

What about the equal-opportunity harasser—an employee who equally treats everyone like garbage? For example, non sex-based conduct that targets women and men the same, no matter how harsh, is not sexual harassment. Case in point? *Miceli v. Lakeland Automotive Corp*.[5]

During her tenure at Lakeland Automotive, Diana Miceli was its only female salesperson. Generally, she alleged that her manager abused, belittled, and harassed her. She admitted, however, that the manager treated the other salespeople (all male) the same way. Because the manager was an equal-opportunity abuser, the court upheld summary judgment:

> *The sales manager's abrasiveness was not limited to Miceli. In Miceli's deposition testimony she stated that "[e]veryone complained about [the sales manager]." Miceli admitted that the sales manager treated another male co-worker "extremely abusive[ly]" and "very condescending[ly]." . . . [T]here is no evidence to suggest that the . . . conduct, although rude and obnoxious, was motivated by gender. Personality conflicts, albeit severe, do not equate to*

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[4] *Id.* at *25-26.

[5] 39 A.3d 199 (N.J. 2011).

> *"hostile work environment" claims simply because the conflict is between a male and female employee.*[6]

In other words, there is no law against being a workplace ass, just against being an ass based on some protected characteristic. I call this the "asshole defense" to harassment claims. In the words of one Ohio court:

> *Fortunately or unfortunately, not all upsetting or even mean-spirited conduct in the workplace is actionable. In the absence of an employee's membership in a protected class, participation in a protected activity, or a clear public policy*

[7]

O . *Oncale v. Sundowner Offshore Services*[8]—
the Supreme Court case that first recognized that Title VII protected

. In *Wasek v. Arrow Energy Services*,[9] another same-sex harassment case involved oil rig employees. *Wasek*, however, did not turn out as well for the complaining employee as did *Oncale*.

To save money after accepting a job with Arrow Energy, Harold Wasek decided to share a hotel room with one of his new coworkers, Paul Ottobre. As it turns out, that decision proved to be a poor one. Ottobre tormented Wasek by grabbing his buttocks, poking him in the rear with a hammer handle and long sucker rod, making comments such as, "You've got a pretty mouth," "Boy, you have pretty lips," and "You know you like it, sweetheart," telling sexually explicit jokes, stories, fantasies, and calling Wasek names. Wasek believed that Ottobre acted like this because he was bisexual.

When Wasek complained, his superiors first told him not to "make waves [by] whining," and later told him he should just "kick [Ottobre's] ass," that they should "duke it out" to "get it out of [their] systems." When Wasek pursued the issues with HR, the regional supervisor told him that it's "the way the oil field is" and that if Wasek could not handle it he "should find another line of work."

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[6] *Id.*

[7] *Kimmel v. Lowe's Inc.*, Case No. 23982, 2011-Ohio-28, ¶ 9 (Ohio Ct. App. 2011).

[8] 523 U.S. 75, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998).

[9] 682 F.3d 463 (6th Cir. 2012).

The Sixth Circuit affirmed the dismissal of Wasek's harassment claim:

> *Title VII is not "a general civility code for the American workplace." . . . [T]he conduct of jerks, bullies, and persecutors is simply not actionable under Title VII unless they are acting because of the victim's gender. No evidence exists that Ottobre was motivated by a general hostility towards men. And the oil rig was not a mixed-sex workplace, so there is no possibility of comparative evidence. Thus, in order to infer discrimination, Wasek must demonstrate that Ottobre was homosexual. In his deposition, Wasek speculated that Ottobre was "a little strange, possibly bisexual." We need not delve into what inferences—if any—might be drawn from a harasser's bisexuality. A single speculative statement in a deposition cannot be the first link in the "chain of inference" that Oncale recognizes may follow from the harasser's nonheterosexuality. . . . Therefore, Wasek's Title VII hostile work environment claim cannot survive.*[10]

egardless of where you stand on the issue of whether there should exist a

not to respond to a

. It is shameful that the supervisors told Wasek to stop

. There are a million better ways this employer

that this misconduct is not actionable Title VII harassment.

National Origin Discrimination—Context Matters

Consider the following examples:

- *EEOC v. Spitzer Management:*[11] Employer denied summary judgment based on allegations that an Asian American employee was called "slant eye" and "rice rat," and an African American employee was called a "jungle bunny" and a "gorilla."
- *Burrage v. FedEx Freight:*[12] Employer granted summary judgment based on allegations that an employee was repeatedly called a "Mexican" and referred to as "cheap labor."

How do you rationalize these two seemingly incongruous decisions? The reconciliation depends on the national origin or race of the complainant. In *Spitzer*, an Asian American was complaining about harassment based on his

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[10] *Id.* at 467-68.

[11] Case No. 1:06-CV-2337, 2010 U.S. Dist. LEXIS 34975 (N.D. Ohio Apr. 9, 2010).

[12] Case No. 4:10-CV-2755, 2012 U.S. Dist. LEXIS 43365 (N.D. Ohio Mar. 29, 2012).

national origin and an African American about harassment based on his race. In *FedEx*, however, the complainant was not Mexican American or of any Hispanic descent. In reality, he was half white and half black. As the court in *Burrage v. FedEx* explained:

> *At best, the references to Burrage as "the Mexican" and "cheap labor," and the use of the Spanish terms "andale" and "ariba," represent the very unfortunate employment of offensive stereotypes of Hispanics, and can be said to arise out of a misperception that Burrage was of Hispanic descent.*[13]

. Claims based on perceived class membership are not
II, and the Court will not expand the reach of Title
VII .

Burrage v. FedEx and use it as an excuse
. *FedEx* just as easily could have gotten dinged for
. Regardless of whether there

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Do not hang your harassment hat on a technicality, because the court hearing your case might not be so generous.

Employer Liability for Harassment

An employer's liability for unlawful harassment depends, in part, on whether the alleged perpetrator of the harassment is a supervisor or a coworker. Employers are strictly liable for unlawful harassment committed by a supervisor but only liable for harassment committed by a nonsupervisory coworker if the company was negligent in discovering or remedying the harassment.

In *Vance v. Ball St. Univ.,*[14] the court concluded that for the purpose of imposing strict liability for harassment, "supervisor" means "*direct* supervisor." That is, if the alleged harasser is a supervisor in title, but lacks the power to *directly* affect the terms and conditions of the *plaintiff's* employment, strict liability cannot attach, and the court must analyze the employer's liability under a negligence standard. An employer's liability for coworker harassment hinges on the reasonableness of the employer's own acts or omissions in responding to and remedying the harassment. An employer's response is unreasonable if it manifests indifference or unreasonableness in light of the facts that the

[13] *Id.* at *16.

[14] 646 F.3d 461 (7th Cir. 2011).

employer knew or should have known. Conversely, an employer's response is adequate if it is reasonably calculated to end the harassment.

Yet, the federal appellate courts are split on this issue. The First, Third, Sixth, and Eight Circuits agree with the Seventh Circuit's opinion in *Vance v. Ball St. Univ.*, while the Second, Fourth, and Ninth Circuits, in addition to the proemployee EEOC, conclude that a supervisor is a supervisor regardless of the degree of oversight or control over the alleged victim of the harassment.

Regardless of the liability standard, what's the best way to avoid missing a
Don't be an ostrich. Under no circumstances can you,

. It is not a defense for you to bury your organizational head in the sand
. If you opt

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Do You Do When an Employee Complains?

ow that you understand *some* of the legal landscape of harassment, what are

harassment?

The first step is making sure you have cleared an unobstructed path for employees to make complaints in the first place. Consider, for example, *EEOC v. Management Hospitality of Racine, Inc., d/b/a International House of Pancakes, Flipmeastack, Inc.*,[15] which concerns allegations (too vile in their particulars to be repeated here) of sexual harassment of two teenage employees by a Flipmeastack manager a decade their senior.

The employer tried to avoid liability by relying on its zero-tolerance sexual harassment policy and its prompt investigations of complaints. The court disagreed for several reasons, including that managers had never received any harassment training and that the employer waited two months to investigate the complaints in this case. Most importantly, however, the court concluded that the employer's harassment policy failed on its face:

> *An employer's complaint mechanism must provide a clear path for reporting harassment, particularly where, as here, a number of the servers were teenagers. . . . Flipmeastack's sexual harassment policy did not provide a point person to air complaints to. In fact, it provided no names or contact information at all.*[16]

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[15] 666 F.3d 422 (7th Cir. 2012).

[16] *Id.* at 436.

What does this mean for you? A harassment policy is worthless if it does not tell employees how to complain and to whom to make complaints. Here are four points to keep in mind:

1. Any harassment policy should have more than one avenue available for an employee to complain, such as different people across different departments.
2. Additionally, employees should not be limited to complaining in person. Employees should be able to complain in writing, over the phone, or by email.
3. Consider setting up a telephone or email hotline to log complaints.
4. Ensure that the person accused of the harassment is not the individual receiving complaints or conducting investigations. That person, even if it is your director or human resources or chief executive office, must be screened-off from any investigation other than his or her own investigatory interview.

. It is one thing to have a harassment policy. In fact, you would be hard-pressed to find many businesses that do not. It is entirely another thing, however, to have corporate culture that takes the enforcement of that policy seriously.

EEOC v. Dave's Supermarkets[17] illustrates the dangers that lurk for employers that choose to give their harassment policies lip service.

In *Dave's Supermarkets,* female employees complained that the store ignored their complaints when the meat department manager sexually harassed them. The court not only denied the employer's summary judgment motion as to (most) of the employees' harassment claims but also permitted their punitive damage claims to proceed to a jury trial. In refusing to dismiss the punitive damages claims, the court relied heavily on the fact that while the employer maintained a detailed antiharassment policy, it did not follow through on its own procedures when it received the plaintiffs' complaints.

A comprehensive antiharassment policy involves three components:

1. The antiharassment policy.
2. Appropriate training of all employees about that policy.

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[17] Case No. 1:09-CV-2119, 2011 U.S. Dist. LEXIS 19881 (N.D. Ohio Mar. 1, 2011).

3. A consistent corporate culture that take the policy and the company's antiharassment stance seriously.

Having a policy and enforcing it are two different animals. A policy is only as good as the people who execute it. Training and the right corporate culture are necessary to ensure that your antiharassment policy works as best as it should and as often as it is needed. Otherwise, you are left in the awkward (and expensive) position of having to explain to a jury why your actions did not match your policy.

Brenneman
,[18] in which the employer meaningfully responded

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Famous Dave's for sexual harassment. She claimed
David Ryburn, subjected her to a hostile work

I'd love to stab you."
There was no issue as to whether those incidents created a hostile work environment, but whether (1) Famous Dave's exercised reasonable care to prevent and promptly correct any sexually harassing behavior, and (2) whether Brenneman failed to take advantage of any preventative or corrective opportunities provided by the employer or otherwise to avoid harm. Because Brenneman unreasonably quit her employment and did not suffer a tangible employment action, proof of both elements would permit Famous Dave's to escape liability for the harassment by its supervisor, for which it would otherwise have been vicariously liable.

So let's look at Famous Dave's policies and how it responded to Brenneman's complaint:

1. *Antiharassment policy.* Famous Dave's had a facially valid antiharassment policy, with a nonretaliation provision, and a flexible reporting procedure, listing four different people an employee could contact in case of harassment. Famous Dave's also maintained an employee hotline that employees could use to report harassment. It distributed the policy to all employees, including Brenneman, and specifically trained about the policy and how to use it.

[18] 507 F.3d 1139 (8th Cir. 2007).

2. *Prompt corrective action.* When Brenneman reported the harassment via the hotline, Famous Dave's immediately sent an HR representative to investigate and stop the harassment. It attempted to work out a new schedule with Brenneman to keep her away from Ryburn. It also offered to transfer her to a different store 5 miles away. Brenneman did not accept any of the remedial measures and instead quit.

Famous Dave's did most things right in responding to Brenneman's complaint. It had a meaningful antiharassment policy. The employer widely disseminated

. And the

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. Instead, the corrective measures must
. To attempt to minimize

1. *Promptness.* Upon receipt of a complaint of harassment, a business must act as quickly as reasonably possible under the circumstances to investigate and, if necessary, correct the conduct.
2. *Thoroughness.* Investigations must be as comprehensive as possible given the severity of the allegations. Not every complaint of offensive workplace conduct will require a grand inquisition. Egregious allegations, however, usually require a more comprehensive investigation.
3. *Shielded those with potential bias.* You should exclude from the investigatory process anyone involved in the alleged transgressions. Including an alleged harasser in the inner circle of your investigation will enable the complaining employee to claim that bias irreparably tainted the investigation.
4. *Consider preliminary remedial steps.* While an investigation is pending, it is best to segregate the accused(s) and the complainant(s) to guard against further harassment or, worse, retaliation. Unpaid suspensions can always retroactively be paid, for example, and companies are in much worse positions if they are too lax instead of too cautious.

5. *Communication.* The complaining employee(s) and the accused employee(s) should be made aware of the investigation process—who will be interviewed, what documents will be reviewed, how long it will take, the importance of confidentiality and discretion, and how the results will be communicated.

6. *Follow-through is crucial.* There is nothing illegal about trying remedial measures less severe than termination in all but the most egregious cases. A valued employee may be no less valued after asking a coworker about her underwear. If the conduct continues, however, the discipline must get progressively harsher. If you tell an employee that termination is the next step, you must be prepared to follow through on that threat or face the risk of being second-guessed by a court.

indsight is 20/20 and investigations are always subject to being second-
. Promptness, consistency, thoroughness, and follow-through are a
. A failure of any

. Complacency is also dangerous. As the *Engel* case illustrates, one

believe they are not (such as a second complaint), more severe measures must be taken.

Finally, if you have doubts at all, *involve an attorney*. *West v. Tyson Foods*[19] provides a great example of the importance of the early involvement of counsel.

Amanda West quit her job at a Tyson chicken-processing plant after being subjected to more than a month of fairly pervasive sexual harassment. During her exit interview with Tyson's HR manager, West talked about all of the harassment to which she had been subjected and that her supervisors failed to respond to her complaints. She also identified the perpetrators by name. The HR manager, however, did not conduct any investigation into the allegations until after Tyson received West's EEOC charge. At trial, the court admitted into evidence the HR manager's notes from the exit interview, along with its EEOC statement of position. That position statement falsely claimed that Tyson launched an investigation following the exit interview. From this evidence—along with the evidence of the harassment and the supervisor's lack of response—the jury awarded West $1,281,636.58—$131,636.58 in lost wages, $750,000 for mental distress, and $400,000 in punitive damages—which the Sixth Circuit affirmed.

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[19] Case No. 08-6516, 2010 U.S. App. LEXIS 7863 (6th Cir. 2010)

What is the lesson here? Having an attorney draft the position may not have saved the day, but it would have certainly lessened the impact of Tyson's involvement in the harassment. The misstatements in the position statement make it look like Tyson was trying to cover up what happened. That perception of a cover-up likely led to the high compensatory and punitive awards.

How Do You Remedy Harassment?

Perhaps no single act can more quickly alter the conditions of employment and

S Seventh Circuit in *Rodgers v. Western-Southern Life Ins. Co.*[20]
H . To be actionable, the offensive conduct
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. A white employee dropping an "N-bomb" on a black employee
.
H N-bombs"
in *Hargrette v. RMI Titanium Co.*?[21] It took swift remedial action.

> *In 2002, Kearns allegedly called McKinnon a "nigger." . . . [T]he inappropriate comment occurred during an argument between Kearns and McKinnon. The argument resulted in both Kearns and McKinnon being suspended for three days. In his deposition, McKinnon states that Kearns was not a supervisor. In addition, this remark appears to be an isolated instance. While McKinnon stated he did not get along with Kearns, it is only alleged that Kearns called McKinnon a "nigger" on this single occasion. Finally, we note that, upon being informed of the incident, management investigated the situation and reprimanded Kearns for his misconduct.*[22]

But, what is *prompt* remedial action? In *Bailey v. USF Holland*,[23] the Sixth Circuit had occasion to examine whether the employer's response to two African American employees' claims of racial harassment was sufficiently prompt to defeat liability. This case provides a good case study from which companies can learn how, and how not, to respond to an employee's internal complaint.

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[20] 12 F.3d 668, 675 (7th Cir. 1993).

[21] Case No. 2009-T-0058, 2010-Ohio-406 (Ohio Ct. App. Feb. 5, 2010).

[22] *Id.* at ¶ 47.

[23] 526 F.3d 880 (6th Cir. 2008).

Bailey and Smith, both African American, were dock workers for USF Holland. Throughout their employment, their white coworkers constantly subjected them to the word "boy." When they would complain to their coworkers that the word "boy" is offensive when directed at a black man, they would sarcastically respond, "Damn it, boy." The more they complained, the more serious the harassment would become. It moved from words to vandalism, including "boy" spray painted on equipment, etched into walls, used to depict black men in cartoon drawings, and even written on a calendar on MLK Day. The harassment was not limited to the use of the word "boy." Bailey discovered
Smith overheard one white coworker
Smith because he could call him "a low-down
Smith would not do anything about it.

Smith started complaining to management about
P of
decided to conduct "sensitivity training" at the terminal. During that

. During the training,

.'" One white
Fred Connor, even told the terminal manager that "boy" was a "southern thing" and he would continue to use it regardless of company policy.

Not surprisingly, the behavior continued for several months after the training, as did Bailey and Smith's complaints to management. At that time, USF brought in an outside lawyer who conducted a three-day investigation. He concluded that "while the environment likely is non*racially* hostile [huh?], it is certainly one in which more sensitive employees can feel uncomfortable." As a result, the VP of HR wrote to Bailey and Smith, telling them that the company could not discipline any employees because the use of "boy" was not racially motivated and that everyone had denied the other alleged conduct.

As the graffiti and harassment continued, USF hired a handwriting expert and terminated the offending employee, Fred Connor. He filed a union grievance and was reinstated. After his reinstatement, Connor reiterated to the terminal manager that "he would not adhere to the policy and would continue to use the word 'boy' as he saw fit."

Finally, in 2006, four years after Bailey and Smith's first complaint and a year after they filed their lawsuit, USF installed 25 security cameras, which finally ended the graffiti.

At a bench trial, the district court judge awarded Bailey and Smith each $350,000 in compensatory damages.

On appeal, USF argued that it could not be liable for the harassment because it took "reasonable, prompt, and appropriate corrective action." The court disagreed: [24]

> *Defendant cites examples of its corrective action, noting for example that it "consistently had a reasonable harassment policy," conducted employee meetings to respond to plaintiffs' complaints, and disciplined the employee responsible for the graffiti. The district court correctly rejected these actions as insufficient. A harassment policy itself means nothing without enforcement, and the persistent harassment plaintiffs received over an extended period of time*

. Usually courts do not second guess an employer's course of remedial
. Indeed, had the sensitivity training succeeded in ending the harassment,
I Smith would have prevailed. When, however, the offending employee tells the VP of HR during sensitivity training that he will continue calling black employees "boy" and others offer similar resistance, a company cannot turn a blind eye and hope that everything will work out. By the time employees started being disciplined and security cameras were involved, it was "too little, too late."

The timeline in this case spanned nearly 4 years from the first complaint to the installation of the cameras. In a case such as this, 4 weeks might not even be quick enough of a response. The severity of the response (i.e., counseling, discipline, termination) can vary depending on the severity of the harassment, but the quickness of the response cannot. Companies that allow problems such as these to fester and continue by dragging their feet in investigating and remedying them do so at their own peril, as the $700,000 verdict in this case illustrates.

Moreover, how do you know if the punishment you impose fits the crime? An employer has an absolute obligation to investigate a complaint of harassment and, where founded, take appropriate corrective action to stop the harassment from continuing. Consider *Wilson v. Moulison North Corp.*,[25] in which the plaintiff alleged that his employer failed to take appropriate corrective action

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[24] *Id.* at 887.

[25] 639 F.3d 1 (1st Cir. 2011).

in response to his complaint that coworkers created a workplace permeated by heinous racially discriminatory taunts. The plaintiff argued that the employer's verbal reprimand and warning that future harassment would result in termination was too mild a sanction and that the company should have immediately terminated them instead.

The court refused to armchair-quarterback the employer's business judgment:[26]

> *In most situations—and this case is no exception—the imposition of employee discipline is not a rote exercise, and an employer must be accorded some flexibility in selecting sanctions for particular instances of employee misconduct. . . . The short of it is that, given the totality of the circumstances, the punishment seems to have fit the crime.*

> *We appreciate the sincerity of the plaintiff's outrage, but the discipline imposed need not be such as will satisfy the complainant. . . . The plaintiff's argument that the sanction must have been inadequate because it was ineffective to stop the harassment is nothing more than a post hoc rationalization. . . . Barring exceptional circumstances (not present here), a reasoned application of progressive discipline will ordinarily constitute an appropriate response to most instances of employee misconduct.*

The key takeaway here is the progressiveness of progressive discipline. When might a similar warning not suffice and a court require more severe corrective action?

- If the perpetrators are repeat offenders.
- If discrimination is a long-standing problem for the employer.
- If the employer has a history of inconsistent discipline.

Absent these "exceptional circumstances," do not always jump to the conclusion that a harassment investigation must end in termination. Instead, make the punishment fit the crime.

A Word on Confidentiality in Workplace Investigations

In *Banner Estrella Medical Center*[27], the NLRB concluded that an employer's request to employees not to discuss a workplace investigation with their

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[26] *Id.* at 8.

[27] 358 N.L.R.B. No. 93 (2012).

coworkers while a workplace investigation was ongoing violated the employees' rights to engage in protected concerted activity under the NLRA:

> *To justify a prohibition on employee discussion of ongoing investigations, an employer must show that it has a legitimate business justification that outweighs employees' Section 7 rights. . . . Respondent's generalized concern with protecting the integrity of its investigations is insufficient to outweigh employees' Section 7 rights. Rather, in order to minimize the impact on Section 7 rights, it was the Respondent's burden "to first determine whether in any give[n] investigation witnesses need[ed] protection, evidence [was] in danger of*

. Moreover, it is often difficult to determine
. This difficulty is exacerbated by the

HR personnel.

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interview is that the employee should keep everything said confidential. That way, later interviewees will not be influenced and do not have an opportunity to compare (and prepare) their stories.

By prohibiting employers from requiring that workplace investigations remain confidential, the NLRB's decision in *Banner Estrella* neuters the ability of employers to make key credibility determinations. Limiting confidentiality in this manner will severely constrain the ability of employers to conduct thorough and accurate workplace investigations, which, in turn, will limit the ability of employers to stop the workplace evils they are investigating (discrimination, harassment, theft, etc.).

What are employers to do? One option is to ignore *Banner Estrella*, in light of conflicting guidance from the EEOC, in its requirement, contained in its Enforcement Guidance on the topic of harassment investigations, that employers keep workplace investigations confidential:

> *An employer should make clear to employees that it will protect the confidentiality of harassment allegations to the extent possible. An employer cannot guarantee complete confidentiality, since it cannot conduct an effective investigation without revealing certain information to the alleged harasser and potential witnesses. However, information about the allegation of harassment should be shared only with those who need to know about it. Records relating to harassment complaints should be kept confidential on the same basis. A*

conflict between an employee's desire for confidentiality and the employer's duty to investigate may arise if an employee informs a supervisor about alleged harassment, but asks him or her to keep the matter confidential and take no action. Inaction by the supervisor in such circumstances could lead to employer liability. While it may seem reasonable to let the employee determine whether to pursue a complaint, the employer must discharge its duty to prevent and correct harassment. One mechanism to help avoid such conflicts would be for the employer to set up an informational phone line, which employees can use to discuss questions or concerns about harassment on an anonymous basis.[28]

EEOC's Buffalo, NY, office, however, has notified an employer of an

You have admitted to having a written policy that warns all employees who participate in one of your internal investigations of harassment that they could be subject to discipline or discharge for discussing "the matter," apparently with anyone.

Comment: The EEOC is supposed to prevent workplace discrimination and harassment. How can it possibly take issue with a key component of the crucial tool employers use to weed out unlawful harassment? This position simply does not make any sense. The EEOC should be championing confidential investigations, not signaling that they constitute a "flagrant" violation of Title VII. Prohibiting employers from keeping workplace investigations confidential will render investigations meaningless. I do not think this is a result the EEOC wants to foster.

Epilogue—How Bad Can This Get?

The acts of sexual harassment alleged by Ashley Alford against her supervisor, Richard Moore, in *Alford v. Aaron Rents, Inc.* are among most horrific I have ever encountered (taken from the court's opinion denying the employer's motion for summary judgment[29]):

- Shortly after Alford began working at Aaron Rents, beginning in November 2005, Moore began intentionally and inappropriately touching her.

[28] The U.S. Equal Employment Opportunity Commission, "Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors, http://www.eeoc.gov/policy/docs/harassment.html, June 18, 1999.

[29] Case No. 08-cv-0683-MJR, 2011 U.S. Dist. LEXIS 47121 (S.D. Ill. May 3, 2011).

- Moore called Alford degrading pet names, such as "Trixie" and "Trix."
- Moore gave Alford unwanted gifts for which he demanded "sucky-sucky."
- Moore grabbed Alford by her ponytail, unzipped his pants, pulled her head back and hit her in the head with his penis, twice.
- Moore grabbed Alford, threw her to the floor, pulled up her shirt, masturbated, and ejaculated on her.

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ever in a single-plaintiff harassment case—$95 million. *The St. Louis Post-*[30] quoted a representative of the company, who called the verdict .'" I agree. The conduct proven at trial was .

Nevertheless, this verdict underscores the importance of prompt and thorough investigations into complaints of harassment by employees. The jury did not subject the employer to this verdict because of the acts of a rogue supervisor but because the company did not do anything about him when the plaintiff complained. Do not make this same mistake in your business.

Retaliation

The statutory protections for retaliation come in two flavors: participation and opposition. The former protects employees who have "made a charge, testified, assisted, or *participated* in any manner in an investigation, proceeding, or hearing under" the relevant statute. The latter protects employees who have *opposed* any discriminatory employment practice. Participation is easy to spot; opposition, however, often proves to be elusive.

Jackson v. Board of Education of Memphis City Schools[31] answers the question of how far the opposition clause goes to protect employees who make

[30] STLToday.com, "Jury awards $95 million in Fairview Heights sex harassment suit," http://www.stltoday.com/news/local/crime-and-courts/article_6f46fa47-3a8b-5266-b094-b95910d51c46.html. June 10, 2011.

[31] Case No. 10-5937, 2012 U.S. App. LEXIS 17365 (6th Cir. 2012).

unreasonable or unfounded complaints about discrimination. It also teaches an important lesson that not every employee who complains about discrimination is bulletproof.

The Memphis City Schools employed Janice Jackson (African American) as a teacher's assistant. She worked at a school run by an African American principal. 97% of the school's staff was African American, including 29 of the school's 31 teacher's assistants. After being admonished by the principal for unprofessional behavior, Jackson delivered a personal letter, in which she indicated that she felt unfairly singled out because her white coworkers were

Rights Act of 1964." After her

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. The court noted that to support a claim of retaliation under the

." In this case,

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personnel issue raised by Jackson's unprofessional behavior.

Critically, the court went out of its way to point out that employers do not always need to fear taking action when faced with a poor-performing employee who happens to complain about discrimination.

To hold that opposition is reasonable when the employer is addressing an apparent and legitimate personnel matter in a way that does not explicitly or implicitly implicate Title VII, with no other testimony or evidence of racial discrimination, would hamper an employer's ability to address legitimate issues for fear that doing so could leave the employer vulnerable to liability under Title VII.

Many employees believe they can make themselves bulletproof merely by raising the specter of discrimination. They wrongly believe that the antiretaliation statutes will automatically protect their jobs. Conversely, many employers have a paralyzing fear of terminating a complaining employee no matter the circumstances. *Jackson* demonstrates that both of these fears can be unfounded. The potential of a retaliation claim certainly ups the ante when terminating an employee who has complained about discrimination or harassment. Yet, in the right circumstances and for the right reasons, employers do not need to live in fear of firing a deserving employee, provided that they take the right steps and have the proper documentation.

Thus, *Jackson* defines the parameters of how far the opposition clause goes to protect unfounded or unreasonable claims of discrimination. *Trujillo v. Henniges Automotive Sealing Systems NA, Inc.*[32] defines the specificity of one's opposition to an act of discrimination.

Trujillo involves two different allegations of protected activity:

1. After the company's vice president referred to Mexican plant employees as "those fucking wetbacks," Trujillo lightheartedly confronted him, resulting in an embarrassed apology.
2. After the same vice president made some disparaging remarks about a Latin American employee, Trujillo spoke to the company's Vice President of Human Resources.

The ixth Circuit concluded that only the latter constitutes protected

> *Rollins about the comments at the time they were made. With regard to the "wetback" comment, Trujillo admits that he did not communicate that Rollins's comment offended him, let alone that he was complaining about the racial or ethnic character of the conduct. . . . In contrast, the district court erred in holding that Trujillo's statement to Gasperut was not in "opposition" to the alleged racial character of Rollins's comments. . . . We have repeatedly held that complaints to human resources personnel regarding potential violations of Title VII constitute protected activity for purposes of establishing a prima facie case of retaliation. . . . The fact that it was, as the district court characterized it, an "informal conversation" does not change the nature and purpose of the conversation, which was a "discrete, identifiable, and purposive" opposition to racially-oriented language.*[33]

Part of the takeaway from this case is that not every response to a tinged or biased remark qualifies for Title VII's antiretaliation protections. This case, however, also teaches a different lesson. Opposition can rest in the eye of the beholder. The dissent, for example, would have refused to have protected *any* of Trujillo's complaints and would have concluded that he had merely engaged in nonprotected venting:

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[32] Case No. 11-1148, 2012 U.S. App. LEXIS 17793 (6th Cir. 2012).

[33] *Id.* at 10-11.

If the plaintiff had complained that such comments constituted discrimination against him, I would have no quarrel with the majority opinion. If the plaintiff had in any way intimated that such remarks could constitute discrimination against other people in the company, I would concur. However, the plaintiff himself said: "I kind of was just venting. I was not intending for her to take action." Not every casual remonstrance against bad language equates to complaining of illegal discrimination.

What is the best practice? Assume all but the most attenuated of responses to a potentially discriminatory statement qualify as protected, and do not

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. In *Crawford v. Metropolitan Gov't of Nashville*,[34] the Supreme Court held that Title VII's antiretaliation provision covers

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harassment against a different employee. The Court found Crawford's activity to be protected by the antiretaliation provision's opposition clause:

> *[N]othing in the statute requires a freakish rule protecting an employee who reports discrimination on her own initiative but not one who reports the same discrimination in the same words when her boss asks a question. . . .*
>
> *If it were clear law that an employee who reported discrimination in answering an employer's questions could be penalized with no remedy, prudent employees would have a good reason to keep quiet about Title VII offenses against themselves or against others. . . . The appeals court's rule would thus create a real dilemma for any knowledgeable employee in a hostile work environment if the boss took steps to assure a defense under our cases. If the employee reported discrimination in response to the enquiries, the employer might well be free to penalize her for speaking up. But if she kept quiet about the discrimination and later filed a Title VII claim, the employer might well escape liability, arguing that it "exercised reasonable care to prevent and correct [any discrimination] promptly" but "the plaintiff employee unreasonably failed to take advantage of . . . preventive or corrective opportunities provided by the employer." Nothing in the statute's precedent supports this catch-22.*[35]

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[34] 555 US 271, 129 S. Ct. 846, 172 L. Ed. 2d 650 (2009).

[35] *Id.* at 852-853.

How Soon Is Too Soon?

One question that is often repeated in retaliation cases is, "How soon is too soon to fire a complaining employee?" For example, if Jane Doe complains about retaliation today, how much time must elapse before the complaint will not irreparably taint her subsequent termination?

Typically, an employee needs to prove something more than the mere closeness in time between protected activity and adverse action. But what happens when the protected activity and the adverse action occur almost

Mickey v. Zeidler Tool & Die Co.[36], in which the Sixth

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Mickey, age 67, was a 33-year employee of Zeidler Tool & Die. After
Harold DeForge, cut his responsibilities and pay
Mickey's refusal to retire, Mickey filed an age discrimination charge
EEOC. DeForge first learned of Mickey's EEOC charge when he
October 19, 2004. When Mickey
DeForge followed him into his office and

immediately fired him. The district court dismissed Mickey's retaliation claim on summary judgment, relying on the proposition that temporal proximity, without more, is insufficient for a reasonable juror to conclude that DeForge would not have terminated Mickey but for the EEOC charge.

The Sixth Circuit reversed that dismissal, ruling that where an adverse employment action occurs very close in time after an employer learns of a protected activity, such temporal proximity, in and of itself, is significant to constitute evidence of a causal nexus. Contrarily, where some time elapses between when the employer learns of the protected activity and the adverse action, the employee must present other evidence of retaliatory conduct to establish the required causality. The Court explained its rationale for this distinction:

> *[If] an employer immediately retaliates against an employee upon learning of his protected activity, the employee would be unable to couple temporal proximity with any such other evidence of retaliation because the two actions happened consecutively, and little other than the protected activity could motivate the retaliation. Thus, employers who retaliate swiftly and immediately upon learning of protected activity would ironically have a stronger defense than those who delay in taking adverse retaliatory action. . . .In those limited*

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[36] 516 F. 3d 516 (6th Cir. 2007).

> *number of cases–like the one at bar–where an employer fires an employee immediately after learning of a protected activity, we can infer a causal connection between the two actions, even if Mickey had not presented other evidence of retaliation.*[37]

Meanwhile, *Meyers v. Goodrich Corp.*[38] illustrates the other end of the spectrum. In that case, an entire year lapsed between when the company's vice president of HR interviewed the plaintiff in a harassment investigation and his termination. The Court concluded that the

Meyers's claim:

> *In this case, no inference of causation can be deduced from "temporal proximity." Goodrich did not terminate Meyers until a year after he participated in the internal discrimination investigation. Thus, to survive summary judgment, Meyers was required to submit additional evidence of retaliatory conduct—or discriminatory intent—between the time he took part in the protected activity and the time he was fired. There is evidence that sometime before October 2006, Goodrich managers met to discuss how to improve the overall performance of its employees, including supervisors. . . . The managers ranked Meyers the 24th lowest-performing production supervisor out of 26 supervisors. . . . Meyers's manager at that time, sent Meyers a letter on October 26, 2006, notifying him that he had 30 days to improve and maintain his performance in certain areas, which were outlined in the letter. But notably, this occurred three months before Meyers took park in the internal investigation. Even according to Meyers, after January 2007 when the protected activity occurred, the evidence indicates that Goodrich's conduct—if anything—was favorable to him, not retaliatory. He received a 3.5 percent merit raise in April 2007, where he asserts he "was in line with the raises of several of his fellow supervisors." . . . As Meyers concluded in his appellate brief, "[t]he record is simply devoid of any evidence" that Goodrich treated him badly in 2007, . . . i.e., "[n]o write-ups, no disciplinary actions, no poor reviews."*[39]

If you need to terminate an employee after he or she engages in some protected activity, what are the best practices for you to follow?

1. *Don't wait to terminate.* Shockingly, employees who complain about protected activity can be chronic complainers, often complaining about lots of innocent workplace issues before they step on one protected by Title VII or some other statute. Employees do not become insubordinate, obstinate, or difficult

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[37] *Id.* at 525.

[38] Case No. 95996, 2011-Ohio-3261 (Ohio Ct. App. June 30, 2011).

[39] *Id.* at ¶¶ 30, 34, 36.

overnight. Yet a history of weak and nonconfrontational supervisors who refuse to do anything about it will doom a later retaliation claim. I'm not saying that you should fire an employee at the first sign of trouble, but there is a line between a fair warning and years of capitulation. The former will put you in good stead defending a lawsuit. The latter could result in a judge or a jury asking why you waited so long and looking for an illegitimate reason for the late-in-the-game termination.

2. *Document, document, document*. There are few terminations that can survive scrutiny without proper documentation. Your odds as an employer go down exponentially if you pair a lack of documentation with a termination on the heels of protected activity. A poor performer is a poor performer, regardless of complaints about harassment or other protected conduct. Without a legitimate paper trail, however, you will find yourself without the ammunition to do anything about it.

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Retaliation Claim

The antiretaliation rules do not protect employees from all actions taken against them—only from adverse action. Yet what qualifies as "adverse" under the antiretaliation provisions of the various EEO statutes is very broadly defined.

In *Burlington Northern & Santa Fe Railway Co. v. White*[40], the Supreme Court clarified that an employer need not take an ultimate employment action (such as termination, demotion, or transfer) against an employee for retaliation to occur. Instead, any "materially adverse action" could constitute actionable retaliation. The Supreme Court explained the level of seriousness to which the employment action must rise before it becomes "adverse" and therefore actionable:

> *[A] plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination. We speak of material adversity because we believe it is important to separate significant from trivial harms. . . . The antiretaliation provision . . . prohibit[s] employer actions that are likely to deter victims of discrimination from complaining to the EEOC, the courts, and their employers.*

[40] 547 US 53, 126 S. Ct. 2405, 165 L. Ed. 2d 345.

> *. . . And normally petty slights, minor annoyances, and simple lack of good manners will not create such deterrence.*[41]

Thus, the key determination in whether an employer has subjected an employee to an adverse employment action is the distinction between material adversity and trivial harm. During one's employment, actions such as demotions, suspensions, and failures to promote all qualify as adverse actions, as might removing someone from a key team or refusing to let an employee sit at a certain table in the lunchroom.

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- A negative job reference[42]
- The denial of pension credits or other benefits to which the employee was entitled[43]
- The filing of a law enforcement complaint[44]
- Threats and ostracism[45]

What does this mean for employers? It means that retaliation does not stop on the last day of employment. It means that employers must treat ex-employees who have engaged in protected activity with the same kid gloves as current employees. And it provides one more concept to build into your EEO training for your managers and supervisors.

Associational Retaliation

In *Thompson v. North Am. Stainless*,[46] the Sixth Circuit originally recognized the theory of associational retaliation—that Title VII prohibits an employer from retaliating by inflicting reprisals on a third party (such as a spouse, family member, or fiancé) *closely associated* with the employee who engaged in such protected activity but who engaged in no protected activity of his or her own.

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[41] *Id.* at 68.

[42] *Jute v. Hamilton Sundstrand Corp.* (2d Cir. 2005).

[43] *James v. Metropolitan Government of Nashville* (6th Cir. June 20, 2007).

[44] *Bragg v. Office of the Dist. Atty.*, 704 F. Supp. 2d 1032 (D. Colo. 2009).

[45] *Brazoria Cty. v. EEOC*, 391 F.3d 685 (5th Cir. 2004)

[46] 520 F.3d 644 (6th Cir. 2008).

In a unanimous opinion, the U.S. Supreme Court[47] agreed with the original opinion by the Sixth Circuit and recognized that certain employees, within the "zone of interests" protected by Title VII, will have a valid claim for associational retaliation: [48]

> *Title VII's antiretaliation provision prohibits any employer action that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." . . . We think it obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired. . . . We . . . decline to identify a fixed class of relation ships for which*
>
> *ways meet the Burlington standard, and inflicting a milder reprisal*
>
> *circumstances, we think Thompson well within the zone of interests sought to be protected by Title VII.*

What does all this mean?

1. This supposed probusiness Court continues to be decidedly antibusiness when it comes to protecting employees from retaliation, and even the most conservative members of this Court are open to expanding civil rights when it satisfies a policy they consider important.
2. Employers are now subject to retaliation for taking an adverse action against anyone "closely related" to an employee who engaged in protected activity.
3. To claim associational retaliation, the aggrieved employee must prove that the employer intended to injure the associated employee by its action against the aggrieved employee.

For employers, there are no bright-line rules for associational retaliation. The real import of this decision is the expansion of Title VII's retaliation rights to

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[47] 131 S. Ct. 863, 178 L. Ed. 2d 694 (2011).

[48] *Id.* at 869-870.

a whole new class of employees. Indeed, if Title VII protects those "who are so closely related to or associated" with employees who engage in protected activity, it simply begs the question, "How close is close enough?" In *Thompson*, the relationship was a fiancée. It is safe to assume liability will also extend to action taken against spouses. What about boyfriends and girlfriends? How long do you have to date to be protected from retaliation? The same protection also will probably extend to parents and children. What about siblings? Grandparents? Cousins? Third cousins twice removed? In-laws? Friends? Carpoolers? The people you share your lunch table with? The person you sat

How close is close enough for an employer to intend for

Do employers now

Thompson court answers, could hamstring

October. The implications of this case have the potential

. The best course of action is still to make

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Closing Thoughts: Sue Me? No, I Sue You!!

There are two statements I hear from clients more often than any others:

1. "I can't believe we're being sued for *this*. I want to countersue!"
2. "I can't believe we're being sued for *this*. I want to collect our attorneys' fees!"

As discussed below, both of these very natural inclinations are dangerous strategies to follow in lawsuits and should be avoided in all but the most extreme cases. Instead, employers should accept lawsuits from employees as a cost of doing business and move forward with their defense or settlement.

Counterclaims as Retaliation

In 1998, Tammy Greer-Burger filed a sexual harassment suit against Lazlow Temesi. The case proceeded to trial, at which Temesi prevailed. Thereafter, Temesi filed suit against Greer-Burger seeking to recover the $42,334 in attorney's fees and costs he had incurred defending against the harassment suit, plus compensatory and punitive damages. In response to Tamesi's lawsuit,

Greer-Burger filed a charge of discrimination with the OCRC, claiming that Temesi's lawsuit was retaliation for her protected conduct, the prior sexual harassment suit. Based solely on the fact that Temesi had filed suit, the OCRC found that Tamesi's lawsuit was prohibited retaliatory conduct and ordered Temesi to immediately cease and desist from pursuing his lawsuit and to pay Greer-Burger the $16,000 she claimed to have expended in defending against it. The common pleas court and appellate court both affirmed the OCRC's decision.

In reversing the lower courts, the Ohio Supreme Court started and ended its
First Amendment's fundamental right to petition and seek
. Despite the fundamental nature of that right, the Court
. The First
does not protect "sham" litigation, that is, an objectively baseless
.

Supreme Court, would "undermine the right to petition for redress by

. . . that the complainant had one motive
. . . . This danger is further highlighted when the only

lawsuit."[49] Because of the *McDonnell Douglas* burden-shifting analysis used in retaliation cases, the Court placed the burden on the employer to demonstrate, as its legitimate nonretaliatory reason, that an alleged retaliatory lawsuit is not objectively baseless:

> *Instead, we find it more prudent to permit an employer the opportunity to demonstrate that the suit is not objectively baseless. In determining whether the employer's action has an objective basis, the OCRC administrative law judge should review the employer's lawsuit pursuant to the standard for rendering summary judgment. . . . Thus, an employer needs to show his lawsuit raises genuine issues of material fact. If the employer satisfies this standard, the suit does not fall under the definition of sham litigation. The suit, therefore, shall proceed in court while the proceedings before the OCRC shall be stayed. The procedure outlined above falls within the jurisdiction of the OCRC as provided for in R.C. 4112.04 and promotes judicial economy because the employer's lawsuit will not have to be fully litigated in the trial court before the OCRC can make its determination as to the reasonableness of the suit. In this way, the OCRC essentially shall vet the action to ensure it is not sham litigation.*[50]

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[49] *Greer-Burger v.* Temesi, 879 N.E.2d 174 (Ohio 2007) (internal quotations and citations omitted).

[50] *Id.* at 181.

The majority opinion concluded by recognizing the stigma of being falsely accused as a discriminator and the importance of being able to seek legal redress to remedy that misclassification:

> *An employee's right to pursue a discrimination claim without fear of reprisal is a laudable goal entitled to considerable weight. The OCRC's position in this case, however, has the potential to give employees a carte blanche right to file malicious, defamatory, and otherwise false claims. As the concurring opinion of the appellate court astutely noted, the per se standard advocated by the OCRC does not advance the goal of Chapter 4112 when it "permits a claimant to engage in any kind of slander or defamation, and possibly even perjury, without consequence," and then precludes "those falsely accused of being discriminators from seeking legal redress."*[51]

Ohio law, and the law of your state may differ.

. Instead, employers should be wary in using *Greer-Burger* (or a similar decision) as a justification for filing lawsuits against . As the concurring opinion correctly

threshold."[52] Merely because this case gives companies the apparent right to file a claim does not mean ultimate success on that claim. Indeed, the decision whether to pursue a claim against an employee or ex-employee who has brought a discrimination claim must be carefully thought out and not merely filed as a knee-jerk reaction to being sued.

Chasing Attorneys' Fees is a Fool's Errand

There are statutes[53] and rules[54] in place that permit a defendant, in certain and extreme circumstances, to collect their attorneys' fees from the plaintiff. But there are few cases that will meet this high threshold for recovery. In reality, the likelihood of a judge ordering that a plaintiff-employee pay the defendant-employer's attorneys' fees under one of these fee-shifting mechanisms is on par with winning the lottery.

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[51] *Id.* at 184-85.

[52] *Id.* at 186 (Lanzinger, J., concurring in part and dissenting in part).

[53] 28 U.S.C. § 1927.

[54] Fed. R. Civ. P. 11.

If you want to take any solace from this loser-doesn't-pay system, consider these words, published by the Sixth Circuit Court of Appeals, in *Gibson v. Solideal USA, Inc.*:[55]

> *As an initial general proposition, we are not entirely unsympathetic to Solideal's position. Statutes designed to empower employees in the vindication of their rights may, at times, be used as bases on which a plaintiff asserts claims that are later determined to be without merit. Undeniably, large employers may be forced to incur significant litigation expenses in defending against such claims. However, if this Court were to follow the course now advocated by Solideal, it*

L . Some cases can last for a decade
. We all have principles. We don't like to pay money to an undeserving
. And when we prove that we are
. The

. The sooner employers realize that chasing reimbursement of their attorneys' fees is a litigation snipe hunt, the sooner they can focus their efforts on the task at hand, concluding the case as quickly and cost-effectively as possible.

[55] Case No. 11-5625, 2012 U.S. App. LEXIS 14415, *9 (6th Cir. 2012).

CHAPTER

7

The Right to

The Fair Labor Standards Act and Other Wage-and-Hour Issues

I was once asked the following question: "If you could press a button and instantly vaporize one sector of employment law, which would it be?" My answer, without a moment's hestitation, was the Fair Labor Standards Act (FLSA)—the federal law that governs how many hours employees work and how employers pay them for those hours.

We need to vaporize the FLSA because compliance is impossible. Congress enacted the FLSA during the Great Depression to combat the sweatshops that had taken over our manufacturing sector. In the 70 plus years that have passed, it has evolved via a complex web of regulations and interpretations into an anachronistic maze of rules with which even the best-intentioned employer cannot hope to comply. I would bet any employer in this country a free wage-and-hour audit that I could find an FLSA violation in its pay practices. A regulatory scheme that is impossible to meet does not make sense to keep alive.

Do not misinterpret my remarks. I am all in favor of employees receiving a full day's pay for a full day's work. What employers and employees need, though, is a streamlined and modernized system to ensure that workers are paid a fair wage.

Workplace email is but one example that illustrates my point. Our iPhoned workforce raises an interesting wage-and-hour question: is time spent outside the office emailing compensable time under the FLSA? Because employers provide these technological tools with the understanding that employees will use them during off-duty hours, there is a good argument that the time spent . Yet we are stuck shoehorning the

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I am not convinced that employers should have to pay for any . Most messages can be read in a matter of . The FLSA calls such time *de minimus* . "Insubstantial or insignificant of time beyond the scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes, may be disregarded."[1] This is good; think of the administrative nightmare of an HR or payroll department having to track, record, and pay for every fraction of a minute an employee spends reading an email.

The safest course of action for employers is to provide smart phones only to exempt employees. If companies, however, are going to provide these devices to nonexempt employees, they should have a policy in place stating that employees who check emails off the clock do so of their own choice and that the time spent will not be compensated. Of course, such a policy is not foolproof, and businesses that make it possible for employees to remain connected when off duty will have to take the risk that the time might count as hours worked.

Nevertheless, we are stuck with the FLSA and the maze of rules and regulations that travel with it. The issue that employers face when dealing with these issues is that employees typically do not bring these claims on an individual basis. They assert their wage-and-hour rights on a class-wide or collective basis, significantly increasing employers' risks.

Most companies cannot afford the risk of a big judgment in a wage-and-hour class action. Indeed, the real risk in defending these cases is the leverage

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[1] 29 C.F.R. § 785.47.

plaintiffs gain from the threat of big judgments, and the seven-figure settlements that often result.

Consider the results of a recent study of wage-and-hour settlements conducted by NERA Economic Consulting:[2]

	Mean Settlement (rounded to the nearest million)	**Median Settlement (rounded to the nearest million)**
	$9 million	$3 million
	$11 million	$3 million
	$22 million	$12 million
	$23 million	$14 million

. Few companies can afford to write a check for
. Yet, this is the prospect that

laws.

As a general matter, pursuant to the FLSA, employers must pay employees a minimum wage, and they must further pay all nonexempt employees for all time worked, including a one-and-one-half overtime premium for all hours in a week worked in excess of 40. This rule, however, merely begs the following questions: 1) what does it mean to be "nonexempt"; and 2) what is "time worked"? This chapter will provide answers to those and other sticky questions.

Exemptions

The FLSA separates employees into two general categories: *exempt* and *nonexempt*. The distinction is important. If an employee is *nonexempt*, the FLSA requires that the employer compensate the employee at the premium rate of one-and-one-half times the regular rate of pay for any hours worked in excess of 40 in any given work week. *Exempt* employees, on the other hand, are called such because they are exempt from this overtime pay requirement,

[2] Mondaq Employment and HR, "United States: Recent Trends in Wage and Hour Settlements," http://www.mondaq.com/unitedstates/article.asp?articleid=129638, April 19, 2011.

and can work as many hours as they and their employers see fit without any premium pay for overtime hours (hours in excess of 40 in a work week).

FLSA exemptions are fact-specific and always a judgment call. Because it is a subjective decision, classifications may not always be correct. In fact, I once represented a company that had its entire employee classification system undone by a Department of Labor (DOL) audit. The company had used a human resources consultant to establish their exemptions, and the DOL concluded that more than 80% of the employees had been misclassified and were owed substantial unpaid overtime. There are no hard and fast rules, but

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Exemption

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FLSA. Employers routinely misbelieve that if an employee

FLSA. In fact, the administrative exemption only applies

and which includes the exercise of discretion and independent judgment with respect to matters of significance.

What does it take for an employee to qualify under the FLSA's administrative exemption?

To qualify for the administrative employee exemption, all of the following qualifications must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $455 per week;
- The employee's primary duty must be the performance of office or nonmanual work directly related to the management or general business operations of the employer or the employer's customers; and
- The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

"Primary duty" means the principal, main, major or most important duty that the employee performs, with the major emphasis on the character of the employee's job as a whole.

Work "directly related to management or general business operations" includes, but is not limited to, work in functional areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations; government relations; computer network, Internet and database administration; legal and regulatory compliance; and similar activities. It's work directly related to assisting with the running or servicing of the business, as distinguished from working on a manufacturing production line or selling a . It also covers employees acting as

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. It implies that

. Factors to consider include, but are not

- Whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices;
- Whether the employee carries out major assignments in conducting the operations of the business;
- Whether the employee performs work that affects business operations to a substantial degree;
- Whether the employee has authority to commit the employer in matters that have significant financial impact; and
- Whether the employee has authority to waive or deviate from established policies and procedures without prior approval.

"Matters of significance" refers to the level of importance or consequence of the work performed.

Examples of some professions that the DOL has found could qualify for the administrative exemption include mortgage loan officers,[3] insurance

[3] United States Department of Labor, "Opinion Letters—Fair Labor Standards Act," http://www.dol.gov/whd/opinion/FLSA/2006/2006_09_08_31_FLSA.htm, Sept. 8, 2006

agents,[4] sales managers,[5] marketing analysts,[6] purchasing agents,[7] financial services registered representatives,[8] and loss-prevention managers.[9]

These categories, however, are merely guidelines to observe and not dogma to follow. Whether an administrative employee is administratively exempt is a fact-intensive analysis, determined on an employee-by-employee basis, even within the same job category within the same organization.

And the rules are changing. In 2010, the DOL issued a game-changing opinion, in which it concluded: "Employees who perform the typical job duties of a [10]

This pronouncement is significant because it is a stark departure from .

E Exemption

What does it take for an employee to qualify as exempt under the Executive Exemption of the FLSA? As is the case with the administrative exemption, job titles do not determine exempt status. For an exemption to apply, an employee's specific job duties and salary must meet all the requirements of the DOL's regulations.

To qualify for the executive employee exemption, all of the following tests must be met:

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[4] United States Department of Labor, "Opinion Letters—Fair Labor Standards Act," http://www.dol.gov/whd/opinion/FLSA/2009/2009_01_16_28_FLSA.htm, Jan. 16, 2009.

[5] United States Department of Labor, "Opinion Letters—Fair Labor Standards Act," http://www.dol.gov/whd/opinion/FLSA/2009/2009_01_14_04_FLSA.htm, Jan. 14, 2009.

[6] United States Department of Labor, "Opinion Letters—Fair Labor Standards Act," http://www.dol.gov/whd/opinion/FLSA/2008/2008_04_21_03_FLSA.htm, Apr. 21, 2008.

[7] United States Department of Labor, "Opinion Letters—Fair Labor Standards Act," http://www.dol.gov/whd/opinion/FLSA/2008/2008_03_06_01_FLSA.htm, Mar. 6, 2008.

[8] United States Department of Labor, "Opinion Letters—Fair Labor Standards Act," http://www.dol.gov/whd/opinion/FLSA/2006/2006_11_27_43_FLSA.htm, Nov. 27, 2006.

[9] United States Department of Labor, "Opinion Letters—Fair Labor Standards Act," http://www.dol.gov/whd/opinion/FLSA/2006/2006_09_08_30_FLSA.htm, Sept. 8, 2006.

[10] United States Department of Labor, "Wage and Hour Division," http://www.dol.gov /WHD/opinion/adminIntrprtn/FLSA/2010/FLSAAI2010_1.htm, Mar. 24, 2010.

- The employee must be compensated on a salary basis (as defined in the regulations) at a rate not less than $455 per week;
- The employee's primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
- The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent (such as one full-time and two part-time employees, or four part-time employees); and
- The employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status for other employees must be given particular weight.

anagement" includes, but is not limited to, activities such as interviewing,

or sales records for use in supervision or control; appraising employees' productivity and efficiency for the purpose of recommending promotions or other changes in status; handling employee complaints and grievances; disciplining employees; planning the work; determining the techniques to be used; apportioning the work among the employees; determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of the employees or the property; planning and controlling the budget; and monitoring or implementing legal compliance measures.

"Customarily and regularly" means greater than occasional but not necessarily all the time. For example, work normally done every workweek is customarily and regularly, but isolated or one-time tasks are not.

Factors to be considered in determining whether an employee's recommendations as to employment decisions are given "particular weight" include whether it is part of the employee's job duties to make such recommendations and the frequency with which such recommendations are made, requested, and relied upon. An employee's recommendations may still be deemed to have "particular weight" even if the employee is not the ultimate decision maker.

Salespeople

The FLSA has two different exemptions that could cover salespeople—the *outside sales employee exemption* and the *commissioned retail employee exemption*. If an employee qualifies for either of these exemptions, that employee is not owed overtime for any hours worked in excess of 40 in any given work week.

To qualify for the outside sales employee exemption, both of the following must be met:

1. The employee's primary duty must either be making sales or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and
2. The employee must customarily and regularly be engaged away from the employer's place or places of business.

. Outside sales typically do not include Internet. For example, this exemption

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Note: The outside sales exemption does not cover telemarketers or those soliciting orders over the Internet.

To qualify for the commissioned retail employee exemption, all three of the following requirements must be met:

1. The employee must be employed by a retail or service establishment;
2. The employee's regular rate of pay must exceed one and one-half times the applicable minimum wage; and
3. More than half of the employee's earnings must be in the form of commissions.

Computer Employees

One of the FLSA's lesser-known exemptions is the computer employee exemption.

For an employee to qualify for the computer employee exemption, the employee must either be paid a salary of at least $455 per week or an hourly rate of at least $27.63. The employee must be employed as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer field.

Additionally, the employee's primary duty must fall into one of the following four categories:

1. The application of systems analysis techniques and procedures, including consulting with users to determine hardware, software, or system functional specifications;
2. The design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
3. The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
4. A combination of the aforementioned duties, the performance of which requires the same level of skills.

This exemption does not include:

- Employees engaged in the manufacture or repair of computer hardware and related equipment.
- Employees whose work is highly dependent upon, or facilitated by, the use of computers and computer software programs (such as engineers, drafters, and others skilled in computer-aided design software) but who are not primarily engaged in computer systems analysis and programming.

Internships

One area that has received a lot of recent attention and is ripe for wage-and-hour problems is unpaid internships.

The DOL uses a six-factor test to determine whether an intern is an employee in disguise and therefore one who must be paid. All six of the following factors must be met before an employer can legally refuse pay to an intern:

1. Is the training similar to what would be given in a vocational school or academic educational instruction?

2. Is the training for the benefit of the trainees or students?
3. Do the trainees or students work under the close observation of regular employees without displacing them?
4. Does the employer derive no immediate advantage from the activities of the trainees or students, and on occasion are the employer's operations actually impeded?
5. Are the trainees or students not necessarily entitled to a job at the conclusion of the training period?
6. Does the employer and the trainees or students understand that the trainees or students are not entitled to wages for the time spent in training?

. According to Nancy J. Leppink, the DOL's Wage and Hour Division:

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Consider the following examples of real lawsuits filed by interns against their employers in the past year.

- A former unpaid intern for the *Charlie Rose* show has filed a lawsuit against the host and his production company. According to Steven Greenhouse at the *New York Times Media Decoder* blog,[12] the former intern claims that she was not paid for the 25 hours a week she worked in the summer of 2007. The lawsuit seeks a class action on behalf of all unpaid interns who have worked for the show since March 2006.
- A former unpaid intern for the fashion magazine *Harper's Bazaar* filed a similar lawsuit, claiming she worked full-time without any pay. Steven Greenhouse at the *New York Times Media Decoder* blog quotes the lawyer who filed the lawsuit, "Unpaid interns are becoming the modern-day equivalent of

[11] Steven Greenhouse, "The Unpaid Intern, Legal or Not," The New York Times, B1 (Apr. 3, 2010).

[12] Steven Greenhouse, "Former Intern at 'Charlie Rose' Sues, Alleging Wage Law Violations," http://mediadecoder.blogs.nytimes.com/2012/03/14/former-intern-at-charlie-rose-sues-alleging-wage-law-violations/?hp, March 14, 2012.

entry-level employees, except that employers are not paying them for the many hours they work."[13]

- Two interns who worked on the film *Black Swan* have sued Fox Searchlight Pictures making similar claims.[14]

In response to this spate of lawsuits, publishing giant Condé Naste has revised its guidelines for the use of unpaid interns. Condé Naste's interns:

- Cannot stay at the company for more than one semester per calendar year.
- Must complete an HR orientation about where to report mistreatment or unreasonably long hours.
- Cannot work past 7 PM.
- Must receive college credit.
- Must be assigned an official mentor.
- Cannot run personal errands.
- Will be paid stipends of $550 per semester.[15]

These procedures might not be right for your organization. But they highlight that you need to be thinking about these issues if you are a private sector, for-profit entity using, or considering using, interns. The rules haven't changed; only they are now more widely known and are being enforced.

Employers that use unpaid interns should pay careful attention to this issue. It is far better to scrutinize interns under the DOL's six factors before the agency, or a group of plaintiffs, swoop in and do it for you. It is even better to formalize the relationship in a written internship agreement that formally spells out how each of these six questions is answered in your favor. Or maybe it is best simply to assume that except in rare cases, there is no such animal as an "unpaid intern," and you should simply accept the fact that if you are going to label entry-level employees as interns, you need to pay them for their services.

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[13] Steven Greenhouse, "Former Intern Sues Hearst Over Unpaid Work and Hopes to Create a Class Action," http://mediadecoder.blogs.nytimes.com/2012/02/01/former-intern-sues-hearst-over-unpaid-work-and-hopes-to-create-a-class-action/, February 1, 2012.

[14] Paul Davidson, "Fewer unpaid internships to be offered," http://www.usatoday.com / money/workplace/story/2012-03-07/summer-internships-paid-unpaid/53404886/1, March 7, 2012.

[15] Rebecca Greenfield, "Conde Nast's Internship Reforms Show How Bad the System Really Is," http://www.theatlanticwire.com/national/2012/03/conde-nasts-unpaid-internship-reforms-show-how-bad-system-really/49830/, March 13, 2012.

■ **Note:** The best solution for handling interns might be to simply pay them for their work.

Employee or Independent Contractor?

Another potential classification pitfall is the key distinction between an employee and an independent contractor. If companies had their choice, they would classify all workers as "independent contractors." As a contractor, the

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properly classified as a contractor.

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. You could expose yourself to discrimination or
. You could be responsible for unpaid wages such as overtime.
IRS will come looking (and, trust me, it

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distinction between an employee and an independent contractor.

First, the IRS uses three characteristics to determine the relationship between businesses and workers and whether the workers are employees or independent contractors:

1. *Behavioral Control*: Does the business have a right to direct or control how the work is done through instructions, training or other means?
2. *Financial Control*: Does the business have a right to direct or control the financial and business aspects of the worker's job?
3. *Type of Relationship*: How do the workers and the business owner perceive their relationship?

If you have the right to control or direct the tasks the worker performs but also how they are to be done, then the workers are most likely employees. If, however, you can direct or control only the result of the work done—but not the means and methods of accomplishing the result—then your workers are probably independent contractors.

Because of the expensive penalties you can face for unpaid taxes on misclassified employees, this distinction is one that you should not take lightly.

Working Time

What does work time entail? Possibly more than you think. The distinction between work time and nonwork time is significant. Not only must employers pay employees for all working time, but working time must be counted for purposes of determining whether an employee worked more than 40 hours in a given work week and is eligible for overtime compensation. For this reason, misclassifying working time as nonworking time can be an expensive mistake.

onning and Doffing

onning and doffing is a fancy way to say putting on and taking off. In wage-

. Donning and doffing

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I DOL's Wage and Hour Division issued an administrator's finding that that the time spent by employees donning and

paid.[16] It also means that an employee's workday begins with the donning of required protective equipment and ends with its doffing and all of the time in-between is payable work time.

Courts are beginning to fall in line with this administrator's interpretation . For example, in *Franklin v. Kellogg Company,*[17] the Sixth Circuit concluded that the time spent walking between the locker room and the time clock after donning and before doffing protective gear is compensable working time.

The Court started with restating some general principles. Federal wage-and-hour laws define the "workday" as "the period between the commencement and completion on the same workday of an employee's principal activity or activities." Generally, time spent walking to and from a time clock is not compensable. During a "continuous workday," however, the FLSA finds that "any walking time that occurs after the beginning of the employee's first principal activity and before the end of the employee's last principal activity . . . must be compensated." Principal activities are those that are an integral and indispensable part of the activities that the employee is employed to perform.

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[16] United States Department of Labor, "Wage and Hour Division Administrator's Interpretation," http://www.dol.gov/WHD/opinion/adminIntrprtn/FLSA/2010 / FLSAAI2010_2.htm, June 16, 2010.

[17] 619 F. 3d 604 (6th Cir. 2010).

Kellogg required all hourly employees to wear company-provided uniforms, including pants, snap-front shirts bearing the Kellogg logo and employee's name, slip-resistant shoes, and safety equipment (hair and beard nets, safety glasses, earplugs, and bump caps). Kellogg mandated that employees change into their uniform and safety equipment upon arriving at the plant and to change back into their regular clothes before leaving the plant so that the uniform and safety equipment could be washed and cleaned. Kellogg claimed that changing into and out of the uniform and safety equipment is not "integral and indispensable" (and is therefore not compensable) under the FLSA.

The ixth Circuit disagreed, applying a broad interpretation of what is . The court evaluated

> *sanitary working conditions and untainted products. Because Franklin would be able to physically complete her job without donning the uniform and equipment . . . it is difficult to say that donning the items are necessary for her to perform her duties. Nonetheless . . . we conclude that donning and doffing the uniform and standard equipment at issue here is a principal activity. Accordingly, under the continuous workday rule, Franklin may be entitled to payment for her post-donning and pre-doffing walking time.*

In other words, as long as the donning and doffing is mandatory and provides some benefit to the employer (here, a sanitary workplace), it is compensable working time and needs to be paid.

Travel Time

As a general rule, time spent traveling from home to work and back again to home does not have to be compensated.

Like all rules, however, there are exceptions.

1. Time spent by an employee traveling as part of the principal work activity, such as travel from job site to job site during the workday or travel between customers, is counted as hours worked and must be paid.

2. Travel that keeps an employee away from home overnight must also be compensated, but only when the travel time occurs during an employee's normal workday. Thus, if an hourly employee's normal workday runs from 8 a.m. to 5 p.m., only out-of-town travel during those hours must be paid. This rule applies whether the travel occurs on a regular workday or a normal day off. So, if the same employee travels during regular work hours on a Sunday, but regularly has Sunday off, the time must still be paid.
3. Out-of-town travel that is completed all in one day receives different treatment. The employee is compensated for the travel from home to the out-of-town worksite, less the amount of time it would have taken the employee to drive to work during a regular workday. The rationale is that the employee should not have to be compensated for the time he or she would have spent traveling to and from work on a regular workday.

Rest Periods

requirement that employers provide any breaks during the work day, paid or unpaid. What federal law does provide, however, is whether meal and rest breaks, when given, are counted as "hours worked." This distinction is important. If time is counted as "hours worked," it goes into the calculation of time worked during the workweek for consideration of whether the employee has crossed the 40-hour threshold for overtime pay.

- Rest periods, which are considered breaks of 20 minutes or less, are counted as hours worked whether or not the break is paid. Rest breaks are customarily paid, and if they must be counted as work hours, they might as well be paid.[18]
- A bona fide meal period, however, is not considered hours worked. To be a bona fide meal period the employee must be *totally relieved* of his or her work duties. According to the DOL: "The employee is not relieved if he is required to perform any duties, whether active or inactive, while eating."[19]

What does it mean to be "totally relieved of one's duties?" Most courts apply the "predominant benefit" test to determine whether an employee's meal

[18] 29 C.F.R. § 785.18.

[19] 29 C.F.R. § 785.19.

period is compensable. Under this test, the employee bears the burden to prove that the normally noncompensable meal period should be compensable because it is spent predominantly for the employer's benefit. The key inquiry is whether the employee engaged in the performance of any substantial duties during the lunch break. As long as the employee can pursue his or her mealtime adequately and comfortably, is not engaged in the performance of any substantial duties, and does not spend time predominantly for the employer's benefit, the employee is not entitled to compensation under the FLSA for a lunch break. Thus, for example, it may not matter if an employee

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. For example:

Of course, such a policy is only as good as its enforcement.

Telecommuting

Could telecommuting employees present the next wave of wage-and-hour litigation? There are as many as 50 million Americans who work remotely at least part of the time. Because many of these telecommuters will be nonexempt, how employers track their hours and pay their wages has the potential to cause problems.

As I've already discussed, nonexempt employees must be paid for all time worked, including overtime for hours in a week worked in excess of 40. Employers must also maintain a tracking system that accurately records this compensable work time. Because telecommuters work outside of the workplace, and often during odd hours, they present special problems for accurately tracking the amount of time spent working.

If your business is going to employ telecommuters, you should take appropriate measures—in a telecommuting policy or contract—to control the time spent working:

- Employers should clearly communicate to the employee the number of hours expected to be worked each week.
- Telecommuting employees must be required to accurately track all time spent working. Whatever the system used (pen and paper timesheets, Excel spreadsheets, timekeeping software, or electronic logins or other "punches"), employees must understand that they will only be paid for the amount of time reported.
- Because telecommuting employees are working without direct supervision, all submitted work should be reviewed by a manager or supervisor to ensure that the work performed correlates to the amount of working time reported. An employer cannot dock time or refuse to pay an employee for time spent working. However, an employer can take away an employee's ability to telecommute if the employee proves to be irresponsible or abuses the telecommuting privilege.

. It raises, however, enough unique wage-and-hour issues that .

Calculating the Regular Rate of Pay for Overtime Purposes

If you pay your employees a straight hourly wage, the calculation of their overtime rate for any hours worked in any week in excess of 40 is straightforward. You take the hour rate and multiply by 1.5 and pay that premium for all hours over 40 in a given week. If, however, you pay you nonexempt employees other than on an hourly basis, the calculation becomes much more complicated. This section highlights some of these issues.

Salaried, Nonexempt Employees

An employer has two choices in how to pay overtime to a salaried nonexempt employee: by a fixed workweek or based on a fluctuating workweek. For reasons that will be illustrated below, the latter is a much more cost-effective option for most employers.

By a fixed workweek:

1. If the employee is paid solely a weekly salary, his regular hourly rate of pay—on which time and a half must be paid—is computed

by dividing the salary by the number of hours that the salary compensates. For example, If an employee is hired at a weekly salary of $525, which is intended to be compensation for a regular 35-hour work week, the employee's regular rate of pay will be $15 per hour ($525 / 35). If that employee works overtime (more than 40 hours in a given workweek), he or she will have to be paid $22.50 for each overtime hour worked. Thus, in a 45-hour week, the employee would be paid $637.50.

2. Where the salary covers a period longer than a workweek, such as a month, it must be reduced to its workweek equivalent. Thus, for example, a monthly salary can be converted to a weekly salary by multiplying it by 12 and dividing by 52. Once the regular weekly salary is calculated, the analysis is the same as above.

1. Often, the number of hours a salaried employee works will vary from week to week, depending on the given needs of the job. One might work 40 hours one week, 45 the next, and 38 the week after that. An employer and employee can agree that a salary will cover all straight time pay for all hours worked in a given week, no matter how few or how many. Payment for overtime hours at one-half such rate satisfies the overtime pay requirement because such hours have already been compensated at the straight time regular rate as part of the salary. And that overtime premium will vary from week to week depending on the number of hours worked.

2. To use this method of overtime calculation, there has to be a clear mutual understanding between the employer and employee that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek, whatever the number.

3. This "fluctuating workweek" method of overtime payment may not be used unless the salary is sufficiently large to ensure that there will be no workweeks in which the employee's average hourly earnings from the salary fall below the minimum wage.

4. For example, taking our $525 salary from above, in a 45-hour workweek, the hourly rate would be $11.66 ($525/45). But for the extra 5 hours, the employee would only be owed an additional $29.15 ($5.83 x 5), for a total weekly compensation of $554.15. The fluctuating workweek saves this employer $83.35 in wages for the week. Thus, it is easy to see why the fluctuation workweek

is the preferred method for calculating overtime premiums for salaried nonexempt employees.

Nonexempt Commissioned Employees

Only a small subset of commissioned employees is exempt from the FLSA's overtime provisions. For the majority of employees who are paid wholly or in part by commissions, the FLSA presents a complicated calculus of rules and regulations that employers must follow to properly account and pay overtime

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It gets more complicated, however, if the calculation and payment of the commission cannot be completed until sometime after the regular payday for the workweek. In this case, the employer may disregard until later the commission in computing the regular hourly rate and pay overtime exclusive of the commission. However, when the commission is ultimately paid, the employer has to go back and recalculate the overtime premium for each workweek covered by the deferred or delayed commission payment. The employer must apportion the commission back over the workweeks of the period during which it was earned. The employee must then receive additional overtime compensation for each week during the period in which he worked in excess of 40 hours.

It gets even more complicated if it is not possible or practical to allocate the commission among the workweeks per the amount of commission actually earned or reasonably presumed. In this case, the DOL permits employers to choose from one of two different methods to fairly and equitably account for overtime premiums.

1. Allocation of equal amounts each week. Under this method, the employer will assume that the employee earned an equal amount of commission for each week of the period covered and compute any additional overtime compensation based on that pro rata amount. For example:

- For a commission paid monthly, multiply the commission by 12 and divide by 52 to obtain the amount attributable for each week of that month.
- For a commission paid semimonthly, multiply by 24 and divide by 52.
- For a commission that covers a specific number of workweeks, divide the total commission paid by the number of weeks it covers.

  Once the pro rata weekly commissions are determined, simply divide that amount by the total number of hours worked to obtain the increase in the hourly rate. The employee is then owed one-half of that increase for each hour worked in excess of 40 for a given week.

Sometimes, there are facts

. In such cases, the employer can assume that the employee earned the

period. The total commission payment should be divided by the total number of hours to determine the amount of the increase in the regular rate. To determine the amount of additional overtime compensation owed for the period, multiply one-half of the figure by the total number of overtime hours worked by the employee for all workweeks during the covered period.

Bonus Payments

Year-end bonus payments could count as part of a nonexempt employee's regular rate of pay, thereby increasing the overtime premium owed to that employee. Given the current economic state, fewer companies are paying bonuses, but these rules are important to heed when bonuses are paid to hourly and salaried nonexempt employees.

Section 7(e) of the FLSA requires the inclusion in the regular rate of pay all remuneration for employment except seven specified types of payments. Bonuses that do not qualify for exclusion from the regular rate under one of the seven exceptions must be totaled with other earnings to determine the regular rate upon which the overtime premium rate must be based.

A bonus could fall under one of two exceptions: discretionary payments, or gifts made at Christmas time or on other special occasions. Each of these two categories, however, has specific criteria that must be met before a bonus payment can be excluded from the regular rate.

Discretionary Bonus Payments

For a bonus to qualify for exclusion as a discretionary bonus, the employer must retain discretion both as to the fact of payment and as to its amount. Consider the following examples:

- An employer promises at the beginning of the year to pay a bonus at year-end in some undetermined amount. It has given up discretion as to the fact of the bonus, but not as to its amount.
- An employer promises employees that they will receive a bonus based on some mathematical formula, but only if the company determines that it can afford to make the payments at that time. It has given up discretion as to the bonus's amount, but not as to the fact of payment.

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. The employer cannot rely on any prior promise or agreement in .

Gifts, Christmas, and Special Occasion Bonuses

To qualify for exclusion under this exception, the bonus must be a bona fide gift. If it is measured by hours worked, is measured by production or efficiency, is so large that employees would reasonably consider it part of their wages for hours worked, or is paid pursuant to some agreement or policy, then the bonus cannot be considered to be a gift.

According to the DOL, the following circumstances will not disqualify a year-end payment as a gift:

- If an employer pays it with such regularity that employees are led to expect it from year to year.
- The amounts paid vary among employees or groups or are tied to salary, wage, or length of service. For example, a Christmas bonus paid in the amount of two weeks' salary to all employees and an equal additional amount for each five years of service with the firm would be excludable from the regular rate.

The key factors are whether there is a contract and whether the amount is specifically tied to hours worked, production, or efficiency. If so, you must add the amount to the regular rate of pay.

Calculating the Regular Rate with a Bonus Payment

Where a bonus payment is considered a part of the regular rate at which an employee is employed, it must be included in computing the regular hourly rate of pay and overtime compensation. For purposes of calculating the

. Instead, an employer can apportion the bonus amount
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. For example, a bonus plan may pay, as a bonus, a 10% premium of an employee's total compensation, including overtime premiums. In this instance, the payment already covers overtime, and no additional overtime is required.

Comp Time

Unless you are a state or local government, it is illegal to provide "comp" time in lieu of time-and-a-half for hours worked in excess of 40 in a workweek.

Federal law requires that all nonexempt employees receive an overtime premium of one-half the regular rate of pay for all hours worked in excess of 40 in a given work week. To save on wages, some employers seek to provide overtime as "comp" time to employees. In other words, instead of paying an employee time-and-a-half for overtime worked, the employee would be paid the regular straight time rate and receive an additional half-hour of paid time off to be banked and used in the future. Under the FLSA, this practice is illegal for private employers. It interferes with employees' right to be *paid* their overtime premium.

For state and local governments, the FLSA has a specific provision that allows for the payment of comp time in certain circumstances, such as where it is provided for in a collective bargaining agreement or other agreement between the employer and employee.

For most employers, though, implementing a comp time program to skirt overtime obligations is a huge wage-and-hour no-no.

Pay Docking

The hallmark of the key exemptions under the FLSA is that the exempt employee *must* be paid a *salary* of at least $455 per week. An employee is paid on a salary basis when the employee receives the same amount of pay each pay period, without any deductions. For this reason, if you take deductions

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. The lost exemption does not only apply to the

.[20]

I *Orton v. Johnny's Lunch Franchise, LLC,*[21] the Sixth Circuit illustrated the

. Johnny's Lunch employed Orton as a vice president

. The employer suffered from financial

. Thus, from August 2008 until

Lunch laid off the entire executive staff on December 1, 2008, Orton worked without receiving any pay. The Sixth Circuit concluded that the employer's failure to pay Orton his full salary for those four months eradicated the exemption, which, in turn, put the employer on the hook not only for Orton's unpaid salary, but also any overtime he worked during those months.

The court started by defining the scope of an "improper deduction" from an employee's salary: "An employer who makes improper deductions from salary shall lose the exemption if the facts demonstrate that the employer did not intend to pay employees on a salary basis."[22] The court concluded that Orton's employment agreement (which established his annual salary) was irrelevant to the issue of whether he lost his exemption: "The question is therefore not what Orton was owed under his employment agreement; rather, the question is what compensation Orton actually received." Because Orton did not receive his full salary for the weeks in question, he lost his exemption.

All of this begs the question—what is an employer to do if it cannot afford to pay an otherwise exempt employee his or her full salary and needs to make deductions to keep the doors open? The Sixth Circuit answered this question, too:

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[20] 29 C.F.R. § 541.603(a).

[21] 668 F.3d 843 (6th Cir. 2012).

[22] 29 C.F.R. § 541.603(a).

> *That is not to say a company with cash flow issues is left with no recourse. Nothing in the FLSA prevents such an employer from renegotiating in good faith a new, lower salary with one of its otherwise salaried employees. The salary-basis test does not require that the predetermined amount stay constant during the course of the employment relationship. Of course, if the predetermined salary goes below [$455 per week], the employer may be unable to satisfy the salary-level test, which explicitly addresses the amount an employee must be compensated to remain exempt.*

Despite the general rule against deductions from salaries, the DOL's rules [23]

1. When an exempt employee is absent from work for one or more full days for personal reasons, other than sickness or disability.
2. For absences of one or more full days occasioned by sickness or disability (including work-related accidents) if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by such sickness or disability.
3. While an employer cannot make deductions from pay for absences of an exempt employee for jury duty, attendance as a witness, or temporary military leave, the employer can offset any amounts received by an employee as jury fees, witness fees, or military pay for a particular week against the salary due for that particular week.
4. For penalties imposed in good faith for infractions of safety rules of major significance.
5. For unpaid disciplinary suspensions of one or more full days imposed in good faith for infractions of workplace conduct rules imposed pursuant to a written policy applicable to all employees.
6. For any time not actually worked during the first or last week of employment.
7. For any time taken as unpaid leave under the Family and Medical Leave Act.

[23] 29 C.F.R. § 541.602.

Other Miscellaneous Pay Issues

There are a few other pay issues to be aware of—holiday pay, vacation pay, and lactation breaks.

Holiday Pay

There is no requirement that an employer pay nonexempt employees for holidays. Paid holidays is a discretionary benefit left entirely up to you. Exempt
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. You can

. If, however, you pay the nonexempt

must pay the employee for any holidays off or risk the fluctuating
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. This often

. Similarly, many employers observe a holiday on the preceding Friday or the following Monday when a holiday falls on a Saturday or Sunday when the employer is not ordinarily open.

It is also entirely up to your company's policy whether nonexempt employees qualify for holiday pay immediately upon hire or after serving some introductory period. Similarly, an employer can choose only to provide holiday pay to full-time employees, but not part-time or temporary employees. Because holiday closings are a discretionary benefit, you can also require that employees work on a holiday. In fact, the operational needs of some businesses will require that some employees work on holidays (hospitals, for example).

You can also place conditions on the receipt of holiday pay. For example, some employers are concerned that employees will combine a paid holiday with other paid time off to create extended vacations. To guard against this situation, some companies require employees to work the day before and after a paid holiday to be eligible to receive holiday pay.

If an employer provides paid holidays, it does not have to count the paid hours as hours worked for purposes of determining whether an employee is entitled to overtime compensation. Also, an employer does not have to pay any overtime or other premium rates for holidays (although some choose to do so).

Other federal statutes, other than the FLSA, might have something to say about paid holidays.

For example, under the Family and Medical Leave Act (FMLA) you have to treat FMLA leaves of absence the same as other non-FMLA leaves. Thus, you only have to pay an employee for holidays during an unpaid FMLA leave if you have a policy of providing holiday pay for employees on other types of unpaid leaves. Similarly, if an employee reduces his or her work schedule for intermittent FMLA leave, you may proportionately reduce any holiday pay (as long as you treat other non-FMLA leaves the same).

Il you must reasonably accommodate an employee whose

. One example of

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your employees. Without such a benefit, however, best of luck to you in recruiting all but the bottom-of-the-barrel employees for your business.

One issue that often arises with employees is whether they should pay for unused vacation pay at the end of employment.

The law of my home state, Ohio, considers vacation pay a deferred payment of an earned benefit. Therefore, an employer generally cannot withhold accrued vacation pay at the end of employment (just like it cannot withhold wages from a final paycheck). Unlike wages, however, because this benefit is *deferred*, an employer can implement a policy under which an employee forfeits unused vacation days.

Thus, a rule for vacation pay is as follows:

- If an employer does not have a policy pursuant to which unused vacation time is forfeited, and if the employee has unused, accrued vacation time, he or she is entitled to be paid for that time.
- If, however, the employer has a clear written policy, set forth in a manual, handbook, or elsewhere, providing that paid vacation time is forfeited on resignation or discharge, an employer *may* withhold unused vacation pay.

What does such a policy looks like? A recent Ohio appellate decision—*Majecic v. Universal Devel. Mgmt. Corp.*[24]—provided the following example:

> *Paid Time Off (PTO) includes sick, vacation . . . and personal time off with pay. . . . Employees will be given PTO days after one year of employment. . . . All unused PTO will be forfeited upon an employee's resignation or termination.*

Your mileage might vary, depending on the state law of your particular . Let me leave you with one thought, however. Notwithstanding

HR practice or whether it makes more sense

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Patient Protection and Affordable Care Act (President bama's health initiative, which some call Obamacare) adds a new provision FLSA that *requires* employers to provide reasonable unpaid breaks for . Specifically:

- Unpaid breaks must be provided each time a lactating employee needs to express breast milk for up to 1 year after the child's birth.
- The employer must provide the employee with a place that is shielded from view and free from intrusion from coworkers and the public, other than a bathroom.
- These requirements are mandatory for employers with 50 or more employees.

Employers with less than 50 employees are exempt upon a showing that the requirements impose an undue hardship by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business.

According to the DOL's published, preliminary interpretation of section 4207,[25] this provision imposes some significant requirements on businesses.

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[24] 2011-Ohio-3752, 2011 Ohio App. LEXIS 3177 (Ohio Ct. App. Jul. 29, 2011).

[25] Department of Labor Wage and Hour Division, "Reasonable Break Time for Nursing Mothers," http://edocket.access.gpo.gov/2010/pdf/2010-31959.pdf, December 21, 2010.

Paid or unpaid breaks? Employers are not required to compensate nursing mothers for breaks taken for the purpose of expressing milk. However, lactation breaks are covered by the same rules that govern other workday breaks. If the employer permits short breaks, usually 20 minutes or less, the time must be counted as hours worked and paid accordingly. Additional time used beyond the authorized paid break time could be uncompensated.

What is a reasonable break time? Employers should consider both the frequency and number of breaks a nursing mother might need and the length of time she will need to express breast milk. The DOL believes that most women will

. These guidelines, however, are just that, and will

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. The only room that is not appropriate is a

. The DOL also believes that an employee's right to express milk

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What qualifies as an undue hardship for employers with less than 50 employees? The difficulty or expense must be "significant," which is a stringent standard that employers will only be able to meet in limited circumstances.

Is there a relationship between lactation breaks and the FMLA? The DOL does not believe that breaks to express breast milk can be considered FMLA leave or counted against an employee's FMLA leave entitlement.

All of these rules, regulations, and cases beg the following question—is workplace lactation a problem that needs a solution? Consider the following statistic. Since Obamacare mandated that employers provide space in the workplace for mothers to lactate, the DOL has cited a whopping 23 companies for not providing adequate lactation breaks or spaces.[26]

According to the U.S. Census Bureau's latest statistics[27], there are 5,767,306 American employers and yet only 23 have been cited for a violation of this mandate. In other words, the DOL has cited 0.0004% of all American

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[26] Alicia Ciccone, "Breastfeeding Law Poses Unique Challenge to Businesses," http://www . huffingtonpost.com/2012/01/05/breastfeeding-law-poses-challenge-to-businesses_n _1186982.html?ref=business&ir=Business, January 5, 2012.

[27] United States Census Bureau, "Statistics of U.S. Businesses," http://www.census.gov/econ /susb/.

employers. If we only consider employers with 20 or more employees, the DOL has cited 0.0038%—still an infinitesimally small number. If we only consider the largest of employers—those with 100 or more employees—the percentage of citations drops to a still-miniscule 0.023%.

What do these numbers mean? Either that the lactation mandate is not yet widely known, and as public knowledge catches up with the law's requirements complaints (and citations) will rise. Or the lack of lactation space in American workplaces is a myth that does not need a legislative solution.

oreover, we already have laws that handle this issue. Under Title VII and its
. The last I checked, women
. For this reason, unless you are going to
all employees the ability to take short breaks during the workday for any
.g., smoking, bathroom, a cup of coffee), denying women the ability
.[28]

Section 4207? Before a company institutes a policy

. If you cannot find a consistent pattern of discipline or termination of similar nonlactating employees, you must reconsider the decision. A no-breast-feeding policy will, by its very nature, only apply to women. What other similar policies might a company have? Does it allow bathroom breaks during the workday? Smoke breaks? Other personal time? If so, a ban on nursing during the workday should be deemed discriminatory on its face, because it is necessarily targeted only at women.

What Is the Answer? Audit, Audit, Audit

The sweatshops of the Great Depression that led to the passage of the FLSA and its 40-hour workweek are virtually nonexistent in today's America. Nonetheless, claims for unpaid overtime continue to rise, more than doubling in the federal courts in the last decade. These cases rarely are the result of the intentional withholding of overtime premiums. Yet, as I've illustrated, the complexity of these rules renders compliance difficult, if not impossible.

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[28] At least one court disagrees. In *EEOC v. Houston Funding*, Case No. H-11-2442, 2011 U.S. Dist. LEXIS 13644 (S.D. Tex. Feb. 2, 2012), the court concluded that "[f]iring someone because of lactation or breast-pumping is not sex discrimination," because once the employee gave birth, she was no longer pregnant and her "pregnancy-related conditions" covered by Title VII ended.

Thus, the question is not whether companies need to audit their workforces for wage-and-hour compliance, but whether they properly prioritize doing so before someone calls them on it. You cannot predict when, why, or who the DOL will audit or which employees will sue you. What can you do? Take a detailed look at all of your wage-and-hour practices: employee classifications, meal and rest breaks, and off-the-clock issues. Make sure you are 100% compliant with *all* state and federal wage-and-hour laws. If you are not sure, bring in an attorney who knows these issues to check for you.

If you are ever investigated by the DOL or sued in a wage-and-hour case, it . It is immeasurably less

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Thoughts—A Glimmer of

A little more than three months after the DOL issued its opinion on mortgage loan officers, the Second Circuit, in *In re Novartis Wage and Hour Litigation*,[29] reached the same conclusion regarding another group of employees traditionally believed to be exempt administrative employees—pharmaceutical sales representatives. The court in the *Novartis* case concluded that the sales reps did not qualify for the administrative exemption because their jobs lacked any exercise of discretion and independent judgment. Specifically, the court pointed to the reps' lack of any role in planning marketing strategies or formulating the core messages delivered to doctors, their inability to deviate from the promotional core messages or to answer any questions for which they have not been scripted, and quotas for doctors' visits, sales pitches, and promotional events.

In the wake of *Novartis*, the courts are split on this issue. In *Christopher v. SmithKline Beecham Corp.*[30], the Ninth Circuit agreed that sales reps are not exempt. But, in *Schaefer-LaRose v. Eli Lilly & Co.*[31], the Seventh Circuit disagreed. This issue is currently on appeal to the U.S. Supreme Court, which will decide two issues: 1) whether deference is owed to the DOL's interpretation of the

[29] 611 F.3d 141 (2nd Cir. 2010).

[30] 635 F. 3d 383 (9th Cir. 2011).

[31] Case No. 2012 U.S. App. LEXIS 9300 (7th Cir. May 8, 2012)

exemption and related regulations and 2) whether the exemption applies to pharmaceutical sales representatives at all.

On June 18, 2012, the United States Supreme Court issued its long-awaited opinion in *Christopher v. SmithKline Beecham Corp.*[32] The Supreme Court, by a 5-4 margin, held that pharmaceutical sales representatives are exempt, outside salespeople to whom employers need not pay overtime.

In summary, the Court concluded the following:

1. To be considered a salesperson, one need to actually consummate a transaction. It is sufficient that the promotional work performed by the employee can lead to a sale. This rationale rebukes the argument of the DOL, which the Court called "quite unpersuasive" and lacking the hallmarks of thorough consideration."[33]
2. Nonbinding commitments from physicians to prescribe certain drugs qualify as sales under the FLSA's outside sales exemption. This rationale applies a common-sense approach to a statute that is often confusing and too rigidly applied.[34]

> *Our holding also comports with the apparent purpose of the FLSA's exemption for outside salesmen. The exemption is premised on the belief that exempt employees "typically earned salaries well above the minimum wage" and enjoyed other benefits that "set them apart from the nonexempt workers entitled to overtime pay." . . . It was also thought that exempt employees performed a kind of work that "was difficult to standardize to any time frame and could not be easily spread to other workers after 40 hours in a week, making compliance with the overtime provisions difficult and generally precluding the potential job expansion intended by the FLSA's time-and-a-half overtime premium." . . . Petitioners—each of whom earned an average of more than $70,000 per year and spent between 10 and 20 hours outside normal business hours each week performing work related to his as signed portfolio of drugs in his assigned sales territory—are hardly the kind of employees that the FLSA was intended to protect. And it would be challenging, to say the least, for pharmaceutical companies to compensate detailers for overtime going forward without significantly changing the nature of that position.*[35]

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[32] 567 US __, 132 S. Ct. 2156, 183 L. Ed. 2d 153 (2012).

[33] *Id.* at 2169.

[34] *Id.*

[35] *Id.* at 2173.

I have long argued that the FLSA is an anachronistic maze of rules and regulations that does not fit well within the realities of the 21st century workplace. It seems that at least five members of the Supreme Court are inclined to agree with me. This excerpt provides hope for businesses that in the face of an overly active DOL and an overly confusing statute, courts can provide relief by adopting common sense interpretations to these dizzying rules.

CHAPTER

8

The Right to

How to Operate as an Employer of Choice for Employees, Not One of Opportunity for Unions

No company is a perfect employer. We know that employees gripe to each other. We know that they complain about how much they make, how many hours they work, how much of a jerk that supervisor is, and how stupid the work rules are. And, from time to time, they even mention that most dreaded of five letter words—union.

Most companies do not want to be unionized. Some companies go to great lengths to avoid labor unions, often skirting the law, and spending a lot of money in the process. But "union" does not have to be a dirty word. I am here to give you a four-step program to help you determine if you are risk of unionization and what to do about it without stepping in National Labor Relations Act's (NLRA) traps of illegality—threats, coercion, retaliation, and discrimination.

How to Avoid a Labor Union

Under federal labor law, the tools used to recognize a union as employees' exclusive bargaining representative begin with an employee petition for representation by a union and, in most cases, end with a secret ballot election. If more than 30% of employees (but less than a clear majority) sign petition cards requesting representation, the signed cards are submitted to the National Labor Relations Board (NLRB) to hold a secret ballot election. If more than 50% of employees certify their desire for representation, a union . An employer, however, does

NLRB. Because most, if not all, employers will insist on

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Do You Determine If You Are at Risk?

The first step in determining whether you are at risk for a union-organizing campaign is to understand why organizing campaigns are successful at all.

Businesses often believe that their employees consider labor unions out of lack of satisfaction over wage and benefits. To the contrary, union-organizing campaigns are much more successful when they shy away from focusing on the core monetary issues of wage and benefits and instead focus on issues such as lack of respect, poor employee/management communication, and unequal treatment among employees.

Once you realize why union campaigns succeed, you can begin to segregate in your workplace issues over which you can exert control from those over which you lack control.

What factors are within your control?

- Supervisors are poorly trained and play favorites.
- HR does not promptly and efficiently address issues.
- There is chronic dissatisfaction among employees.
- Employees feel disconnected from the larger company.

What factors are outside of your control?

- There has been recent reductions in the workforce or outsourcing (or likely to be soon).
- There has been a restructuring of the company.
- Employees perform work traditionally done by union workers.
- Workplace has a factory atmosphere.

What should you be doing to determine the extent to which you need to alter that which is in your control?

- Assess employee satisfaction levels, both via informal meetings between employees and management and with formal written surveys.
- Management and human resources must get out the shop floor to interact with employees.
- Ensure that HR has up-to-date policies (no solicitation, open door, and discipline, for starters).

Risk of Unionization

There is no surefire way to prevent the unionization of your organization. There are, however, six proactive steps you can take to limit the risk and be prepared in the event a union organizer comes knocking at your door.

1. Create an Environment Where Workers Do Not Feel the Need to Unionize

How do you create a workplace where employees do not believe they need a labor union to address their concerns or create a workplace responsive to their needs? Let me suggest five ideas.

- Have a prompt and effective HR department, one that responds to employees' issues as soon as possible after they are raised and does not ignore employee complaints or concerns. If employees feel ignored or back-burnered, they will look elsewhere for help.
- Decrease job insecurity issues where possible.
- Encourage worker participation.
- Train supervisors.
- Employ an effective no solicitation policy.

(There is more on training supervisors and no solicitation policies below.)

2. Communicate With and Engage Employees

If you leave your employees in the dark, they will never feel part of a team. If they do not feel like they are part of a team, they will look elsewhere, such as to a labor union. Open your doors, open your eyes and ears, and welcome employees into your decision making.

Inform employees about what the company is doing. No one likes surprises. One hallmark of a collectively bargained relationship is a lack of surprises. Every detail of the employment relationship is set forth in the collective bargaining agreement. If you want to dissuade employees from looking for certainty elsewhere, provide them some insight and detail into what the company is thinking and doing.

Listen to employee complaints. The single, most effective combatant to stave off labor unions is listening to what employees have to say. Have an open door policy and some mechanism to receive employee complaints (such as a hotline, suggestion box, or dedicated email account). That policy, however, is not worth the paper on which it is written if you do not respond to the complaints you receive. The only thing worse than not taking complaints at all is giving them lip service upon receipt. Your employees will feel patronized and look elsewhere to be heard.

- *Implement "safe" ways to engage workers*. Some ideas to engage your employees in management and its decision-making process include employee forums, peer review boards, and employee/management committees.

3. Deploy a Solicitation Ban

Remember the no solicitation policy mentioned in Chapter 4? This is where it bears fruit. As long as it is nondiscriminatory (that is, it does not single out solicitations by or about labor unions), a written and consistently enforced no solicitation policy will enable you to prohibit employees from discussing union-related matters during working hours and on company property.

Any effective no solicitation rule should include the use of bulletin boards and corporate computer systems, as recognized by the NLRB in its seminal

Register-Guard decision.[1] In that case, the NLRB expressly protected the right of employers to control their computer and email systems, while at the same time restricting employees' ability to solicit using company property.

In 1996, the Register-Guard, a unionized newspaper publisher, began installing a new computer system. Around the same time it also implemented a new communications systems policy (CSM), which governed employees' use of its communications systems, including email. The policy stated, in relevant part:

> *Company communication systems and the equipment used to operate the communication system are owned and provided by the Company to assist in conducting the business of* The Register-Guard. *Communications systems are not to be used to solicit or proselytize for commercial ventures, religious or political causes, outside organizations, or other non-job-related solicitations.*

espite the policy, the company allowed its employees to send and receive

. However, it never allowed solicitations regarding any outside agency United Way. The employer gave two warnings to an employee who sent three union-related emails, which lead to the charge that the employer was discriminatorily enforcing the policy.

In ruling that the policy, on its face, did not violate the NLRA, the NLRB relied upon an employer's legitimate business interest in its "basic property right to regulate and restrict employee use of company property," including its computer system. The NLRB saw no distinction between a traditional bulletin board and an email system:

> *[T]he Respondent's CSP does not regulate traditional, face-to-face solicitation. Indeed, employees at the Respondent's workplace have the full panoply of rights to engage in oral solicitation on nonworking time and also to distribute literature on nonworking time in nonwork areas. . . . What the employees seek here is use of the Respondent's communications equipment to engage in additional forms of communication. . . . "Section 7 of the Act protects organizational rights . . . rather than particular means by which employees may seek to communicate."*

A solicitation or other communication policy can lawfully bar employees' non work-related use of an employer-owned email system or other property unless, on its face, it discriminated against employees' exercise of Section 7

[1] 351 N.L.R.B. 1110 (2007).

rights. Thus, a policy that prohibits employee use of an email system for "non job-related solicitations" does not violate the NLRA.

Along the same lines, the NLRB found that "discrimination" in the context of rules limiting employee solicitations means drawing a specific distinction along Section 7 lines. In the NLRB's words:

> *Thus, in order to be unlawful, discrimination must be along Section 7 lines. In other words, unlawful discrimination consists of disparate treatment of activities or communications of a similar character because of their union or*

. In the first, an employee

. While the employer tolerated
.), there was no evidence

. Thus, disciplining the employee for this set of emails did not
Section 7 lines, because the CSP did not permit any group- or cause-related solicitations. The second set of emails, however, presented a different problem. Those were not a solicitation or some call for collective action. Instead, they merely clarified the facts surrounding a union rally. Because the CSP only prohibited non work-related "solicitations" and because the company permitted a wide range of non work-related emails, disciplining the employee for an email that disseminated information about the Union (as opposed to soliciting some action on its behalf) discriminated along Section 7 lines and therefore violated the NLRA.

Under Register Guard, an employer is permitted to lawfully prohibit union-related use of company email systems if it has a consistently enforced policy prohibiting "non job-related solicitations." If it was not clear before, after Register-Guard it is clear that an employer's email system is company property and employees have no statutory right to use a company's email system for union-related purposes.

What, however, does that rule mean? In a published memorandum the NLRB discusses five examples to help guide employers.[2]

Case No. 1: The employer had historically allowed the union to use the company's email system to conduct union business and to communicate with

[2] NLRB General Counsel Memo No. 08-07 (May 15, 2008).

the employer about labor relation matters at the facility. Recently, the employer sent a letter to the union stating that it had knowledge that the union was inappropriately using the company's email system by sending broadly distributed emails to company managers outside the facility. The letter cautioned that further similar activity could result in immediate suspension of the union's email account. The NLRB found the rule to be lawful because it concerned how the union was permitted to use the employer's email system and did not otherwise prohibit the union from engaging in protected communications outside the plant or to broad groups

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No. 2: Both before and after the union's organizing campaign began, the

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No. 3: The employer had a handbook provision which stated that its email system is intended for reasonable and responsible business purposes and is not intended for personal use and that employees may not solicit during working time for any purpose. After sending an email communication about a union meeting, an employee received a written warning for using the email system for solicitation purposes in violation of handbook provision. Other employees, however, frequently sent non work-related emails while at work and during working times (such as chain letters, jokes, party invitations, and solicitations for candy sales) and were not disciplined. The NLRB concluded that the employee was unlawfully singled out because of the union-related content of his email.

Case No. 4: An employee, who was dissatisfied with working conditions, circulated an email petition to try to drum up support to take the concerns to management. When the Directors of the NLRB learned who was responsible for the petition, it terminated him for insubordination for participating in the "anonymous email scheme" and for inappropriately using the employer's computers in violation of its policy. The NLRB concluded that the employer unlawfully discharged the employee for engaging in protected concerted activities when seeking the support to address working conditions. An employer may not rely on an employee's failure to adhere to a rule that prohibits protected activity as a basis for discipline. Further, because the employer's email policy allowed reasonable personal use of the computer and

the employer permitted employees' extensive use of the Internet, email, and other company equipment for their personal purposes, it disparately enforced its email policy against protected concerted activity.

Case No. 5: An employee union organizer led a delegation of union supporters into one of the employer's stores. The group handed the store manager a letter announcing of the formation of a union, together with a written list of demands regarding wages and working conditions. Simultaneously, other union members and supporters distributed union leaflets outside of the entrance. At the time of this event, the employer maintained two bulletin

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. The next day, the main

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. The store manager informed the union organizer

. The NLRB concluded that the employer had an antiunion motive and that its actions were directly in response to the union activity. There was no disparate enforcement of a written company-wide policy but an unwritten policy that was abruptly changed in response to union activities.

In summary, if an employer permits a union representing its employees to use an employer's email system, it can place reasonable limits on that use. If, however, an otherwise valid rule is promulgated or enforced for antiunion reasons, Register-Guard will not protect the employer's actions. The key is consistency. A neutral policy should be in place before any union activity or communication occurs. That reasonable policy should then be uniformly and consistently applied and enforced to avoid running afoul of the NLRA's protections for union and other concerted activities.

4. Train Supervisors and Educate Employees

We talk a lot about the effective training of supervisors, but in the area of union avoidance, it can really pay dividends. Supervisors should be trained in how to talk to employees about their wants, needs, and complaints. More importantly, supervisors need to know the company's official stance on unionization and how to talk to employees about it.

Training supervisors is only one half of the equation. You must also educate your employees about the generalized negatives that labor unions bring with

them (mandatory paycheck deductions for union dues, lack of discretion in personnel decision, and the inability of employees to communicate directly with management), as well as on the company's official position on labor unions. Companies can accomplish this educational goal in several ways:

- Compose a clear company policy on unionization.
- Inform employees of their rights to organize and *not* to organize.
- Teach employees what it means if they sign a union card—that if enough of the employees sign, the union will have the right to hold an election to become certified as the representative of all employees, even those that do not want a union and vote against it.
- Make sure workers know what questions to ask union organizers and what authority unions will have over workers.

Think Your Employees Are Unionization?

We have discussed how to recognize an organizing campaign and the proactive steps you can take to prevent one from starting. How can you tell, however, if a union organizing campaign is taking hold, despite your best efforts? Look for some of the following:

- Union literature.
- Union authorization cards.
- Prounion buttons, shirts, and other swag.
- Unusual off-site employee gatherings.
- Changes in employee behavior.
- Strangers in parking lots with handouts.

In the event you begin to see some of these activities, there are certain things you can do and certain things you cannot do in response to an organizing campaign that takes hold in your business.

What to Do

- *Alert supervisor.* Supervisors are your first line of defense. They are your eyes and ears on the ground and those in your

organization closest to your rank and file workers. They will be the ones to listen to what is going on, and who will have your employees' ears to talk to them about why voting for a labor union is a bad idea.

- *Be open to employees*. Now is not the time to take an us-versus-them attitude. Listen to your employees' issues and concerns. The more you can do to address their issues, the lesser incentive they have to vote for a union.

  Communicate. Explain to employees the negatives associated with labor unions. Explain that union dues will come out of each and every paycheck, whether or not they are in favor of the union. Explain how promotions will no longer be based on merit but instead on seniority. Explain how employees will no longer have a direct channel of communication with management but will instead have to filter communications and concerns through a union representative and a time-consuming, formal grievance and arbitration process.

Not to Do

What not to do breaks down into four different categories:

- Threats
- Interrogations
- Promises
- Surveillance

No Threats

- "If the Union comes in, we will close our offices and lay off employees."
- "We will do everything we can to prevent a union from coming in."
- "The company forbids you to support the union, sign authorization cards, or speak to union reps."
- "If a union is voted in, there will be strikes."

No Interrogations

- "What are your views on the union?"
- "Who is leading the charge to get a union in here?"
- "What does _____ think about the union? Do you think he'll sign a card?"
- "Have you heard of a union sniffing around?"
- "I heard there was a union meeting—how did it go?"

o Promises

- "If you all vote against the union, we will give everyone a pay raise/extra benefits/bonuses/extra days off."
- "I think you are due for a promotion. I can make that happen if you vote against the union."

o Surveillance

- Lingering around the water cooler or break room, trying to hear what employees are saying about the union.
- Monitoring phone calls or emails about union activity.

Protected Concerted Activity

Recall that the NLRA grants all employees (not just those in a labor union) the right to engage in protected concerted activity. This means that employees have the unfettered right to talk between and among themselves about their terms and conditions of employment. Recently, the NLRB has launched an all-out offensive in this area. The battleground, however, is not in your physical workplace. Instead, the NLRB is waging this battle in cyberspace, in the evolving communication tool known as social media, as the following cases illustrate.

It All Started with a "Dickhead"

In November 2010, the NLRB issued a complaint against a company—American Medical Response—that fired employee Dawnmarie Souza after she posted negative comments about her supervisor on her personal Facebook page. Among other things she wrote from her home computer, she called the supervisor a "dickhead" after the supervisor informed her of a complaint by a

customer. She also posted on Facebook, "Love how the company allows a 17 to become a supervisor" ("17" was the company's internal lingo for a psychiatric patient).[3] Following an investigation, the NLRB concluded "the employee engaged in protected activity by . . . discussing supervisory actions with coworkers in her Facebook post."[4]

It Continued with a Rant

Hispanics United is a nonprofit service provider.[5] In or around July 2010, an

. One month later, she had

. She also sent regular text messages over the next several days to the one particular coworker, criticizing other employees' work

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When the coworker about whom they were complaining reported the wall posts to the Executive Director as "cyber bullying" and harassing behavior, the five employees who had participated in the Facebook wall conversation were all fired.

The NLRB's Administrative Law Judge (ALJ) decided that the Facebook discussion was a textbook example of concerted activity. One employee initiated the conversation in an appeal to her coworkers for help. The resulting conversation, among coworkers and about job performance and staffing level issues, constituted concerted activity.

Additionally, the conversations were protected. Because the Facebook postings directly related to terms and conditions of employment, the ALJ concluded that the Facebook conversation was concerted activity for "mutual aid or protection" under Section 7.

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[3] Steven Greenhouse, "Company Accused of Firing Over Facebook Post," http://www . nytimes.com/2010/11/09/business/09facebook.html, November 8, 2010.

[4] See NLRB Office of the General Counsel Division of Operations-Management, Memorandum OM 11-74, p. 5 (Aug. 18, 2011).

[5] These facts are pulled from the Aug. 18, 2011, NLRB Office of the General Counsel Division of Operations-Management, Memorandum OM 11-74, which discusses the case anonymously.

> *It is irrelevant to this case that the discriminatees were not trying to change their working conditions and that they did not communicate their concerns to Respondent. I find that the discriminatees' discussions about criticisms of their job performance are also protected. [A]n employer violates Section 8(a)(1) in disciplining or terminating employees for exercising this right—regardless of whether there is evidence that such discussions are engaged in with the object of initiating or inducing group action. Moreover, the fact that Respondent lumped the discriminatees together in terminating them, establishes that Respondent viewed the five as a group and that their activity was concerted.*[6]

Ended (for now) with a Hotdog Cart

I Motors, Inc.,[7] the NLRB finally provided some much needed

NLRA and how far employers' policies can go in trying to restrict

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Facebook posts by Robert Becker, a Motors's BMW dealership.

I Facebook post, Becker criticized a dealership promotional event at . Becker posted photos on his employer's Facebook page of the hot dog cart, along with salespeople holding hot dogs, bags of Doritos, and bottles of water. He also posted the following comment on the dealership's event page criticizing the catering as beneath BMW's standards:[8]

> *I was happy to see that Knauz went "all out" for the most important launch of a new BMW in years . . . the new 5 series. A car that will generate tens in millions of dollars in revenues for Knauz over the next few years. The small 8 oz bags of chips, and the $2.00 cookie plate from Sam's Club, and the semi fresh apples and oranges were such a nice touch . . . but to top it all off . . . the Hot Dog Cart. Where our clients could attain a over cooked wiener and a stale bun.*

In his second Facebook post, Becker posted on his personal Facebook page a photograph of a car driven into a pond by the 13-year-old son of a customer of the adjacent Knauz-owned Land Rover dealership. Becker appended this caption to the photograph: "This is your car: This is your car on drugs."

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[6] ALJ Decision, Case No. 3-CA-27872, p. 8 (Sept. 2, 2011).

[7] 358 NLRB No. 164 (Sept. 28, 2012).

[8] 2011 NLRB LEXIS 554, *8 (N.L.R.B. Sept. 28, 2011).

The NLRB concluded that the posts related to the BMW promotional event were protected, concerted activities for which Becker could not be disciplined or terminated—since Becker, a commissioned salesperson, believed that the low-budget food choices could negatively impact sales and, therefore, his earnings. He had posted to enlist the support of his fellow employees as an outgrowth of a prior in-person conversation about the same issue. Conversely, the post related to the Land Rover incident was not protected—Becker posted it without discussion with other employees and without connection to any terms and conditions of employment.

U NLRB concluded that Knauz lawfully terminated Land Rover post and not because of the hot dog posts. NLRA's rules on protected

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Other Social Media Cases

Karl Knauz BMW is the only official decision of the NLRB discussing when social media posts qualify for protection as protected concerted activity. In addition, however, the NLRB Office of General Counsel has issues a series of advice memoranda opining on similar cases.

In Children's National Medical Center,[10] the General Counsel recommended the dismissal of a charge brought by a respiratory therapist terminated for posting a Facebook status update during an ambulance ride which threatened a co-worker who was committing the cardinal sin of sucking on her teeth:

> *[T]here is no evidence to establish concert. The Charging Party did not discuss her Facebook post with any of her fellow employees, and none of her coworkers responded to the posts. . . . The Charging Party was merely airing a personal complaint about something that had happened on her shift.*[11]

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[9] Id.

[10] Case No. 05-CA-036658 (Nov. 14, 2011).

[11] Id.

In TAW Inc.,[12] the General Counsel recommended the dismissal of a charge brought by an accountant terminated for refusing to remove a Facebook post which suggested that her employer was engaged in fraudulent accounting practices:

> *Even if the Charging Party initially posted the comment in furtherance of alleged concerted activity . . . her refusal to remove the comment after the April 18 meeting with the outside auditor was not protected. . . . [H]er comment suggesting that the Employer was engaged in fraud was false and, after April 18, she knew it was false. Her insistence on retaining the post after knowing it was false is not entitled to protection under the Act.*[13]

I ,[14] the General Counsel recommended the dismissal of a Facebook posts

> *The Charging Party did not post her comment on her Facebook page in furtherance of concerted activity for mutual aid or protection. The Charging Party admits that that she was not speaking on behalf of any other employees, nor is there evidence that that she was looking to group action when she posted her comments on Facebook.*[15]

In Intermountain Specialized Abuse Treatment Center,[16] the General Counsel recommended the dismissal of a charge brought by a therapist who took to her Facebook wall to complain about staff meetings, including at least one interaction with a coworker during which they agreed to use Facebook to "complain about work."

> *The Charging Party's Facebook posting was merely an expression of an individual gripe about . . . a staff meeting that affected only the Charging Party – her removal as the facilitator of her victims group. The posting contained no language suggesting that she sought to initiate or induce co-workers to engage in group action. And the only coworker who commented in response to the posting stated that he did not think that the Charging Party's post was an attempt to change anything at work.*[17]

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[12] Case No. 26-CA-063082 (Nov. 22, 2011).

[13] Id.

[14] Case No. 15-CA-061204 (Dec. 1, 2011).

[15] Id.

[16] Case No. 27-CA-065577 (Dec. 6, 2011).

[17] Id.

These memos suggest that the sky may not be falling in regards to social media and the NLRB. Children's National, TAW, and Copiah Bank are reasoned opinions on lone-wolf employees who took to social media to air gripes about work or, in the case of Children's National, to threaten a coworker.

Intermountain, though, may have wider implications. One of my key concerns about the NLRB's foray in regulating workplace social media is that, by its very nature, social media is concerted—such that a coworker's unsolicited comment or response to a social media post ipso facto converts lone-wolf conduct into concerted activity. Intermountain suggests that the concerted

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L NLRB a passing grade in this area.
. An employee responded to a supervisor's LinkedIn request with the following joke: "f**ktard." More than a year later, the company LinkedIn site.

NLRB. He claimed that his employer did not fire him because of the L In post but instead because of a discussion he had with some coworkers two months earlier about the company's overtime practices.

In Schulte, Roth & Zabel,[18] the NLRB Office of General Counsel opined that the termination was lawful and recommended the dismissal of the charge:

> *Moreover, the LinkedIn posting was not a pretextua1 reason for discharging the Charging Party; the Employer has demonstrated that it only discovered the posting in its April review of prior employee posts as part of its assessment of problems with its new LinkedIn page. Finally, no one contends that the Charging Party's posting in violation of the electronic usage policy—the stated reason for his discharge—was protected by Section 7.*[19]

■ **Comment** In American Medical Response, the NLRB argued that calling one's boss a "d*ck" is "not so opprobrious as to lose the protections of the Act" because the "namecalling was not accompanied by any verbal or physical threats." Yet, in *Schulte, Roth & Zabel*, the same agency points out that Section 7 does not protect the "f**ktard" post. What is the difference?

One possible explanation is that the NLRB is using social media cases to run a well-staged long con. Could the NLRB have enough marketing savvy to latch on to *the* hot issue of the day (social media), take an extreme position to raise awareness among nonunionized employees that they

[18] Case No. 02-CA-060476 (Oct. 13, 2011).
[19] Id.

have rights under the NLRA, and then slowly and quietly backtrack into a more reasonable position on a case-by-case basis?

If you compare where we started with *American Medical Response* and where is ended in *Karl Knauz BMW*, this long con might be the most logical explanation. If that is the case, then I say, "Well played, NLRB. I tip my hat to you."

Other Examples of Protected Concerted Activity

B, it is not the only area reached by the NLRA's rules protecting . For example, the NLRA protects:

1. Employees protesting safety conditions[20]
2. Employees talking about wages[21]
3. Refusing to divulge the names of employees who circulated a petition about working conditions[22]

. For example, in Medco Health Solutions of Las Vegas, Inc.,[23]

publicly recognized employees during a weekly ceremony for various work-related accomplishments. It called the program "WOW." The company terminated an employee for wearing to work a t-shirt reading, "I don't need a WOW to do my job." The employee, a pharmacist, was required to wear a lab coat while working, a work rule which the employer concluded the t-shirt violated. The NLRB concluded that the wearing of the shirt was protected concerted activity because "wearing the shirt 1) was a logical outgrowth of concerted activity that 2) brought a group complaint to management's attention."[24]

Concluding Thoughts: Whither the 93%?

Currently, only 7% of private-sector employees belong to a labor union. Doing the math, that leaves 93% of the private-sector workforce as nonunionized.

[20] *See Lenape Prods*., 283 NLRB 178 (1987).

[21] *See Starbucks Corp*., 354 NLRB No. 99 (2005).

[22] *See Texas Dental Assoc*., 354 NLRB No. 57 (N.L.R.B. 2009).

[23] 357 NLRB No. 25 (N.L.R.B. 2011)

[24] Id. at p. 1.

Yet, the NLRB's ability to impact the workplace is not limited by unions' 7% reach.

In June 2012, the NLRB launched a web portal entirely dedicated to protected concerted activity.[25] It highlights 12 recent cases litigated by the NLRB involving protected concerted activity. According to the NLRB:

> *The law we enforce gives employees the right to act together to try to improve their pay and working conditions or fix job-related problems,* even if they aren't in a union. *If employees are fired, suspended, or otherwise penalized for*

. It is a calculated

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NLRB, nonunion concerted activity accounts for more than
. If the agency is being honest, I bet it would
. The NLRB wants to be the go-to agency for
. It is in the process of reinventing itself
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Businesses must prepare themselves for increased knowledge by their employees on these issues, along with the increased enforcement efforts by the NLRB.

I give credit where credit is due. The NLRB, relegated to near-obsolescence by the 7% penetration of labor unions, has made itself relevant to all businesses in America. By shifting its enforcement priorities to issues surrounding protected concerted activity, the NLRB has extended its reach to the 93% of nonunionized workers. It has also made itself the go-to agency for employees fired for complaining about work. Businesses that fail to prepare themselves for increased knowledge by their employees on these issues, and the increased enforcement efforts by the NLRB, will find themselves on the losing end of litigation over these issues.

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[25] http://www.nlrb.gov/concerted-activity.

CHAPTER

9

The Right to Requests

The FMLA, the ADA, USERRA, and Religious Accommodations

There is perhaps no issue that confounds employers more than employee leaves of absence and accommodations for other special requests. Myriad laws exist that grant employees rights to leaves and other accommodations.

For example:

- The Family and Medical Leave Act (FMLA) grants employees for all but the smallest of businesses 12 weeks of unpaid leave in any given year.
- The Americans with Disabilities Act (ADA) requires employers to provide reasonable accommodations for employees' medical conditions. These accommodations can

include extended unpaid leaves of absence or other modifications to the terms and conditions of employment.

- The Uniformed Services Employment and Reemployment Rights Act (USERRA) provides for extended leaves of absence, again unpaid, for employees serving in the armed forces. The FMLA also now provides for leaves of absence for certain military issues.
- Title VII's protections against religious discrimination also impose affirmative obligations on employers to accommodate employees' sincerely held religious beliefs.

Each of these laws presents a series of landmines for businesses trying to . As employers, we should want to . We do not want to lose quality, productive

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The A mandates unpaid, job-protected leave for up to 12 weeks a year:

- to care for a new child, whether for the birth of a son or daughter, or for the adoption or placement of a child in foster care;
- to care for a seriously ill family member (spouse, son, daughter, or parent);
- to recover from a worker's own serious illness;
- to care for an injured service member in the family; or
- to address qualifying exigencies arising out of a family member's deployment.

Who Is a Child?

The definition of "son or daughter" includes not only a biological or adopted child, but also a "foster child, a stepchild, a legal ward, *or a child of a person standing in loco parentis*."[1] According to the Department of Labor (DOL), "Congress stated that the definition was intended to be 'construed to ensure that an employee who actually has day-to-day responsibility for caring for a

[1] 29 C.F.R. § 825.122(c)(3).

child is entitled to leave even if the employee does not have a biological or legal relationship to that child.'"[2]

In the DOL's words:[3]

> *It is the Administrator's interpretation that the regulations do not require an employee who intends to assume the responsibilities of a parent to establish that he or she provides both day-to-day care and financial support in order to be found to stand in loco parentis to a child. For example, where an employee provides day-to-day care for his or her unmarried partner's child (with whom there is no legal or biological relationship) but does not financially support the child, the employee could be considered to stand in loco parentis to the child and therefore be entitled to FMLA leave to care for the child if the child had a serious health condition. The same principles apply to leave for the birth of a child and to bond with a child within the first 12 months following birth or placement. . . . Where an employer has questions about whether an employee's relationship to a child is covered under FMLA, the employer may require the employee to provide reasonable documentation or statement of the family relationship. A simple statement asserting that the requisite family relationship exists is all that is needed in situations such as in loco parentis where there is no legal or biological relationship.*

in loco parentis, the FMLA covers:

- An employee who will share equally in the raising of an adopted child with a same sex partner but who does not have a legal relationship with the child.
- An employee who will share equally in the raising of a child with the child's biological parent.
- Stepparents.
- Where a grandparent or other relative takes in a child and assumes ongoing responsibility for raising the child because the parents are incapable of providing care.

What Is a "Serious Health Condition"?

You may take FMLA leave to care for your spouse, child or parent who has a serious health condition or when you are unable to work because of your own serious health condition. The most common serious health conditions that qualify for FMLA leave are:

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[2] Wage & Hour Division Administrator's Interpretation No. 2010-3.

[3] *Id.*

- Conditions requiring an overnight stay in a hospital or other medical care facility.
- Conditions that incapacitate you or your family member (for example, unable to work or attend school) for more than three consecutive days and have ongoing medical treatment (either multiple appointments with a health care provider, or a single appointment and follow-up care such as prescription medication).

  Chronic conditions that cause occasional periods when you or your family member are incapacitated and require treatment by a health care provider at least twice a year.

  Pregnancy (including prenatal medical appointments, incapacity due to morning sickness, and medically required bed rest).[4]

FMLA provides two types of leave rights related to *military caregiver (or covered servicemember) leave* and *qualifying exigency leave*.

Military Caregiver Leave[5]

- Eligible employees who are family members of covered servicemembers will be able to take up to 26 workweeks of leave—for up to five years after a veteran leaves active duty—to care for a covered servicemember with a serious illness or injury incurred in the line of duty on active duty.
- This provision also extends FMLA protection to additional family members (i.e., next of kin) beyond those who may take FMLA leave for other qualifying reasons.
- When leave is taken to care for a covered servicemember with a serious injury or illness, an employer may require an employee to support his or her request for leave with a sufficient certification, which includes certain necessary military and medical information support the request for leave.

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[4] 29 C.F.R. § 825.113.

[5] 29 C.F.R. §§ 825.127.

Qualifying Exigency Leave[6]

- This provision makes the normal 12 workweeks of FMLA job-protected leave available to family members of active-duty service members to use for "any qualifying exigency" arising out of the fact that a covered military member is on active duty or called to active duty status in support of a contingency operation.
- The DOL's final rule defines qualifying exigency as any of the following categories for which employees can use FMLA leave: i) short-notice deployment; ii) military events and related activities; iii) childcare and school activities; iv) financial and legal arrangements; v) counseling; vi) rest and recuperation; vii) postdeployment activities; and viii) additional activities not encompassed in the other categories, but agreed to by the employer and employee.
- Employers will be able to require an employee to provide a copy of the covered military member's active duty orders or other documentation issued by the military, which indicates that the covered military member is on active duty (or has been notified of an impending call or order to active duty), and the dates of the covered military member's active duty service.
- Each time leave is first taken for a qualifying exigency, an employer may require an employee to provide a certification that sets forth information pertaining to the exigency.

Who Is Entitled to Receive FMLA Leave?

Most people think of "50" as the magic number for the FMLA. "Oh, we have 50 employees, so we now have to comply with the FMLA" is a popular refrain among HR departments. It's not that simple.

The FMLA has two different rules that must be met before you have to offer FMLA leave to an employee—coverage and eligibility. Coverage applies to the employer and eligibility applies to the employee. They both have the magic number 50 as a key component but are very different in application.

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[6] 29 C.F.R. §§ 825.126.

Coverage

The FMLA covers any private employer that has 50 or more employees on the payroll during 20 or more calendar workweeks (not necessarily consecutive workweeks) in either the current or the preceding calendar year. Who counts as an employee for coverage purposes?[7]

Any employee whose name appears on the payroll will be considered employed each working day of the calendar week and must be counted whether or not any compensation is received for the week.[8]

E FMLA leave, leaves of absence, .[9]

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working day of a calendar week, or who terminates employment before the last working day of a calendar week, is not considered employed on each working day of that calendar week.[12]

Once a private employer meets the 50 employees/20 workweeks threshold, the employer remains covered until it reaches a future point where it no longer has employed 50 employees for 20 (nonconsecutive) workweeks in the current and preceding calendar year.[13] Thus an employer who met this threshold in 2010 but drops below it later that year and never crosses it again during 2011 would remain covered until December 31, 2011.

Eligibility

Just because the FMLA covers a particular employer does not mean that the FMLA requires that employer to provide FMLA leave to any or its employees.

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[7] 29 C.F.R. § 825.104.

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

An employee must still meet the FMLA's eligibility requirements. To be eligible for FMLA leave, an employee must work for a covered employer and:

1. Was employed by the employer for at least 12 nonconsecutive months;
2. Worked 1,250 hours during the 12-month period preceding the start of the requested leave; and
3. Works at a location where the employer employs 50 or more employees within a 75-mile radius.[14]

. At least as the FMLA is concerned, 50 does not necessarily . If you have a business that has 50 or more employees who are

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covered by the FMLA is required to post a notice explaining FMLA's provisions. The notice must be posted prominently where it can be easily seen by employees and applicants for employment and must be large enough to be legible and easily read.[15]

Covered employers (those with 50 or more employees on the payroll during 20 or more calendar workweeks in either the current or the preceding calendar year) must post this general notice even if no employees are eligible for FMLA leave (no employee was employed for at least 12 nonconsecutive months, worked 1,250 hours during the 12-month period preceding the start of the requested leave, and works at a location where the employer employs 50 or more employees within a 75-mile radius).

If, however, an FMLA-covered employer has at least one FMLA-*eligible* employees, it must also provide this same general notice to each employee by including the notice in employee handbooks or other written guidance to employees concerning employee benefits or leave rights, if such written materials exist, or by distributing a copy of the general notice to each new employee upon hiring. In either case, distribution may be accomplished electronically.[16]

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[14] 29 C.F.R. § 825.110.

[15] 29 C.F.R. § 825.300.

[16] *Id.*

The FMLA requires covered employers to maintain records that disclose the following information on all employees:

- Basic payroll and identifying employee data, including name, address, and occupation.
- Rate or basis of pay and terms of compensation.
- Daily and weekly hours worked per pay period.
- Additions to or deductions from wages.

  Total compensation paid.[17]

  Dates FMLA leave is taken by FMLA-eligible employees. Time records and leave request forms are sufficient as long as the leave in those records is designated as FMLA leave.

  If FMLA leave is taken by eligible employees in increments of less than one full day, the hours of the leave.
- Copies FMLA-leave requests made by employees (if in writing), and copies of all written FMLA designations and other notices given to employees. Copies may be maintained in employee personnel files.
- Any documents (including written and electronic records) describing employee benefits or employer policies and practices regarding the taking of paid and unpaid leaves.
- Premium payments of employee benefits.
- Records of any dispute between the employer and an eligible employee regarding designation of leave as FMLA leave, including any written statement from the employer or employee of the reasons for the designation and for the disagreement.[18]

An employer is not required to keep a record of actual hours worked for any FMLA-eligible employee who is either not covered by the FLSA or exempt from the Fair Labor Standards Act (FLSA). For these employees, however, FMLA eligibility will be presumed for any employee who has been employed for at least 12 months. Additionally, for employees who take FMLA leave

[17] 29 C.F.R. § 825.500.

[18] *Id.*

intermittently or on a reduced leave schedule, the employer and employee must agree on the employee's normal schedule or average hours worked each week and reduce their agreement to a written record that that employer preserves.[19]

Employers must maintain records and documents relating to certifications, recertifications or medical histories of employees or employees' family members, created for purposes of FMLA, as confidential medical records in separate files/records from the usual personnel files and in compliance with ADA confidentiality requirements.[20]

Estoppel

eeting the FMLA's coverage and eligibility thresholds is not the only way an . An employer can also estop FMLA based on representations upon which employees

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Peters v. Gilead Sciences.[21] There was no dispute that Peters was not eligible for statutory FMLA leave. Nevertheless, at the Gilead sent him a letter stating that "all employees" were eligible. Gilead's employee handbook makes a similar promise of 12 weeks of medical leave. Because of those representations, Peters was eligible for medical leave, and it was illegal for Gilead to replace him while on such leave:

> *Gilead's handbook does not exclude any employees from the entitlement to 12 weeks of family and medical leave except those who do not meet the basic prerequisites of 12 months' employment with the company and 1,250 hours of work in the preceding 12 months. There is no reason employers cannot offer FMLA-like leave benefits using eligibility requirements less restrictive than those in the FMLA . . . and that is what Gilead did. Peters' statutory ineligibility is irrelevant.*[22]

In other words, because Gilead promised leave, Peters was entitled to rely on that promise and enforce it to the extent that he relied on it to his detriment.

There are two critical lessons for employers from this case:

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[19] *Id.*

[20] *Id.*

[21] 533 F.3d 594 (7th Cir. 2008).

[22] *Id.* at 600.

1. *Triple-check employee handbooks for appropriate disclaimers.* The key to a promissory estoppel claim is that any detrimental reliance was reasonable. A disclaimer in a handbook that tells employees that the handbook is not a contract but a general statement of company policy, that the company has the ability to modify such policy at any time, and that employees are not to rely upon anything in the handbook as binding on the company, would go a long way to showing that an employee's reliance was not reasonable.

2. *Be careful what you tell employees.* The handbook notwithstanding, if you present to an employee that she or he is entitled to a benefit (such as FMLA leave) you better be prepared to stand behind that statement and live up to everything that goes along with it. Before you tell an employee that she or he is covered by the FMLA, it is best to check whether that statement is accurate. That checking may require a 15-minute phone call to your employment counsel. That 15-minute phone call, however, could save your company two years of litigation hell.

How an Employee Requests FMLA Leave

Employees cannot simply take FMLA leave on a whim. They must provide their employers at least some notice, depending on the circumstances. An employee who needs foreseeable FMLA-qualifying leave is required to provide at least verbal notice sufficient to make the employer aware of the need for the leave and its anticipated timing and duration. An employee who needs unforeseeable FMLA-qualifying leave must, as soon as practical, provide sufficient information for the employer to reasonably determine whether the FMLA applies to the leave request.[23]

What happens, though, if an employee fails to give timely notice?

- Foreseeable leave—30 days: When the need for FMLA leave is foreseeable at least 30 days in advance, and the employee fails to provide at least 30 days of advance notice, the employer may delay FMLA coverage until 30 days after the date the employee provides notice. Thus, if an employee should have provided 30 days of notice but only provided 29 days' notice, the employee can delay FMLA coverage for a full 30 days. This section is the most penal.[24]

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[23] 29 C.F.R. § 825.302.

[24] *Id.*

- Foreseeable leave—less than 30 days: When the need for FMLA leave is foreseeable less than 30 days in advance and an employee fails to give notice as soon as practicable under the facts and circumstances, the employer's right to delay FMLA coverage for leave will vary from case to case. For example, if an employee reasonably should have given the employer two weeks of notice but instead only provided one week, then the employer may delay FMLA-protected leave for one week.[25]
- Unforeseeable leave: When the need for FMLA leave is unforeseeable and an employee fails to give notice as soon as practicable under the facts and circumstances, the employer's right to delay FMLA coverage for leave will vary from case to case. For example, if it would have been practicable for an employee to have given the employer notice of the need for leave very soon after the need arises consistent with the employer's policy, but instead the employee provided notice two days after the leave began, then the employer may delay FMLA coverage of the leave by two days.[26]

. Delaying an employee FMLA coverage means that any absences can be considered unexcused. For an employee who fails to give timely notice of a foreseeable FMLA leave, the employee could accumulate enough absences to warrant termination before the FMLA coverage ever kicks in.

While an employee does not have to specifically ask for FMLA leave, the employee does need to provide enough information to enable the employer to determine that the employee can determine that the request is covered by the FMLA. If an employee does not give the employer enough information to know that the leave may be covered by the FMLA, the leave may not be protected. For example, an employee does not have to tell the employer of the specific diagnosis but does need to provide sufficient information indicating that the need for leave is caused by an FMLA-covered condition—e.g., the employee stating that he or she has been to the doctor, has been given antibiotics, and was told to stay home from work for four days.

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[25] *Id.*

[26] 29 C.F.R. § 825.303.

Medical Certifications

The FMLA defines serious health condition as "an illness, injury, impairment, or physical or mental condition that involves . . . continuing treatment by a health care provider." The FMLA's regulations define "incapacity" as the "inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefore, or recovery therefrom." The regulations further define a "serious health condition involving continuing treatment by a health care provider" as requiring a "period of incapacity of more than *three consecutive, full calendar days*."[27]

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1. Some courts hold that an employee's own statements, without any medical support whatsoever, are sufficient to establish incapacitation to support a claim for FMLA leave. One court, for example, even allowed an FMLA claim to proceed when an employee's statements about his health directly contradicted his doctor's note, which permitted him to return to work without restrictions.

2. Other courts hold that an employee can support a claim of incapacity for FMLA-leave purposes with a combination of the employee's own statements in combination with documentation from a health care provider. In *Schaar v. Lehigh Valley Health Servs., Inc.*,[28] for example, the employee supported her claim for an FMLA entitlement with a doctor's note, which said that she was incapacitated for two days, along with her own statements that she was incapacitated for another two days.

3. Both of these views give employees a tremendous amount of latitude to game the system by claiming FMLA-leave that may not be medically supported. If you are fortunate enough to be located in the minority of jurisdiction that subscribe to the most restrictive view—that an employee can establish that he or she was required to be absent from work only upon the production of evidence showing that a health care provider made a professional assessment of his condition and determined, based on that assessment, that an extended absence from work was

[27] 29 C.F.R. § 825.303.

[28] 598 F.3d 156 (3d Cir. 2010).

necessary—you can limit of the game playing in which employees can engage under the less restrictive rules.[29]

Regardless of the legal standard employed in determining whether an employee is "incapacitated" and therefore eligible for FMLA leave, your best defense against potential liability is to use the FMLA's medical certification process to verify the employee's qualification for the statutory leave.

When an employee takes an FMLA leave for his or her own serious health condition or that of a family member, an employer may require that the

FMLA. The certification may

1. The name, address, telephone number, and fax number of the health care provider and type of medical practice/specialization.
2. The approximate date on which the serious health condition began and its probable duration.
3. A statement or description of medical facts regarding the patient's health condition for which FMLA leave is requested. The medical facts must be sufficient to support the need for leave. Such medical facts may include information on symptoms, diagnosis, hospitalization, doctor visits, whether medication has been prescribed, any referrals for evaluation or treatment (physical therapy, for example), or any other regimen of continuing treatment.
4. If the employee is the patient, information to establish that the employee cannot perform the essential functions of the job, the nature of any other work restrictions, and the likely duration of such inability.
5. If the patient is a covered family member with a serious health condition, information to establish that the family member is in need of care and an estimate of the frequency and duration of the leave required to care for the family member.
6. If an employee requests leave on an intermittent or reduced schedule basis for planned medical treatment of the employee's or a covered family member's serious health condition, information to establish the medical necessity for such intermittent or reduced schedule leave and an estimate of the dates and duration of such treatments and any periods of recovery.

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[29] *See, e.g., Olson v. Ohio Edison Co.*, 979 F. Supp. 1159 (N.D. Ohio 1997).

7. If an employee requests leave on an intermittent or reduced schedule basis for the employee's serious health condition (including pregnancy) that may result in unforeseeable episodes of incapacity, information to establish the medical necessity for such intermittent or reduced schedule leave and an estimate of the frequency and duration of the episodes of incapacity

8. If an employee requests leave on an intermittent or reduced schedule basis to care for a covered family member with a serious health condition, a statement that such leave is medically necessary to care for the family member, which can include assisting in the family member's recovery, and an estimate of the frequency and duration of the required leave.[30]

The has published two forms for employers to use for a health care FMLA leave: WH-380-E (for an employee's H-380-F (for a family member's serious . While these forms are optional, the DOL approves their

. In other words, if you're not using these .

What about the recertification of FMLA leaves? The FMLA and its regulations provide answers to this question too. Indeed, asking an employee taking leave under the FMLA to recertify the need for the leave is a powerful tool employers can use to curb FMLA abuse. However, there are specific rules employers must follow to ensure that they are not the one accused of abuse:

- *30-day rule*. Generally, an employer may request recertification no more than once every 30 days and only in connection with an absence by the employee. An employer can never ask for or require a second or third opinion on recertification. It must wait for the next 30-day period to request another recertification.
- *More than 30 days*. If the employee's medical certification shows that the minimum duration of the condition is more than 30 days, an employer must wait for that minimum duration to expire before requesting a recertification. Regardless of the minimum duration, an employer may always request a recertification of a medical condition at least once every six months in connection with an employee's absence.

[30] 29 C.F.R. § 825.303.

- *Less than 30 days*. An employer may request recertification in less than 30 days if:
  - The employee requests an extension of a leave; or
  - Circumstances described by the previous certification have changed significantly (e.g., the duration or frequency of the absence, the nature or severity of the illness, complications); or
  - The employer receives information that casts doubt upon the employee's stated reason for the absence or the continuing validity of the certification (e.g., an employee with a knee injury playing on the company softball team).
- *Timing*. An employer must give the employee at least 15 days to provide the recertification. The employee must meet that deadline to keep his or her FMLA leave, unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts.
- *Content*. The employer may ask for the same information when obtaining recertification as permitted for the original certification. The employee has the same obligations to participate and cooperate in the recertification process as in the initial certification process. Importantly, as part of the information allowed to be obtained on recertification, the employer may provide the health care provider with a record of the employee's absence pattern and ask the health care provider if the serious health condition and need for leave is consistent with such a pattern.
- *Expense*. An employer can require that the employee bear the cost of the recertification.

These certification and recertification rules matter and can result in an legal denial of FMLA leave. For example, in *Poling v. Core Molding Technologies,*[31] the plaintiff, who suffered from Reflex Sympathetic Dystrophy Syndrome, claimed that his employer interfered with his FMLA rights when it terminated him for excessive absences. Poling's problem, however, was that he never adequately completed the FMLA medical certification forms his employer had requested.

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[31] Case No. 2:10-cv-963, 2011 U.S. Dist. LEXIS 66810 (S.D. Ohio June 22, 2011).

That omission was fatal to his claim. (It probably did not help Poling's cause that he had initially called off from work via his Lake Erie vacation home.)

The employer in *Poling*:

- Requested certification in writing the day after Poling's absence.
- Told Poling in writing that "[a]ny absences not qualifying as FMLA will be subject to and recorded according to the attendance policy."

  Gave Poling 15 days to return the certification.

  Provided Poling a second chance when he missed the first 15-day deadline.

  Offered an additional seven days for Poling to cure his late-submitted, deficient certification.

I Poling missed the deadline to cure his certification that the

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What is the line between checking on a sick employee and harassing a sick employee to return to work early? *Terwilliger v. Howard Mem. Hosp.*[32] draws that line in a case that concluded that the employee was entitled to present her FMLA interference claim to a jury.

Regina Terwilliger worked as a housekeeper for Howard Memorial Hospital. On November 14, 2008, Terwilliger completed and submitted an FMLA request for leave for necessary back surgery. After the hospital approved her request, Terwilliger took her leave, underwent surgery, and returned to work after release by her doctor. During her recovery, and before her return to work, Terwilliger claimed that her supervisor, Kim Howard, contacted her weekly to inquire when she was going to return to work. During one phone call, Terwilliger claimed that she asked Howard if her job was in jeopardy, to which Howard replied that she should return to work as soon as possible. According to Terwilliger, she felt pressured by Howard's calls to return to work early.

Terwilliger claimed that the hospital interfered with her statutory right to 12 weeks of FMLA leave by pressuring her to return to work after only 11 weeks. The district court agreed that a jury should decide that claim.

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[32] 770 F. Supp. 2d 980 (W.D. Ark. 2011).

Interference includes discouraging an employee from using FMLA leave . . . as well as manipulation by a covered employer to avoid responsibilities under FMLA. . . . To prove interference, an employee must show that the employer denied his or her benefits to which he or she was entitled under the FMLA.

Defendants argue that, because Plaintiff returned to work after her doctor had released her to return to work without any restrictions, she cannot claim that she was denied a benefit that she was entitled to under the FMLA. Defendants, however, are overlooking the fact that an interference claim includes the "chill theory." . . . Interference occurs when an employer's action deters an employee's exercise of FMLA rights. . . . Here, Plaintiff had a right not to be discouraged from taking FMLA leave. . . . [T]he Court finds that a reasonable jury could conclude that Defendants interfered with Plaintiff's exercise of her FMLA rights by discouraging or chilling her exercise of those rights.[33]

FMLA leaves. But this case is
FMLA has specific
FMLA leaves.

Reasonable Accommodations for Disabilities

The ADA, as amended in 2009, makes it much easier for individuals to demonstrate that they meet the definition of "disability." To have a disability, an individual must be "substantially limited" in performing a "major life activity" as compared to most people in the general population. An impairment need not prevent, or even significantly or severely restrict, the individual's performance of a major life activity. The determination is supposed to be a common-sense assessment based on comparing the individual's ability to perform a specific major life activity with that of most people in the general population. Major life activities include daily functions as well as the operation of major bodily functions (which would include, for example, the respiratory system).

The focus in ADA cases has shifted from the legal argument of whether an employee's medical condition rises the level of an ADA-protected disability, to the factual issue of whether the employer reasonably accommodated that disability. Employers need to be very aware of this change in focus. Managers

[33] *Id,* at 983–984.

and supervisors should be trained in their obligations to engage in the interactive process with employees to determine what reasonable accommodations—if any—can be made to enable the employee to perform the essential functions of the job. Lots more employees will be able to claim the protections of the ADA for lots more medical issues. How managers and supervisors respond to requests for reasonable accommodations will dictate the strength of an employer's position in ADA lawsuits going forward.

Suppose, for example, an employee suffers from sleep apnea, which keeps the employee awake for periods of time at night. In fact, the employee's nighttime

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middle of the workday. When it took her more than five minutes to roust him, she told him that he could resign his employment or be terminated. The employee claims that he said that he had sleep apnea, which causes him to involuntarily fall asleep, although he never requested any type of accommodation. In his resignation letter, he stated that he was disappointed that his employer was unable to accommodate his medical condition.

These are the facts of *Medlin v. Springfield Metro. Hous. Auth.*,[34] a case in which Medlin sued for constructive discharge for a failure to reasonably accommodate his sleep apnea. The court of appeals upheld the dismissal of his claim because he failed to request an accommodation for his disability:

> *Federal courts have recognized that the duty of an employer to make a reasonable accommodation also mandates that the employer interact with an employee in a good faith effort to seek a reasonable accommodation. . . . To show that an employer failed to participate in the interactive process, a disabled employee must demonstrate: 1) the employer knew about the employee's disability; 2) the employee requested accommodations or assistance for his or her disability; 3) the employer did not make a good faith effort to assist the employee in seeking*

[34] 2010-Ohio-3654 (Ohio Ct. App. Aug. 6, 2010).

> *accommodations; and 4) the employee could have been reasonably accommodated but for the employer's lack of good faith.*
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> *As noted, Medlin never asked for reasonable accommodations to accommodate sleeping on the job before being given the option to resign or be terminated. At that time, Medlin did not even suggest what a reasonable accommodation might be; he simply stated in his resignation letter that he was disappointed that SMHA was unable to accommodate his medical condition. SMHA was entitled, however, to terminate Medlin's employment the day before, when he was found asleep in violation of company rules. There is no showing that SMHA failed to act in good faith by giving Medlin the option the following day to resign or be fired for sleeping on the job, particularly when Medlin had never asked for an accommodation. This is not a situation in which an employee was ignorant of his condition. Medlin was aware for many years that he had sleep apnea, and had ample opportunity to bring the issue of accommodation to his employer's attention. Medlin was twice questioned about sleeping on the job, and was specifically informed that he had been observed sleeping by other employees and by board commissioners. Nonetheless, Medlin failed to ask for a reasonable accommodation for his condition.*

How far do you have to go to accommodate an employee's disability? In *Regan v. Faurecia Automotive Seating*[35], the Sixth Circuit provides some boundaries and teaches us a lesson about accommodation best practices.

Alisha Regan—an assembly line worker at Faurecia—suffers from narcolepsy, a sleep disorder that causes excessive sleepiness and frequent daytime sleep attacks. When her supervisor pushed back the start and end times of her shift by an hour, Regan advised that her narcolepsy would make it difficult for her to get to work, as it would push her commute into rush hour, causing longer commute times and a greater likelihood of sleepiness.

When the company refused to allow her to work her original schedule, Regan resigned, noting the "tremendous consequence" the change in work hours would have on her narcolepsy. She then filed suit, claiming that the company's refusal violated the disability discrimination laws.

The court of appeals affirmed the trial court's decision that the ADA does not require an employer to accommodate an employee's commute to and from work:

> *While an employer is required to provide reasonable accommodations that eliminate barriers in the work environment, an employer is not*

[35] 679 F.3d 475 (6th Cir. 2012).

> *required to eliminate those barriers which exist outside the work environment. We find . . . that the Americans with Disabilities Act does not require Faurecia to accommodate Regan's request for a commute during more convenient hours.*

This case is not the only case discussing whether an employer has an obligation to provide a reasonable accommodation for an employee's commute. For example, in *Colwell v. Rite Aid Corp.*,[36] the 3rd Circuit reached the opposite conclusion, finding that an employer must change an employee's work hours if needed to enable a disabled employee to commute to and from work.

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Regan and *Colwell*, this issue is squarely open for interpretation.
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The ADA requires that the employer and employee engage in

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Regan).
D FMLA leave as a prerequisite to the interactive process (as the employer in *Regan* appears to have done).

Each conversation with an employee (which should be documented in his or her confidential medical file) is an opportunity to establish your consideration of the employee's specific needs in light of the specific and essential job requirements. If you legitimately cannot start a production line an hour early to accommodate an employee's commuting schedule request, then so be it. But how can you (and a court) judge the reasonableness of your decision if you never even have the conversation in the first place?

Whose burden is it, however, to propose a reasonable accommodation to account for an employee's disability? According to *Jakubowski v. The Christ Hosp., Inc.*, the burden falls squarely on the employee.

Dr. Martin Jakubowski suffers from Asperger's syndrome, a severe and sustained impairment in social, occupational, or other important areas of functioning, with a marked impairment in the ability to regulate social interaction and communication. Following his diagnosis, the hospital terminated his employment. Before the termination, the hospital met with Dr. Jakubowski to discuss various accommodations for his poor communications skills, all of which he rejected. Because he did not propose another accom-

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[36] 602 F.3d 495 (3d Cir. 2010).

modation, the hospital met its burden to engage in the interactive process, and he could not proceed on his discrimination claim:

> *Jakubowski contends that Christ Hospital did not act in good faith because it did not offer him a remediation program similar to the one offered to the previous, unnamed resident who exhibited similar deficiencies. Importantly, Jakubowski did not request a remediation program at the accommodation meeting with Christ Hospital.*
>
> *Christ Hospital . . . met with Jakubowski to discuss his proposed accommodations, and told him that the hospital lacked sufficient resources to comply. [It] also offered to help him find a pathology residency because it would involve less patient contact. . . . Because Christ Hospital met with Jakubowski, considered his proposed accommodations, informed him why they were unreasonable, offered assistance in finding a new pathology residency, and never hindered the process along the way, we agree that there is no dispute that Christ Hospital participated in the interactive accommodation process in good faith.*

DA does not require an employer to offer a disabled employee the most reasonable accommodation or the employee's preferred accommodation. Instead, it only requires the employer to offer *a* reasonable accommodation, one which enables the employee to perform all of the essential functions of the job. If an employer meets this burden, the employee cannot complain that the employer rejected a proposed accommodation that did not address all essential functions or failed to implement an accommodation that the employee did not propose.

One area of great disagreement between employers and employees is maximum-leave-of-absence policies and reasonable accommodations.

In June 2009, the EEOC held a public meeting on the use of leave as a reasonable accommodation.[37] Opinions differed sharply on whether an employer can satisfy its obligations under the ADA by implementing a neutral leave of absence policy that caps a maximum allowable leave (for example, a policy that says, "Employees who do not return to work following a maximum of six months leave will be presumed to have resigned" or "Employees will be entitled to a maximum of six months of unpaid medical leave in appropriate circumstances, and thereafter the company cannot hold the employee's position open or guarantee a position to which the employee can return").

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[37] U.S. Equal Employment Opportunity Commission, "EEOC to Examine Use of Leave as Reasonable Accomodation," http://www.eeoc.gov/eeoc/meetings/6-8-11/index.cfm, June 8, 2011.

John Hendrickson, an EEOC Regional Attorney[38] who litigated this issue in the high-profile *EEOC v. Sears Roebuck & Co.* case[39] (which resulted in a $6.2 million settlement), offered the following five observations on the EEOC's view of these policies:

1. An inflexible period of disability leave, even if substantial, is not sufficient to satisfy an employer's duty of reasonable accommodation.
2. The appropriate length of leave under the ADA requires an individualized analysis—even when the employer has a generous fixed leave policy.
3. Separating leave administration—like the administration of worker's compensation benefits or disability benefits—from ADA administration is risky for employers.
4. Clear lines of communication regarding reasonable accommodations are critical not only with employees on leave but also with their health care providers, supervisors and managers.
5. The EEOC occupies a unique role in litigating these cases.

M Ellen McLaughlin[40] argued the employer's position:

> *One way employers attempt to control or manage the impact of employee leaves of absence on their business is to institute a neutral maximum leave of absence policy that sets a maximum duration for which an employee can be away from work. . . . The intent of these neutral leave programs is to provide employers with some level of control over their ability to manage their head-count and business operations. Employers know in advance how much time off an employee may take, and can track when an employee approaches that maximum in order to provide it an opportunity to begin planning coverage/ replacement options sooner. . . .*
>
> *The case law is extremely undeveloped on the maximum leave issue, but what exists establishes that a universally applied maximum leave policy is not, per*

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[38] U.S. Equal Employment Opportunity Commission, "Written Testimony of John Hendrickson, Regional Attorney, EEOC," http://www.eeoc.gov/eeoc/meetings/6-8-11/hendrickson.cfm, June 8, 2011.

[39] U.S. Equal Employment Opportunity Commission, "Sears, Roebuck to Pay $6.2 Million for Disability Bias," http://www.eeoc.gov/eeoc/newsroom/release/9-29-09.cfm, September 29, 2009.

[40] U.S. Equal Employment Opportunity Commission, "Written Testimony of Ellen McLaughlin, Partner Seyfarth Shaw LLP," http://www.eeoc.gov/eeoc/meetings/6-8-11/mclaughlin.cfm, June 8, 2011.

se, violative of the ADA. . . . In the midst of this confusion, the EEOC has begun aggressively litigating against employers with neutral maximum leave policies.

I echo Ellen's sentiments that neutral leave policies provide employers the necessary flexibility to run their businesses in the face of leaves of uncertain duration. The EEOC needs to better consider the needs of the business community and provide greater guidance on this issue.

Employers, however, need to be practical and tread very lightly around these issues until the EEOC softens its position. The agency is aggressively pursuing

. Unless you want to end up in the EEOC's crosshairs, I

1. **A**void leave policies that provide a per se maximum amount of leave, after which time an employee loses his or her job.
2. **E**ngage in the interactive process with an employee who needs an extended leave of absence, which includes the gathering of sufficient medical information and a definitive return to work date documented by a medical professional.
3. **I**nvolve your employment counsel to aid in the process of deciding when an extended leave crosses the line from a reasonable accommodation to an undue hardship.
4. **O**pen your workplace to disabled employees to demonstrate to the EEOC, if necessary, that you take your ADA obligations seriously.
5. **You** should document all costs associated with any extended unpaid leaves (modified schedules, added overtime, temporary hires, lost productivity, etc.) to help make your undue hardship argument, if needed.

Remembering "A, E, I, O, and You" will help you avoid the defense of a costly disability discrimination lawsuit.

Because the ADA is expansive enough to cover most medical conditions, most employees with medical conditions will, at some point during their tenure, need a reasonable accommodation. One accommodation that the EEOC considers presumptively reasonable is an unpaid leave of absence, even for employers too small to be covered by the FMLA. If the ADA now covers most employees' medical issues, and the ADA requires an unpaid leave of absence, hasn't the ADA swallowed the FMLA, at least as employee medical leaves are concerned?

In light of this intersection between the ADA and the FMLA, employers should beware the following mistakes:

- Those uncovered by the FMLA should not assume that they never have to provide unpaid leaves to employee.
- Employers covered by the FMLA should not assume that ineligible employees are never eligible for unpaid leaves.
- Employers should not assume that the leave of an FMLA-eligible employee is capped at 12 weeks.

I FMLA employee medical leaves of absence should be determined DA's . Otherwise, you are putting yourself in the crosshairs of A claim.

I DA's regulations specifically provide that an unpaid medical leave .[41] Thus, an employer may still have to FMLA leave, 2) if an employer has fewer than 50 .

The EEOC's Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act[42] provides the following helpful example:

> *An employee with an ADA disability needs 13 weeks of leave for treatment related to the disability. The employee is eligible under the FMLA for 12 weeks of leave (the maximum available), so this period of leave constitutes both FMLA leave and a reasonable accommodation. Under the FMLA, the employer could deny the employee the thirteenth week of leave. But, because the employee is also covered under the ADA, the employer cannot deny the request for the thirteenth week of leave unless it can show undue hardship. The employer may consider the impact on its operations caused by the initial 12-week absence, along with other undue hardship factors.*

No leave must be extended indefinitely, and at some point a leave of absence is going become an undue hardship to the employer and can be ended. When that is, though, is not only going to vary from employer to employer, but also

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[41] 29 C.F.R. § 1630.2(o).

[42] U.S. Equal Employment Opportunity Commission, "Enforcement Guidance : Reasonable Accomodation and Undue Hardship Under the Americans with Disabilities Act," http://www.eeoc.gov/policy/docs/accommodation.html, October 17, 2002.

from employee to employee. Each specific leave of absence must be analyzed on its own merits, case by case. Six months is generally a good rule of thumb to follow, but there are many circumstances where a court could deem six months unreasonably short. The bottom line is to work with the employee and the medical caregiver to determine how long an employee needs to be off work, and make the best efforts, within reason, to accommodate the necessary leave for employees who qualify for protection under the ADA.

Note About Pregnancy

DA. For employers covered by the FMLA, pregnant workers are entitled to
. But what about employers (or employees) that
FMLA's coverage? Do you have an obligation to provide

. The Pregnancy Discrimination Act (PDA) requires
. The PDA requires

other employees based on their ability or inability to work. In other words, the law already requires that employers provide the same accommodations for an expectant worker that you do for any unpregnant employee unable to perform his or her regular job duties.

Have you ever offered light duty to an employee returning from an injury? Have you ever reassigned job functions to assist an injured worker? Unless you are among the tiniest minority of employers that has never had occasion to provide accommodations for any employees' medical issues or injuries, then the PDA already requires you to accommodate your employees' pregnancies.

Moreover, while a run-of-the-mill pregnancy does not qualify as a protected disability under the ADA, medical complications that arise from a pregnancy can qualify. For example, in *Spees v. James Marine, Inc.*,[43] the Sixth Circuit Court of Appeals concluded that an employer "regarded" a pregnant employee as disabled.

Heather Spees was a welder-trainee with JMI. Shortly after her hire, she learned she was pregnant. Her prior pregnancy ended in a miscarriage. Spees talked to her brother (who was also a JMI foreman), her own foreman, and her obstetrician who originally cleared her for work without restrictions.

[43] 617 F.3d 380 (6th Cir. 2010).

Spees's foreman, however, told her to revisit her doctor and get a note for light duty. He thereafter assigned her to the tool room away from her welding duties, telling her, "For right now, we don't know what to do with you." Apparently, Spees's brother and foreman concluded that the risks associated with welding were too dangerous for the pregnant Spees. When another doctor later ordered Spees to full bedrest, JMI terminated her employment for excessive absences. According to Spees, her brother told her that she "was being fired for being pregnant."

The Sixth Circuit resurrected Spees's "regarded as" disabled claim. Although

DA:

> *where they are not part of a "normal" pregnancy. . . . Susceptibility to a miscarriage, moreover, has been deemed by some courts to be such a condition. . . . There thus appears to be a general consensus that an increased risk of having a miscarriage at a minimum constitutes an impairment falling outside the range of a normal pregnancy.*[44]

Another example of a pregnancy-related medical condition for which courts are recognizing the need for employers to accommodate is in vitro fertilization. Indeed, fertility is a very touchy subject. Most people assume that it is easy for a couple that wants to get pregnant to get pregnant. Unless you experienced a prolonged inability to conceive, and the fertility treatments that go along with it, it is difficult to understand the stress it causes. Part of that stress is caused by the time away from work. Fertility treatments, particularly in vitro fertilization (IVF) are both time-consuming and time-sensitive. What happens when a woman undergoing IVF treatments needs time away from work for those treatments? If her company fires her because of her infertility (a gender-neutral condition), does she present a sex discrimination claim? Two recent cases suggest that the answer is yes.

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[44] *Id.* at 396-397.

In *Hall v. Nalco Co.*[45] the Court permitted a woman fired during her IVF treatments to proceed with her Title VII sex discrimination claim. Hall worked as a sales secretary at Nalco. In March 2003, she requested a leave of absence to undergo IVF, which her supervisor, Mary Baldwin, approved. The first IVF cycle failed, and on July 21 she filed for another leave of absence to begin August 18. Around the same time, Baldwin told Hall that their office was merging with another office and that only the secretary from the other office would be retained. Baldwin told Hall her termination "was in [her] best interest due to [her] health condition." Prior to informing Hall of her

Hall had "missed a lot of work
Hall's job
." Dwyer, the secretary

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all alleged she was fired on account of being "a member of a protected class,
." Without reaching the
Hall's claim, the district court granted summary judgment for Nalco
PDA

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The Seventh Circuit disagreed and reinstated Hall's claim. The PDA made clear that discrimination based on a woman's pregnancy, or childbirth and medical conditions related to pregnancy or childbirth, is, on its face, discrimination because of her sex. The Court believed that the district court's reliance on infertility as a gender-neutral condition was misplaced given the facts of Hall's case.

> *Employees terminated for taking time off to undergo IVF—just like those terminated for taking time off to give birth or receive other pregnancy-related care—will always be women. This is necessarily so; IVF is one of several assisted reproductive technologies that involves a surgical impregnation procedure. . . . Thus, contrary to the district court's conclusion, Hall was terminated not for the gender-neutral condition of infertility, but rather for the gender-specific quality of childbearing capacity.*[46]

Moreover, the Court was troubled by the timing and circumstances surrounding Hall's termination:

> *Hall was fired shortly after a failed IVF procedure and just before she was scheduled to undergo a second attempt; her boss, Marv Baldwin, told her that*

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[45] 534 F.3d 644 (7th Cir. 2008).

[46] *Id.* at 648–649.

> *the termination was "in [her] best interest due to [her] health condition." In her notes documenting Hall's termination, Jacqueline Bonin, Nalco's employee-relations manager, wrote that Hall "missed a lot of work due to health," and also noted in a section regarding Hall's job performance, "absenteeism—infertility treatments." This evidence is susceptible of both discriminatory and nondiscriminatory explanations; a jury will have to decide.*[47]

A different federal court, in *Govori v. Goat Fifty, LLC,*[48] reached the same conclusion. In that case, the company fired the plaintiff the day after she advised her supervisors and coworkers that she had begun

ents. In evaluating the pregnancy discrimination claim, *Hall*:

> *The question presented here is whether an employer, having assumed the financial responsibility of salaried employment, can then fire its female employee solely on the basis that she decided to undergo IVF treatments. . . . Accordingly, Govori has stated a cognizable claim for sex-based discrimination under Title VII, as amended by the PDA.*[49]

Pregnancy and pregnancy-related medical procedures (such as IVF) differentiate female employees from their male counterparts. As long an employer is going to permit any employee to take time off for a non pregnancy-related short-term debilitating condition, it must make the same allowance for a female worker's pregnancy-related medical procedures.

Military Leaves

In 1994, Congress enacted USERRA (the Uniformed Services Employment and Reemployment Rights Act) to protect the employment rights of the men and women who serve our country. Although this statute is not litigated as

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[47] *Id.* at 649.

[48] Case No. 10 Civ. 8982, 2011 U.S. Dist. LEXIS 33708 (S.D.N.Y. Mar. 30, 2011).

[49] *Id.* at *8–9.

often as Title VII, it is nevertheless important to employers, especially in light of the number of military personnel returning from Iraq and Afghanistan.

1. USERRA guarantees returning veterans a right of prompt reemployment after military service, provided the employee meets five conditions:
2. The employee must provide the employer notice that the employee intends to take leave for military service.
3. The cumulative length of the employee's service cannot exceed five years.
4. If the leave exceeded 30 days, the employee makes timely reapplication for employment.
5. If the leave exceeded 30 days and upon the employer's request, the employee documents the timeliness of the reapplication and the duration of the leave.
6. The employee's separation from military service was under "honorable conditions."

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that employee in a position the employee might have reached had it not been for the intervening military service, at the level of pay, benefits, seniority, and status commensurate with that position.

What happens, however, if an employee meets these conditions, but the employer has a good faith doubt about the employee's veracity in documenting the leave? Can the employer refuse to reinstate the employee or reinstate the employee to a lesser position while it sorts out its good faith doubt? According to *Petty v. Metropolitan Gov't of Nashville-Davidson Cty.*[50], the right to reinstatement is absolute, and the employer cannot place conditions upon it if the employee meets all of the statutory requirements.

Brian Petty was a patrol sergeant in the Nashville police department prior to his deployment to Iraq. His tour of duty ended prematurely when he was brought up on military charges for bootlegging wine to Kuwaiti natives in exchange for work. In lieu of going forward with a court martial, Petty was permitted to resign "for the good of the service." The Army accepted his resignation and dismissed all charges against him.

Petty had to fill out certain return-to-work paperwork at the Nashville police department. On that paperwork, he disclosed the charges that were brought against him. He was kept out of work, without pay, for a month while the

[50] 538 F.3d 431 (6th Cir. 2008).

police department investigated. It ultimately permitted Petty to return to work, albeit at a lesser position, answering phones and filling out paperwork at a desk. He remained at that desk job while the department continued to investigate the veracity of his representations about his military charges.

The Court ruled that if an employee meets all of the prerequisites for military leave, reinstatement to the same or similar position is mandatory. It is irrelevant if the employer has a good faith doubt in the veracity of return to work paperwork the employee completes.

[51]

Thus, the police department's doubt, in good faith or not, in Petty's veracity about his military criminal history is irrelevant to his return to work.

According to the Court, the employer's intent in not restoring the employee to his prior position is also irrelevant to the reemployment claim:

> *It is important to note that Petty was not required to make any showing of discrimination in order to sustain either of his reemployment claims. . . . Section 4313 states that any "person entitled to reemployment under section 4312" —which we have found Petty to be—"shall be promptly reemployed in a position of employment in accordance with the" order of priority outlined in § 4313(a)(2). Thus, the express terms of § 4313 make its application contingent only on the prerequisites of § 4312, none of which include a showing of discrimination.*[52]

USERRA sets out a clear policy in favor of returning military personnel and their absolute right to reinstatement if they simply meet the bare requirements of the statute. If the employer has a doubt in the employee's veracity, an employer's only option is to reinstate the employee and then terminate after the fact for "just cause" if the employer verifies its doubts.

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[51] *Id.* at 441.

[52] *Id.* at 442 (internal citations omitted).

Religious Accommodations

Title VII requires an employer to reasonably accommodate an employee whose sincerely held religious belief, practice, or observance conflicts with a work requirement, unless doing so would pose an undue hardship. Undue hardship is a low standard. An accommodation would pose an undue hardship if it would cause more than de minimis cost on the operation of the employer's business. Factors relevant to undue hardship may include the type of workplace, the nature of the employee's duties, the identifiable cost of the

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. It is typically considered an undue hardship to impose these changes . However, the reasonable accommodation

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ranting such a request may impose an undue hardship, depending on the nature of the work performed, the employee's duties, and how many employees will need the time off. Employees can agree to move shifts around to cover for those who need the days off, but employers cannot force such scheduling changes.

Indeed, there might be ways around granting a day or two off for an employee to observe a religious holiday, but do you want to risk the inevitable lawsuit? For example, it will be difficult to assert that a day off creates an undue hardship if you have a history of permitting days off for medical reasons.

Legalities aside, however, this issue asks a larger question. What kind of employer do you want to be? Do you want to be a company that promotes tolerance or fosters exclusion? The former will help create the type of environment that not only mitigates against religious discrimination but spills over into the type of behavior that helps prevent unlawful harassment and other liability issues.

Compare the following two examples.

I spent my summer in between high school and college working at Jones of New York. You would be mistaken if you think my job matched the glamour of their clothing. I worked in its fabric warehouse, humping bales of material from the back of semitrailers. I worked with a man by name of Harland. On my third day of work, another coworker pulled me aside and asked, "Has

Harland gotten to you yet?" Pleading ignorance, I answered, "No." That same afternoon, Harland approached me with a handful of pamphlets, all of which offered information about the pending apocalypse. As it turns out, Harland was an interesting fellow. He believed, for example, that the Freemasons ran the world from a secret office on the 36th floor of Rockefeller Center and the Lee Iacocca saved Chrysler by making a pact with the devil. This warehouse was full of colorful characters in addition to Harland, many of whom enjoyed a good practical joke. One such joke, played at Harland's expense, involved a sketch on Harland's work desk of Mr. Iacocca shaking hands with Satan, with Harland, we're watching you!" Harland did not find the joke . For its part, .

Hyatt, who sued P . after it fired him for refusing to wear a sticker with the number .[53] Mr. H

Devil.

S . One can believe that it . And this employer . Yet this employer could have avoided the cost (in legal fees, bad publicity, and a potential settlement or judgment) by simply exempting this employee from the sticker requirement for that one day? Even if this employer was legally in the right in firing this employee sometimes it is just not worth the cost to be right.

Appearance Policies

Appearance policies present a special issue for religious accommodation and discrimination. According to the EEOC, "An employer's reliance on the broad rubric of 'image' to deny a requested religious accommodation may in a given case be tantamount to reliance on customer religious bias (so-called 'customer preference') in violation of Title VII."[54] At least one court has held that granting an exemption to a uniformly applied dress and grooming policy poses an undue hardship.[55]

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[53] Suzanne Lucas, "666 firing: When demanding compliance costs you a fortune," http://www.cbsnews.com/8301-505125_162-57328145/666-firing-when-demanding-compliance-costs-you-a-fortune, November 21, 2011.

[54] U.S. Equal Employment Opportunity Commission, "EEOC Compliance Manual on Religions Discrimination," http://eeoc.gov/policy/docs/religion.html#_Toc203359534, July 22, 2008.

[55] *Cloutier v. Costco Wholesale Corp.*, 390 F. 3d 126 (1st Cir. 2004).

Yet some businesses are hyperfocused on their image and legislate their employees' appearance in every detail. For example, ever since Disneyland opened in 1955, the theme park has maintained a dress and grooming policy for all cast members to maintain uniformity and the suspension of disbelief — known as "The Disney Look."[56] More famously, retailer Abercrombie and Fitch has battled (and lost) with the EEOC over its insistence that female Muslim employees not wear their religion's traditional head garb, the hijab.[57]

The EEOC has also battled a North Carolina Taco Bell franchise over its requirement that an employee cut his hair. The employee, Christopher Abbey,

Nazarite. A Nazarite is one who takes a biblical vow to refrain from wine,

.[58] According to the EEOC[59]:

> *Abbey is a practicing Nazarite who, in accordance with his religious beliefs, has not cut his hair since he was 15 years old. Abbey had worked at a Taco Bell restaurant owned by Family Foods in Fayetteville, N.C., since 2004. Sometime in April 2010, Family Foods informed Abbey, who was 25 at the time, that he had to cut his hair in order to comply with its grooming policy. When Abbey explained that he could not cut his hair because of his religion, the company told Abbey that unless he cut his hair, he could no longer continue to work at the restaurant.*

Ultimately, the EEOC settled this charge for $27,000, coupled with an agreement by the employer to adopt a formal religious accommodation policy and conduct annual training on Title VII and its prohibition against religious discrimination and retaliation in the workplace.

The EEOC continues to take a long, hard look at businesses that fail to accommodate religious practices that cause employees to look (or not look) a certain way. Unless your business can tie employees' appearance to an integral part of the business (safety issues, Disney cast members), you should think (and rethink) about any decision not to accommodate an employee's religiously based appearance or grooming.

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[56] Disney, "The Disney Look," http://profinterns.disneycareers.com/en/working-here/the-disney-look/.

[57] *See, e.g., EEOC v. Abercrombie & Fitch Stores, Inc.*, 798 F. Supp. 2d 1272 (N.D. Okla. 2011).

[58] History's most famous Nazarite is Samson, who famously refused to cut his hair because it was the source of his strength.

[59] U.S. Equal Employment Opportunity Commission, "Taco Bell Owner Sued by EEOC for Religious Discrimination," http://eeoc.gov/eeoc/newsroom/release/7-28-11.cfm, July 28, 2011.

These issues raise more universal questions for employers. Does your workplace have a religious accommodation policy? Do your managers and supervisors know how to accommodate an employee's sincerely held religious beliefs (as long as it does not impose an undue hardship)? Do your managers and supervisors even understand that they have a legal obligation to accommodation employees' religious beliefs? If you answer "no" to any of these questions, you should consider this case a reminder of your religious accommodation obligations under Title VII (and similar state laws). Implement a religious accommodation policy. Train your managers and supervisors on . The EEOC is . Taking these two simple steps will help keep you off the agency's .

Thoughts

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FMLA leave. The supervisor HR or management. Paralyzed out of fear that they will FMLA process that they really don't understand, they approve the A leave with no other questions asked.

Because of a fundamental misunderstanding of the conditions under which employees qualify for FMLA leave, lots of employers overcompensate when dealing with employee medical issues and the FMLA. They overcompensate by mistakenly assuming that any employee with any illness or medical condition is FMLA-eligible. In reality, only an employee with a "serious medical condition" qualifies for FMLA leave.

In reality, you do not have to take an employee at his or her word that he or she needs FMLA leave. Case in point? *Huberty v. Time Warner Entertainment Co.*[60]

Huberty claimed that Time Warner interfered with his rights under the FMLA when it fired him after he asked his supervisor for time off to deal with "stress in his life." Before Huberty found a doctor to certify his medical condition, he began taking time off. Time Warner terminated Huberty for violating its no-call/no-show policy for three consecutive days.

The court dismissed Huberty's FMLA claim, concluding that his own subjective assessment of his health did not satisfy his burden to establish a "serious health condition."

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[60] Case No. 5:10CV2316, 2012 U.S. Dist. LEXIS 15571(N.D. Ohio Feb. 8, 2012).

> *There is an abundance of case law that makes it clear that Huberty's own subjective assessment of his health cannot be used to demonstrate a serious health condition. A colleague on this Court has noted as follows with respect to this burden: "It does not mean that, in the employee's own judgment, he or she should not work, or even that it was uncomfortable or inconvenient for the employee to have to work. Rather, it means that a "health care provider" has determined that, in his or her professional medical judgment, the employee cannot work (or could not have worked) because of the illness. If it were otherwise, a note from a spouse, parent, or even one's own claim that one cannot work because of illness would suffice. Given the legislative history surrounding its enactment, the FMLA cannot be understood to establish such liberal standards for its application."*[61]

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. Despite these deep shades of gray, however, accommodations

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- An employee asks for FMLA leave? Ask them how much time off is needed.
- An employee requests an accommodation for a medical condition? Talk to them about with what they need assistance and how you can aid in the performance of the essential functions of their job.
- An employee asks for a religious accommodation? Can you make the accommodation without causing too much upset and turmoil to your workplace and workforce?

The bottom line for any of these issues is communication. Too many employers fear this communication because they do not understand the legal issues and fear the unknown. These legal issues do not, however, have to be feared. All you need to do is talk to your employees. The ADA speaks of an "interactive process." That phrase is not lip service. It means what it says. Engage your employees in the process of accommodating their requests, and most of the legal problems will fall by the wayside.

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[61] *Id.* at *9-10 (quoting *Olsen v. Ohio Edison Co.*, 979 F.Supp. 1159, 1166 (N.D.Ohio 1997) (citation omitted)).

CHAPTER

10

The Right to

According to a 2012 survey, 79% of Americans believe that removing confidential files from the office is grounds for termination.[1] Yet 90% of employees think that their brethren do it anyway.

According to the same survey, what is the most popular method of removing information? Exporting it to a USB drive.

How about the answer to the question, "When is it acceptable to remove confidential company information out of the office?" From the same survey:

- 48%—When the boss says it's okay
- 32%—To finish a late night project from home
- 30%—To work over the weekend or while on vacation
- 16%—When the confidential information is about themselves
- 2%—When it can be brought back to the office before the boss knows it was gone

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[1] FileTrek, "FileTrek Survey: 90% of American Adults Believe People Share Company Confidential Information Outside the Company," http://filetrek.com/press/2012/03/filetrek-survey-90-percent-of-adults-believe-people-share-company-confidential-information-outside-the-company, March 20, 2012.

- 2%—To show something to family or friends who promise to keep it confidential
- 40%—Never

What is the answer to this cavalier attitude today's employees hold toward the confidentiality of your corporate secrets and other information? A clear set of policies and agreements that prioritize confidentiality. You need to establish the expectations within your organization that you take confidentiality seriously and that those who do not should not expect to remain employed. Y

. Otherwise, the agreements are not worth the paper on

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The niform Trade Secret Act (UTSA) defines trade secrets as "information,

from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."[2]

Most courts use some variation of the following six factors to determine whether something qualifies as a trade secret

1. The extent to which the information is known outside of the business
2. The extent to which it is known by employees and others involved in the business
3. The extent of measures taken by the employer to guard the secrecy of the information
4. The value of the information to the employer and to its competitors
5. The amount of effort or money expended by the employer to develop the information

[2] *See, e.g.,* O.R.C. § 1333.61(D)(1)-(2).

6. The ease or difficulty with which others could develop or duplicate the information[3]

Some common categories of trade secrets include the following:

- Customer lists and other customer-related data, if it is not readily ascertainable from publicly available sources[4]
- Business information such as pricing, marketing plans, and business strategies, if they contain something extra worthy of protection, such as expertise used in generating the information[5]
- Technological information[6]
- Computer programs[7]

Trade Secret, on't Publish It

. *Rogers Indus. Prods. v. HF Rubber Machinery*[8] serves as a good . Rogers alleged that the various defendants had used confidential information about its tire-curing press to copy the unique design of its system. Rogers's problem was that it had publicly disclosed its press design in a patent application before the alleged trade secret theft. The court concluded there is no trade secret protection for confidential information that is disclosed in

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[3] *See, e.g., Tewari De-Ox Systems v. Mountain States/Rosen*, 637 F.3d 604 (5th Cir. 2011).

[4] *Compare Home Pride Foods, Inc. v. Johnson,* 634 N.W.2d 774 (Neb. 2001) (customer list, which contained information on customers who previously placed orders and the amounts of those orders, was a "trade secret"), and *ATC Distribution Group, Inc. v. Whatever It Takes Transmissions & Parts*, 402 F.3d 700 (6th Cir. 2005) (customer lists were not trade secrets, because the names of customers could have been discovered from telephone book or similar legitimate sources).

[5] *Compare Amoco Production Co. v. Laird*, 622 N.E.2d 912, 920-21 (Ind. 1993) (business plan for drilling based on information developed by sophisticated technology is a trade secret) and *Care v. Service Systems Enterprises, Inc.*, 982 F.2d 1063, 1071-75 (7th Cir. 1992) (marketing and service strategy was not a trade secret, as it was either sufficiently obvious or easily duplicated).

[6] *See Vermont Microsystems, Inc. v. Autodesk, Inc.,* 88 F.3d 142 (2nd Cir. 1996) (protecting computer architecture and algorithms).

[7] *See, e.g., See Liberty Am. Ins. Group, Inc. v. Westpoint Underwriters, L.L.C.*, 199 F. Supp. 2d 1271, 1302 (M.D. Fla. 2001) (concluding that the plaintiff's insurance rating software, including its source code, qualified as a protected trade secret).

[8] Case No. 25093, 2010-Ohio-3388 (Ohio Ct. App. July 21, 2010).

a published patent application but that a factual issue existed as to whether the patent application disclosed the specific trade secret at issue.

Aside from not publishing trade secrets in patent applications (or other public documents), what other practices should your company should be deploying to protect its trade secrets?

So, How Do You Protect a Trade Secret?

There is no hard and fast rule on how to protect a trade secret and keep it, well, secret. There are, however, some general tips you can follow to keep

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1. Require all employees who have access to confidential information to sign confidentiality agreements.
2. Restrict the dissemination of confidential material on a need-to-know basis.
3. Label all confidential information as "confidential."
4. Secure the information: physically behind lock-and-key or electronically behind passwords; routinely change these locks and passwords.
5. Engage in routine security audits, and follow the advice that they generate.
6. Establish a document destruction protocol, and follow it.
7. Create a procedure to recover confidential documents from vendors or other third parties.
8. When a dispute arises over the confidentiality or security of information or data, sue.

Protecting Confidences or Stifling Competition? Drafting and Enforcing the Noncompetition Agreement

Agreements that restrict competition typically come in the following three flavors:

- *Noncompetition agreements*. An agreement in which the employee promises, both during the employment relationship and for a period after it terminates, not to compete against the employer.
- *Nonsolicitation agreements*. An agreement in which the employee promises, both during the employment relationship and for a period of time after it terminates, not to solicit the employer's customers or employees for a competing entity or purpose.
- *Nondisclosure and invention agreements*. An agreement in which the employee promises not to divulge confidential information and trade secrets and promises intellectual property rights in any inventions to the employer.

easonableness of Time

For what post-employment length of time an employer can try to limit an employee's ability to compete will depend on the facts and circumstances of each employee. The reasonableness of a temporal restriction will depend on factors such as the nature of the position, the amount of time necessary to find and train a replacement, and the amount of time necessary for the employee's customers to rebuild goodwill.[9]

Note: Whether a court will "blue pencil" an unreasonable noncompetition agreement will depend on the law of your particular jurisdiction. "Blue penciling" is the rewriting of an unenforceable agreement such that it become reasonable and enforceable. For example, if you are trying to enforce a three-year noncompetition agreement in a jurisdiction that permits court to blue pencil, the court will rewrite the temporal limit such that it becomes reasonable under the facts and circumstances of your case. If, however, your jurisdiction does not permit blue-penciling by the courts, then the unreasonably long time limit would render the entire noncompetition agreement invalid and unenforceable.

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[9] *See, e.g., Klick v. Crosstown State Bank of Ham Lake*, 372 N.W.2d 85 (Minn. Ct. App. 1985).

Geographical Reasonableness

In analyzing the relative strengths and weaknesses of the geographical limitations of your noncompetition agreement, you should consider:

- What territory does your business cover?
- What territory did the employee cover for you?
- In what territory does the covenant bar the employee?

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. Courts do not like imposing nationwide restrictions on . In examining the reasonableness of the

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Employer

Protect

N . They protect employer's trade secrets and other confidential and proprietary information, customers, goodwill, and special training and skills your employees acquire at your expense. But not every employee is worthy of locking down with such an agreement.

For example, consider *Mark Philips Salon & Spa v. Blessing*.[10] The employer of a hair salon hired Blessing as a stylist. Blessing signed a noncompetition agreement on her first day of employment. When she resigned to accept a position at a competing salon less than five miles away, her former employer sued her. Even though Blessing admitted that she violated the agreement by soliciting former customers, the court of appeals concluded that it was unreasonable for the salon to enforce the agreement against her:

> *Blessing testified that she was an experienced hair dresser and had worked for two other salons previous to her employment with MPS. Blessing brought approximately thirty clients with her to MPS, and while there she acquired approximately twenty more. Blessing testified that virtually all of her clients are obtained through referrals from other clients, and there is no evidence that MPS did anything that benefitted Blessing in obtaining any of her clients. Blessing also testified that MPS gave her no particular training or skill that she uses. . . . Blessing testified that after she left MPS she created a list of all her former clients "from my brain, from my knowledge." There is no evidence that*

[10] Case No. 23875, 2011-Ohio-388 (Ohio Ct. App. Jan. 28, 2011).

> *she obtained that information from a database or list maintained by MPS. By engaging in competition with MPS as she has, and especially by mailing solicitations to clients she obtained while employed by MPS, Blessing violated her agreement with MPS in those respects. However, on this record there is nothing in the competition with MPS in which Blessing has engaged that makes it unfair. Blessing uses no trade secrets or competitive advantages she obtained from MPS. The competition MPS seeks to prevent is merely ordinary competition. Therefore, the covenant not to compete cannot be enforced.*[11]

What lessons can employers learn from this case? Noncompetition agreements
. Employers,

. And, if there is no such
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For example:

- Trade secrets and confidences.[12]
- Customers and goodwill.[13]
- Employees whose services are unique, special, or extraordinary. An employer cannot use a noncompetition agreement to annex an employee's special abilities. If, however, the employer provided special training that enabled the employee to acquire the unique skills, courts are more willing to enforce the agreement on that interest alone.[14]

Timing of the Agreement

When do you provide a noncompetition agreement to an employee to sign? At the time of hire? During employment? As part of a severance package? There is a practical answer to this question. It is much more likely that an employee will sign an agreement on the way in the door to secure a job, or during employment to keep a job, than on the way out when they have little to gain other than some severance pay. Even if the employee values severance, the amount likely will not equate to the duration of the restriction. Indeed, the well-connected or valuable employee that you would like to restrict will

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[11] *Id.*

[12] *See Procter & Gamble Co. v. Stoneham*, 747 NE 2d 268 (Ohio Ct. App. 2000).

[13] *See Medtronic, Inc. v. Advanced Bionics Corp.*, 630 N.W.2d 438 (Minn. Ct. App. 2001).

[14] *See Picker Intern., Inc. v. Blanton*, 756 F. Supp. 971 (N.D. Tex. 1990).

likely have little problem finding substitute employment (or already has it lined up) and therefore has little incentive to sign the separation agreement.

Aside from these practicalities, there is a significant legal reason that often dictates the timing of the execution of these agreements. This issue is whether continued employment is sufficient consideration for the agreement.

■ **Definition:** *Consideration* is a legal concept that helps determine whether a contract is valid, binding, and enforceable. Every contract must be supported by adequate consideration. According

[15]

If an employee is at-will, the question arises as to whether a promise of

. Courts reach opposite answers to
. Therefore, your ability to require current employees to execute

.

■ **Note:** The state in which your business operates, or in which the employee bound by a noncompetition agreement performs work, does not always dictate the law under which a court will interpret the agreement. With some limitations, parties are free to select the law of any state for application to a particular agreement. Because that choice of law can be dispositive in later litigation, it is an important, and sometimes overlooked, aspect of drafting any agreement.

If your agreement is governed by the law of Minnesota, North Carolina, Pennsylvania, South Carolina, Texas, Washington, West Virginia, Wisconsin, or Wyoming, continued at-will employment, in and of itself, is not adequate consideration to support a noncompetition agreement. To have an enforceable agreement signed during employment, you will have to provide some added inducement for the employee's signature (a bonus, a raise, extra vacation days, etc.). If you are under any other state's law (provided noncompetition agreements are enforced under that state's law to begin with), continued employment is likely to support the intra-employment execution of a noncompetition agreement.

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[15] Black's Law Dictionary 306 (6th ed. 1990).

Garden-Leave Contracts: A Reasonable Alternative to Noncompetition Agreements

There is nothing more frustrating for a company than a court refusing to enforce a noncompetition agreement, permitting an employee to work for a competitor. Courts have been historically skeptical about the enforcement of such agreements. In today's economy it has become even more difficult to enforce them. Judges simply do not want to enjoin a family's breadwinner from working. At best, the enforcement of even the most narrowly drafted

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garden-leave contract.

UK. It describes the practice

UK

. A typical garden-leave contract requires a lengthy advance notice of resignation, prohibits certain competitive activities during the notice period, and requires that the employee be sent home but still get paid his or her full salary and benefits during the notice period. Alternatively, employers can modify a traditional noncompetition agreement to provide pay during the employee's time on the sidelines. The latter, however, carries greater risk as it would still be subject to the same analysis as a traditional noncompetition agreement, albeit with less impact on the employee.

Provided that an employee has enough value, garden-leave clauses provide many of the same benefits as a traditional noncompetition agreement—the employer is provided time to replace the departing employee, delay competition by the departing employee, cultivate relationships with clients and customers, and maintain good will. Also, because the employee remains an employee during the paid notice period, concepts like the duty of loyalty (which prohibits solicitations of customers and other employees, as well as the misuse of confidential information) remain in place and protect the employer.

Consider garden-leave contracts. They are cost-effective, at least as compared to the price of enforcing a noncompetition agreement, and a potentially less risky avenue to obtain the same goals.

Common Law Noncompetition Covenants: The Duty of Loyalty

Even without a noncompetition agreement, an employee cannot serve two masters at the same time. While in your employ, an employee has an absolute duty to act in your best interest and not to act in the interest of anyone else that is contrary to yours.

Indeed, in almost all states, all employees owe their employer what is called a "duty of loyalty"—which, in the words of one court, means "a duty to act in ."[16] According
. . . employee is prohibited from acting in a manner
. . . employment and is bound to exercise the utmost
."[17]

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of action is as follows:

1. Call your attorney.
2. At a minimum, suspend the employee pending an investigation, which should also include suspension of all computer and network access.
3. Upon confirmation of the competition, convert the suspension to a termination.
4. Consider legal action depending upon the scope of the competition and the harm caused.

Hiring and Firing

Do you know how to guard against the unsuspecting acquisition of trade secrets or a breach of a noncompetition agreement when hiring an employee away from a competitor? Do you know how to secure your information and guard against an ex-employee stealing confidences or breaching an agreement on the way out the door?

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[16] *AK Steel Corp. v. Earley*, 809 F.Supp.2d 1326, 1340 (S.D. Ala. 2011).

[17] *Staffilino Chevrolet, Inc. v. Balk*, 813 N.E.2d 940, 951 (Ohio Ct. App. 2004).

How to Limit Liability When Hiring a New Employee

- Ask all applicants whether they have signed, or are otherwise subject to, any type of restrictive covenant or confidentiality agreements, if they had access to customer lists or any other data that would be considered confidential or proprietary, if they took any information with them, accessed any information after their departure, or had any information sent to them.
- Have counsel review all agreements before extending an offer of employment for scope, enforceability, and potential risk.
- Provide written instruction to the applicant warning him or her not to take or retain any type of information, in any form whatsoever, even arguably belonging to his or her ex-employer, and that he or she should not disclose or use any confidential information of his or her former employer. Be careful not to unwittingly obtain anything belonging to the former company.
- Caution against contact with others. Even without a noncompetition agreement, contact with customers of the ex-employer could raise suspicions, and put your hire on a radar on which he or she otherwise might not appear. After the candidate's formal departure, you can discuss and develop a scripted message for him or her to reach out to former customers, business contacts, and coworkers.
- Consider "buying out" any existing restrictive covenant, to obtain a release of potential claims and avoid expensive and protracted litigation. If you receive a "cease and desist" letter from the ex-employer, do not ignore it. It presents an excellent opportunity to talk resolution.
- Determine the risk of litigation by the former employer: does it have a history of litigation, will the new hire compete directly, have you hired other employees away from the same competitor, will the employee be in a position to use confidential information, and are you incenting the new hire (e.g., commissions or bonuses) to poach business from his or her ex-employer?

- Think about whether the candidate needs separate counsel. The agreement will bind the hire, not your company, but each has its own set of legal risks that often become intertwined. If you value the hire enough, you could decide to foot the legal bill and even indemnify the candidate for any losses incurred as a result of future litigation.

How to Protect Yourself from a Departing Employee

Manage the terms of the departure. Do you want to accept the resignation (and any offer of a notice period) or reject the resignation and walk the departing candidate out the door immediately? Your answer will depend on your relationship with the employee, his or her position within the company and access to information, and your fear that the employee will siphon information, documents, customers, or other employees.

Remind about agreements and other legal obligations. If the employee is under any kind of restrictive covenant, now is the time to remind the employee of those obligations, in writing, along with providing the employee with a copy of any agreements. Even if the employee lacks an agreement, however, you can still remind the employee what a "trade secret" is and how the law prohibits its misuse. As soon as you learn the identity of the new employer, you should send a copy of the agreement, and, if necessary, ask that company to halt its hiring (with a "cease and desist" letter).

- Weave notions of competition into your exit interview. Ask the employee about the company he or she is joining, whether he or she has talked to any coworkers about joining, whether the employee has solicited any customers or employees for the new company, and whether the employee knows if any other employees or any customers are also planning on leaving. The employee might not answer honestly, but, nothing ventured, nothing gained. Moreover, any lies the employee tells will be helpful ammunition in later litigation.
- Preserve and investigate, but do it the right way. It is crucial for any company that is concerned about a departing employee to take steps not only to preserve its confidential information but also any potential evidence for future

litigation. Retain or recover, as soon as possible, all files and other property that belongs to you. This retention and recovery includes all electronic devices of any nature—laptop and desktop computers, mobile devices, portable storage (stick drives, portable hard drives, and cloud storage), and email accounts. Resist the urge to search devices yourself. Careless searches can destroy valuable metadata that you will need in later litigation. Instead, either take the equipment offline and lock it down in a secure place, or retain a credible computer forensics vendor to conduct the searches the right way. What are you looking for? Evidence that the employee deleted (or tried to delete) data, evidence that the employee installed software to "wipe" information from the device, communications with third parties about future plans, or solicitations of coworkers or customers.

- Search your email system for any relevant information. You would be surprised how many employees use their work email accounts to communicate plans and formulate strategies with a competitor.
- Talk to remaining employees to determine what they saw and heard and what they know about the circumstances surrounding the departure. They will also be able to tell you if they were solicited to leave.
- You could also talk to customers and vendors to determine if any of them were solicited, but many employers are rightfully wary about drawing their business relationships into litigation. This business decision will have to be made on a case-by-case basis.

Concluding Thoughts: The Expanding World of Protecting Confidences

Noah Kravitz worked for a company called PhoneDog—a website dedicated to reviewing mobile devices. Among his other job duties, Noah Kravitz was responsible for maintaining PhoneDog's official Twitter account, which he did under the handle @PhoneDogNoah. As @PhoneDogNoah, Noah Kravitz amassed more than 17,000 followers.[18]

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[18] These facts are taken from PhoneDog v. Kravitz, Case No. C 11-03474 MEJ, 2011 U.S. Dist. LEXIS 129229 (N.D. Cal. Nov. 8, 2011).

Then, he decided to leave the company. And, he took @PhoneDogNoah with him. He not only changed the password, so that no one at PhoneDog could access the account, he changed the entire account. @PhoneDogNoah became @NoahKravitz.

In the litigation that followed (were you expecting anything else?), PhoneDog not only claimed that Noah Kravitz unlawfully took control of its Twitter account, but also that the 17,000-plus followers that went along with it were its trade secrets.

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. Put things in writing. PhoneDog's biggest sin was
Noah Kravitz. Instead of reducing his

PhoneDog is leaving it up to a court to
NoahKravitz (nee @PhoneDogNoah) and the relationship
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. Thus, for example, an employee hired to manage a business's social media will have much less of claim over these relations than will an employee who uses social media to foster personal relationships with coworkers, customers, and vendors. Salespeople—who might use LinkedIn to manage business contacts, or Facebook and Twitter to promote their companies and products—present a much grayer issue.

Because shades of gray lead to unpredictability, you should plan for these uncertainties by reaching agreements with your employees—up front and in a social media policy—on how social media ownership will be handled at the end of employment.

In other words, why take a risk that an employee can challenge ownership rights to a social media account? If you have employees using corporate-branded or other official social media accounts, require them to sign an agreement as a condition of their employment that says the following:

1. The company, and not the employee, owns the social media account.
2. The account must be registered in the name of the employer, not that of the employee.
3. All social media accounts, including login information and passwords, must be relinquished at the end of employment.

CHAPTER

11

The Right to Be

Without feelings of respect, what is there to distinguish men from beasts?

—Confucius[1]

Why do employees sue? I often think about this question. More often than not, it comes down to respect. Employees sue when they feel disrespected or when they perceive unfair treatment. Yet, it is not simply enough for an employer to treat employees well during their tenure. Employers should also strive to treat employees well in conjunction with their terminations and even thereafter.

If you do not want to be sued, for example, do not make a terminated employee feel like a common criminal by having security escort them to the door (unless you legitimately and reasonably perceive a safety risk). It is okay not to give a glowing recommendation to a marginal ex-employee, but resist the urge to trash him or her to a prospective employer. Do not fight unemployment except in the most clear-cut cases. These little things could go a long way in helping an ex-employee reach the decision to let bygones be bygones and not to see you in court.

Consider the following examples.

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[1] QuotationsBook, "Respectability," http://quotationsbook.com/quote/34122.

At the conclusion of a day-long plaintiff's deposition in an FMLA and disability discrimination lawsuit, it was clear to me that my client had not only not violated any laws but had bent over backwards to do everything possible to accommodate the plaintiff. The company had treated this employee so well during her employment that I asked a question that I had never asked in any other deposition—why are you suing?

> *It seems to me that they treated you fairly. They gave you an initial medical leave of more than 12 weeks; they provided you every accommodation you requested for your medical conditions; they provided you a second medical leave of more than 12 weeks; and you received several raises during your employment. Why are you suing this company?*

. Her answer:
Even though the case ended in the

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Or consider the following story about an Iowa convenience store:[2]

> *A Bettendorf [Iowa] businessman, branded as the "boss from hell" by some of his employees, offered prizes to workers who could predict which of them would next be fired. . . . William Ernst, the owner of a Bettendorf-based chain of convenience stores called QC Mart, sent all of his employees a memo in March, outlining a contest in which the workers were encouraged to participate. The memo read: "New Contest—Guess The Next Cashier Who Will Be Fired!!! . . . To win our game, write on a piece of paper the name of the next cashier you believe will be fired. If the name in your envelope has the right answer, you will win $10 CASH."*

An administrative law judge sided with an ex-employee in her unemployment hearing, writing about the "egregious and deplorable" contest: "The employer's actions have clearly created a hostile work environment by suggesting its

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[2] Gawker, "'Guess the Next Cashier to Be Fired!' Contest Unpopular With Cashiers," http://gawker.com/5845894/guess-the-next-cashier-to-be-fired-contest-unpopular-with-cashiers, October 2, 2011.

employees turn on each other for a minimal monetary prize. . . . This was an intolerable and detrimental work environment."[3]

Or consider the case of *Gaskins v. Mentor Network-REM*.[4] The company's cardinal sin in terminating Joyce Gaskins that led to the filing of her lawsuit was that it notified her of her termination by voicemail. In short order, the court of appeals affirmed the trial court's dismissal of Gaskins's claim for intentional infliction of emotional distress:

> *Gaskins's intentional infliction of emotional distress claim is based on the fact that REM terminated her via voicemail, which she argues is not standard procedure. This is simply not the sort of outrageous or egregious behavior contemplated for this intentional tort.*

illegal about terminating an employee by voicemail, Facebook, Twitter, or the like. But, as this case

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o matter the ills that led to Gaskins's termination, she deserved to be told . Treating an employee poorly at termination might not

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There is nothing easy about the communication of a firing. I have had to fire people. It is the worst part of my job. It is also part of what you sign up for when you assume a management role. But, as uncomfortable as it is to tell someone they are losing a job, it is exponentially more difficult to be on the receiving end of that news. Do the right thing by your employees and provide them the courtesy of delivering the news in person, no matter the circumstances, and otherwise treating them with the respect with which you would want to be treated if the proverbial shoe was on the other foot.

Responsibility, Where Have You Gone?

These issues of respect, however, become difficult when employees do not respect you back. One area where businesses feel disrespected is in the arena of personal responsibility. No one wants to take responsibility for the acts that lead to a failed promotion, a missed raise or bonus, or, worse yet, job loss.

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[3] *Id.*

[4] *Gaskins v. Mentor Network-REM*, 2010-Ohio-4676 (Ohio Ct. App. Sept. 30, 2010).

This example, while not from an employment case, nevertheless helps drive home this point.

A woman in California filed a class-action lawsuit against McDonald's, which the federal court later dismissed.[5] She claimed that McDonald's tempts kids to eat unhealthily by promoting their fattening food with Happy Meal toys. I know you may find this hard to believe, but, yes, if parents feed their kids *too many* Happy Meals, they may get fat. Is it just the cheap cardboard box and tchotchke toys that tempts families to eat unhealthily, or does the obesity result from parents that are either too busy or too lazy to feed their kids

Or do parents who permit their children to lounge around the

Yes, too

. But not only is it not the only reason kids

I would venture to guess it is not the main reason

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H . I once defended a

. He claimed she was disgruntled after being fired (likely true) and

around the company. Comfortable with his story, confirmed by everyone else at the company and via computer forensics, we denied the allegations in the company's statement of position in response to her EEOC charge. We denied them again in answering her complaint and again in responding to her discovery requests. When the lawyer kept harping on these denials at the company president's deposition, my "Spidey sense" started to tingle. When her lawyer pulled out a closed manila envelope and asked the court reporter to mark it as an exhibit, I started to sweat. When the company president opened the envelope, I knew the case was over. Inside, were seven photographs of the company president, naked in a hot tub with two women of ill repute who shared his state of undress. The case settled shortly thereafter, for a lot more than it was probably worth—all because the company president refused to accept responsibility for a critical lapse in judgment.

We have become a society that refuses to accept responsibilities for our faults. I see it all the time in employment cases. The insubordinate employee is convinced that her race/sex/age/disability was the reason behind her termination. The chronically late employee is convinced that he is being retaliated against despite his unreliability. The overly sensitive employee shrieks that one harmless email is a pattern and practice of lascivious

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[5] Reuters, «UPDATE 1–Judge tosses Happy Meal lawsuit against McDonald's,» http://www.reuters.com/article/2012/04/04/mcdonalds-lawsuit-idUSL2E8F4CX92 0120404, April 4, 2012.

harassment. One theme that resonates repeatedly in cases I defend is a refusal to accept responsibility. Yes, employers do discriminate, retaliate, and harass. More often than not, however, businesses simply try to do right by their employees. Yet, if you believe all of the lawsuits that are filed, corporate America is one giant group of bigots, and employees are never responsible for their own unemployment.

■ **Note:** Take responsibility for your actions—whether you are employer or employee.

Discourse

I consider the degradation of
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I attended Ohio State's graduation. Upon arriving at the
I stopped to ask a traffic-directing
I could turn in for disabled parking for my in-laws. He asked to see the
. The cop followed

"Do you see that little hole at the top? That's so you can hang it from your mirror so I can see it and don't have to ask you for it." That is 26 more words than it would have taken him simply to say, "Thank you sir. Turn here."

I read an article in the *New York Times* about the decreased level of civility in our society and its effect on the workplace.[6] The writer's thesis is that technology has caused a decline in civility over the last 10 years, which, in turn, has negatively affected the workplace:

> *[A]s we're all aware, the 21st century has brought with it new variations on rudeness. Answering texts during a luncheon. Tapping on BlackBerrys instead of listening to a speaker—or a child's recital. Shooting off hostile e-mail anonymously. But is this decline in manners real? And when considering this, should we separate the outward symbols of politeness from general civility? It's a complicated but important issue that has a surprising economic impact.*

The article also discusses a book written by Christine Pearson, a professor of management at Thunderbird School of Global Management in Arizona, entitled, *The Cost of Bad Behavior: How Incivility Is Damaging Your Business and What to Do About It.* Professor Pearson researched 9,000 managers and

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[6] Alina Tugend, "Incivility Can Have Costs Beyond Hurt Feelings," http://www .nytimes. com/2010/11/20/your-money/20shortcuts.html?_r=1&pagewanted=all, November 19, 2010.

workers and concluded that incivility is rampant on the job. She cited examples such as rudeness, ignoring requests for help, ignoring a colleague passing in the hall, gossiping behind colleagues' backs, and borrowing supplies without asking.[7]

From these parables, I can draw three lessons for employers:

1. *Social media has downgraded the level of discourse in our society*. One out of every four Internet pageviews in the United States occurs on Facebook.[8] It is not a stretch to conclude that this increased connectedness and familiarity with each other has led to more informality and less civility. The ability to communicate in 140-character bursts does not require truncated discourse.
2. *It often takes a lot more effort to be an ass than it does to be nice*. The next time you feel bothered by something an innocently intentioned employee says or does, think of which response will more likely result in resentment and division—emotions that lead employees to sue or form unions. And then rethink your response.
3. *Whether incivility is a real workplace problem or not, it cannot hurt to try to be a little nicer to each other*. Behavior models start at the top. If an organization is run by intimidation and scare tactics, then it should come as no surprise when managers and supervisors think they need to motivate their teams by yelling, harassing, sniping, and snubbing. It should also come as no surprise when employees respond with the incivility of litigation.

Concluding Thoughts: The Golden Rule of Employee Relations

On April 4, 2006, Jerry Romans received a call at work from his sister, who told him that his terminally ill mother was unlikely to survive the night, and decisions needed to be made about whether to keep her on life support. Prior, Romans had submitted paperwork to his employer certifying that he was a health care provider and power of attorney for his mother. He intended to go to the hospital immediately after his shift, which was scheduled to end at 11 P.M. His employer, however, told him to work a double shift to cover for an employee on the next shift who had called in sick. Romans told his

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[7] *Id.*

[8] Jolie O'Dell, "Facebook Accounts for 25% of All U.S. Pageviews," http://mashable.com/2010/11/19/facebook-traffic-stats/, November 19, 2010.

supervisor, "I'm not staying. My mom's dying. I'm leaving." The supervisor responded, "I'll have you fired if you leave." Romans nevertheless punched out, left the facility, and drove to the hospital.

In his subsequent lawsuit, Romans challenged that the one-day suspension he received for "leaving the facility and abandoning his shift" violated the FMLA. In *Romans v. Michigan Dep't of Human Servs.*,[9] the court agreed. It pointed out that the FMLA's regulations provide that an employee who is "needed to care for" a family member is entitled to FMLA leave. That "care" can be either psychological comfort or physical care and includes arrangements for changes

. The Sixth Circuit concluded that "a decision regarding whether an ill

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FMLA, the court added: "To be sure, this is

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uch too often, we—as lawyers, business owners, HR professionals, and the

. When we focus too much on the legalities of a personnel decision, we risk losing focus on the humanity of the situation. This case illustrates that 1) the law, every now and again, lets employers make humane personnel decisions, and 2) bad things happen when businesses ignore what I call "The Golden Rule of Employment Relations."

The Golden Rule of Employment Law states: "Treat your employees as you would want (or as you would want your wife, children, parents, etc.) to be treated." If you follow this rule, you will insulate yourself from *most* employment lawsuits. Most would never be filed, and you would win most that are filed.

■ **Corollary**: Of course, the corollary to my Golden Rule is that any employee can sue any employer at any time and for any reason.

Think of it this way. Juries are comprised of many more employees than employers. Jurors will empathize with the plaintiff in most cases. Yet, if jurors feel that you treated the plaintiff the same way the jurors would want to be treated in the same circumstances, the jury will be much less likely to find in the employee's favor.

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[9] 668 F.3d 826 (6th Cir. 2012).

Epilogue: Lessons from Children's Literature

Believe it or not, I do not practice law around the clock (although it often feels like I do). Like most people with small children, when asked about my hobbies, I struggle for a response. That struggle, however, is the answer in itself—my family is my number one hobby.

Ever since my daughter Norah (now age six) could listen, my wife Colleen and I . Our family tradition of nightly bedtime stories Donovan (now age four). Recently, it has Norah can take over the reading duties to D .

F I have been able to draw some lessons that carry over I am sharing with you.

"F . His cows like to type." So starts *Click, Clack,* ,[10] my daughter's favorite book at the ripe old age of one.

In *Click, Clack, Moo*, Farmer Brown's cows and hens decide that they need electric blankets to keep warm at night in the barn. They deliver their demand to Farmer Brown on notes typed by the cows on a typewriter. When Farmer Brown refuses their demands, they go on strike, withholding milk and eggs. Ultimately, in a deal brokered by the duck, Farmer Brown agrees to accept the cows' typewriter in exchange for electric blankets. The labor dispute ends, and the cows and hens go back to producing milk and eggs. The deal backfires on Farmer Brown, though, as Duck absconds with the typewriter and turns it into a diving board for the pond.

Click, Clack, Moo: Cows That Type teaches us some valuable lessons:

1. *Fair treatment*. The best means to avoid collective action by your employees is to treat your employees fairly. The barn was cold, and the cows and hens perceived that they were being forced to work in intolerable conditions. When Farmer Brown refused even to consider any concessions, they went on strike. If you want your employees to work hard, not unionize, and not file lawsuits, treat them fairly. Maintain reasonable, even-handed work rules and policies. Apply them equally. Don't discriminate.

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[10] Doreen Cronin and Betsy Lewin, *Click, Clack, Moo: Cows That Type,* (New York City, New York: Little Simon, 2000).

There is no guarantee that you'll stay out of court, but if you end up there, you'll have a much easier time convincing a judge and a jury of the rightness of your decision if you are perceived as being fair, reasonable, and even-handed.

2. *Litigation is an answer, but not always the best answer.* Even in employment cases, where there are so many emotions in play on both sides of the table, it is only the most frivolous of cases that cannot not be resolved at some dollar figure. It is the job of the employer, working with its attorney, to strike the right balance between the cost of litigation and the cost of settlement. Convictions often get in the way, and often times litigation and trial are the only means to an outcome. But you should always keep an open mind toward a resolution.

3. *Do not go it alone*. When resolving any case, make sure all your loose ends are tied up in a tidy agreement. Farmer Brown missed this last point. A well-drafted agreement that included Duck would have avoided the added expense of the diving board. If Farmer Brown had retained competent counsel, he could have potentially avoided the problem with Duck (who probably went to law school).

Knuffle Bunny: A Cautionary Tale

Another of my children's favorites is *Knuffle Bunny: A Cautionary Tale*.[11] *Knuffle Bunny* tells the story of a toddler named Trixie, who loses her stuffed bunny (and prized possession) during a trip to the Laundromat with her daddy. When she discovers her loss, she tries to tell her daddy, but he does not understand her baby babble. When Mommy catches on, the family rushes back to the laundromat to find Knuffle Bunny.

What lessons can employers take away from this "cautionary tale"?

1. *There are no hard and fast rules about how employees must complain about harassment or discrimination.* Trixie, who had not yet learned to speak, did the best she could to communicate to her daddy that Knuffle Bunny was missing. The fact that he did not understand her did not change his fatherly responsibility to help locate Knuffle Bunny. The same holds true for employers. In a perfect world, employees would lodge complaints in typed memos, dutifully turned in to designated persons in the HR department. Our world, however, is far from perfect. Employees

[11] Mo Willems, *Knuffle Bunny: A Cautionary Tale,* (New York City, New York: Hyperion, 2004).

email, text, leave voice mails, scribble hand-written notes, make off-handed comments, and sometimes even say nothing at all. Regardless of how a manager or supervisor learns about harassment or discrimination, the rules are the same—investigate, remedy, and do not retaliate.

2. *Leave no stone unturned.* When Trixie's family first returned to the laundromat, they could not find Knuffle Bunny. It was not until Trixie's daddy redoubled his efforts that he found it. The same holds true for employers' investigations. A halfhearted investigation is no better than no investigation at all. If a document is missing, you better be able to convince a court that you took all reasonable efforts to locate it. If you conclude that an employee's harassment complaint is unfounded, you better be sure you interviewed everyone identified as a potential witness. If you are going to discipline or terminate an employee, you better double check that you considered all documents and witnesses before reaching a conclusion. Courts are loath to second-guess employers' business judgment but will not hesitate if it appears an employer slacked in its investigatory responsibilities.

Dr. Seuss

One of the highlights of my daughter's kindergarten year was Dr. Seuss week. As I reread many of his classics with her, I got to thinking that, given the adult themes weaved into these books, there must be some lessons for employers. I came up with the following:

Horton Hears a Who teaches that employers should not ignore complaints by employees. If an employee raises a concern about harassment, it is best for the company to take the complaint seriously, investigate, and take whatever corrective action, if any, is necessary. It is far better to investigate and conclude that nothing is there than to ignore the complaint and have it blossom into a lawsuit.[12]

And to Think That I Saw It on Mulberry Street, Dr. Seuss's first children's book, is about a boy who dreams up a wild story to tell his father when he gets home from a walk down Mulberry Street but ultimately decides to simply tell him what he saw. For employers, the lesson is to deal openly and honestly with employees. Gossip runs rampant in every workplace, and it is better to quell rumors than to keep truths from or even lie to employees.[13]

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[12] Dr. Seuss, *Horton Hears a Who* (New York City, New York: Random House, 1954).

[13] Dr. Seuss, *And to Think That I Saw It on Mulberry Street* (New York City, New York: Random House, 1937).

The Cat in the Hat teaches that employers must know when it is the right time to cut bait with a troublesome employee.[14]

Yertle the Turtle involves the king of the pond who commands the other turtles to stack themselves beneath him so that he can see, ignoring the turtles' pleas for rest. The lesson for employers is to treat employees fairly or end up in the mud.[15]

The Sneetches—about shunning those who look different—teaches an important lesson about discrimination. In that book, a race of creatures Sneetches is divided into those with green stars on the bellies and . As the story begins, those with stars shun those without. A Sylvester McMonkey McBean offers the Sneetches . Fearful of losing Sneetches purchase a treatment from cBean's star-off machine, which, as it name suggests, removes their belly . Each group runs from machine to machine to regain their special status. ltimately, the back-and-forth renders the Sneetches penniless, and McBean . Through the experience, the Sneetches learn that neither . Do not Sneetch your workplace by

lawsuit.[16]

Finally, *Fox in Sox* teaches that sometimes you just have to have a little fun.[17]

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[14] Dr. Seuss, *The Cat in the Hat* (New York City, New York: Random House, 1957).

[15] Dr. Seuss, *Yertle the Turtle* (New York City, New York: Random House, 1958).

[16] Dr. Suess, *The Sneetches* (New York City, New York: Random House, 1961).

[17] Dr. Suess, *Fox in Sox* (New York City, New York: Random House, 1965).

Some Common

This book has discussed myriad policies and forms that you should be using in your business's management of its employees. For example, Chapters 4 and 5 discuss the importance of a harassment policy. If you need a harassment policy for your workplace, you can Google the phrase "workplace harassment policy" and in a matter of seconds locate hundreds, if not thousands, of form harassment policies.

Forms, however, are just that. They are models for you to consider and shape to your particular needs. Pulling forms off the Internet, without any additional consideration, is dangerous. You do not know when that form was last reviewed or updated. You do not know under which state's law it complies (if any at all). You do not know when an attorney last vetted that form for legal compliance (if ever). In short, if you are using Internet policies, you are acting at your own peril. There is nothing wrong with using the Internet as a starting point. But *please* have your labor and employment counsel review the form or policy before you roll it out in your workplace. A quick 15-minute phone call for your lawyer to vet your policy *before* you implement it will prove to be a whole lot less expensive that the call to your lawyer *after* an employee challenges an illegal policy in a lawsuit.

With that disclaimer out of the way, consider the following examples of some common workplace forms and policies. And, if you haven't gotten the point already, ***please do not rely on these documents as legal advice, and have***

your own lawyer approve their use for your particular business and its needs.

Social Media Policy

■ **Note:** As discussed in Chapter 4, social media policies have come under a lot of fire from the National Labor Relations Board (NLRB). I have taken this policy verbatim from the NLRB's Office of *Third Report Concerning Social Media Cases.*[1]

At [mployer], we understand that social media can be a fun and rewarding

. The use of social media, however, also presents certain risks and
. To assist you in making responsible

.

Employer].

GUIDELINES

In the rapidly expanding world of electronic communication, *social media* can mean many things.

Social media includes all means of communicating or posting information or content of any sort on the Internet, including to your own or someone else's web log or blog, journal or diary, personal web site, social networking or affinity web site, web bulletin board or a chat room, whether or not associated or affiliated with [Employer], as well as any other form of electronic communication.

The same principles and guidelines found in [Employer] policies and three basic beliefs apply to your activities online. Ultimately, you are solely responsible for what you post online. Before creating online content, consider some of the risks and rewards that are involved. Keep in mind that any of your conduct that adversely affects your job performance, the performance of fellow associates or otherwise adversely affects members, customers, suppliers, people who work on behalf of [Employer] or [Employer's] legitimate business interests may result in disciplinary action up to and including termination.

[1] NLRB Office of General Counsel, Division of Operations-Management, Memorandum OM 12-59 (May 30, 2012).

Know and Follow the Rules

Carefully read these guidelines, the [Employer] Statement of Ethics Policy, the [Employer] Confidentiality Policy, and the [Employer] Discrimination & Harassment Policy, and ensure your postings are consistent with these policies.

Inappropriate postings that may include discriminatory remarks, harassment, and threats of violence, insubordinate, or similar inappropriate or unlawful conduct will not be tolerated and may subject you to disciplinary action up to

.

Respectful

mployer] recognizes the benefits associated with electronic communications . All employees are responsible for communicating with decorum. Always be fair and courteous to fellow

mployer]. Also, keep in mind that you are more likely to resolve work-

.

Nevertheless, if you decide to post complaints or criticism, avoid using statements, photographs, video or audio that reasonably could be viewed as malicious, obscene, threatening or intimidating; that disparage customers, members, associates or suppliers; or that might constitute harassment or bullying. Examples of such conduct might include offensive posts meant to intentionally harm someone's reputation or posts that could contribute to a hostile work environment on the basis of race, sex, disability, religion or any other status protected by law or company policy. Malicious statements include those made with the intent or desire to harm someone or those that done with an evil intent.

Be Honest and Accurate

Make sure you are always honest and accurate when posting information or news, and if you make a mistake, correct it quickly. Be open about any previous posts you have altered.

Remember that the Internet archives almost everything; therefore, even deleted postings can be searched. Never post any information or rumors that you know to be false about [Employer], fellow associates, members, customers, suppliers, people working on behalf of [Employer] or competitors.

Post Only Appropriate and Respectful Content

- Maintain the confidentiality of [Employer] trade secrets and private or confidential information. Trades secrets may include information regarding the development of systems, processes, products, know-how and technology. Do not post internal reports, policies, procedures or other internal business-related confidential communications.
- Respect financial disclosure laws. It is illegal to communicate or give a "tip" on inside information to others so that they may buy or sell stocks or securities. Such online conduct may also violate our Insider Trading Policy.

  Do not create a link from your blog, website, or other social networking site to a [Employer] website without identifying yourself as a [Employer] associate.

  Express only your personal opinions. Never represent yourself as a spokesperson for [Employer]. If [Employer] is a subject of the content you are creating, be clear and open about the fact that you are an associate and make it clear that your views do not represent those of [Employer], fellow associates, members, customers, suppliers or people working on behalf of [Employer]. If you do publish a blog or post online related to the work you do or related to subjects associated with [Employer], make it clear that you are not speaking on behalf of [Employer]. It is best to include a disclaimer such as "The postings on this site are my own and do not necessarily reflect the views of [Employer]."

Using Social Media at Work

Reasonable personal use of social media sites done so during work time or on equipment we provide is permitted. Excessive use, or use that inhibits, hinders, or adversely affects your job performance will be treated as any other performance-related problem.

Do not use [Employer] email addresses to register on social networks, blogs or other online tools used for personal use, unless it is work-related as authorized by your manager.

Employees are prohibited from providing recommendations or otherwise commenting on the job performance (positively or negatively) of a coworker, subordinate, or any other employee of the [Employer], past or present. All

references and recommendations must be handled through the appropriate channels and consistent with the [Employer]'s policy on job references; all appraisals on an employee's job performance must be handled via [Employer]'s formal performance review process, consistent with our performance review policy.

Ownership of Social Media Accounts

If a social media profile links to an employee's [Employer]-provided email
Employer] owns that social media profile, and at the end of that

Employer]'s employment. If, on the other hand, an employee's account is

Facebook, twitter, LinkedIn,
. Additionally, all departing employees

name, social network, and user name of the new person to follow.

Retaliation Is Prohibited

[Employer] prohibits taking negative action against any associate for reporting a possible deviation from this policy or for cooperating in an investigation. Any associate who retaliates against another associate for reporting a possible deviation from this policy or for cooperating in an investigation will be subject to disciplinary action, up to and including termination.

Photographs and Likeness

Periodically, [Employer] may obtain photographs, videos, or other likenesses of its employees at [Employer]-related events, such as outings, holiday parties, and charitable events. If an employee does not want his or her photograph, video, or other likeness recorded at such an event, posted on our [Employer] website or any social networking site (such as the [Employer]'s Facebook page or twitter feed), the employee must inform the human resources department in writing.

Media Contacts

Associates should not speak to the media on [Employer's] behalf without contacting the Corporate Affairs Department. All media inquiries should be directed to them.

Effect of Certain Laws

Nothing in this policy is intended to interfere with employee rights to self-organize, form, join, or assist labor organizations, to bargain collectively

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Social Media Policy is within the
Employer] reserves the right to alter,
Social
M Policy, at any time, in its sole discretion, with or without notice. If you have questions or need further guidance, please contact your HR representative.

Bring Your Own Device Policy

[Employer] would like to provide greater mobile device choice to its employees and simultaneously reduce end-user mobile device complexity. Providing secured company email/calendar/contact data on employee personal smart-phones allows these employees to use their device of choice, and it eliminates the need to carry multiple devices. Thus, [Employer] is implementing a "Bring Your Own Device" (BYOD) program to permit [Employer] personnel to use personally owned smart phones and tablets for business purposes.

This document applies to employees who wish to receive company email/calendar/contact data on a personal mobile device and provides policies, standards, and rules of behavior for the use of personally-owned smart phones and/or tablets by [Employer]'s employees (referred to as users) to access [Employer] network resources. [Employer] grants access to and continued use of network services on the express condition that each user reads, signs, respects, and follows the [Employer]'s policies concerning the use of these devices and services.

Current BYOD Approved for Use

- iOS iPhones & iPads (iOS 4 or higher)
- Android Smart Phones & Tablets (version 2.2 or higher)
- Blackberry Smart Phones & Playbook

Expectation of Privacy

Employer] will respect the privacy of your personal device and will only

mployer] email/attachments/ documents to their personal device). This Employer]'s policy for [Employer]-Employer] employees do not have the Employer] . While access to the personal device itself is Employer]'s policy regarding the use/access of [Employer] email . If there are questions related

drop out of the BYOD program.

Information Technology Responsibilities

- Information Technology (IT) is responsible for configuring and supporting the user's device to receive and access company email, calendar, and contact data.
- IT is responsible for smartphone system removal and for performing a "remote wipe" of [Employer] email, calendar, and contact data from a user's lost or stolen smartphone. IT may perform a full device wipe at the user's request.
- IT is responsible for smartphone system removal and performing a "remote wipe" of company email, calendar, and contact data from user's smartphone upon termination of employment with [Employer].

Employee Responsibilities and Requirements for all BYODs Accessing [Employer] Network Services

- User is responsible for using company email on his or her personal smartphone within the same constraints as on a company-owned device.
- User is responsible for maintaining and paying the monthly/annual fee to the telephone mobile carrier. All mobile telephone charges that he or she incurs are his or her responsibility, regardless whether such charges are work-related or for personal use. This includes, but is not limited to, charges resulting from texts, data plan surcharges, calls, navigation, or application uses or from early termination fees.

  User is responsible for all smartphone support requirements, including the cost of repairs or replacement. [Employer] is responsible, however, for configuring and supporting the smartphone to receive and access company email, calendar, and contact data.

  User will not download or transfer sensitive business data to their personal devices. Sensitive business data is defined as documents or data whose loss, misuse, or unauthorized access can adversely affect the privacy or welfare of an individual (personally identifiable information), the outcome of a charge/complaint/case, proprietary or confidential information, or [Employer] financial operations.
- Rooted Android devices and jailbroken Apple iOS devices pose a risk to company data contained within the secure communications app. Therefore, [Employer] will disable or remove the app and remove company data on devices determined to be rooted or jailbroken. Moreover any attempt to root or jailbreak a device will disqualify the user from any further and future participation in [Employer]'s BYOD program.
- User agrees that because of the business use of the device, User will not share the device with other individuals or family members.
- User agrees to delete any sensitive business files that may be inadvertently downloaded and stored on the device through the process of viewing email attachments. [Employer] will

provide instructions for identifying and removing these unintended file downloads. Follow the premise, "When in Doubt, Delete it Out."

- User agrees that he or she will password-protect the device via the device's operating system's available password protection protocols.
- User agrees that if he or she loses a device covered by this policy, or if a device covered by this policy is stolen, he or she will immediately notify [Employer]'s IT department. Do not first notify your mobile carrier, as it will limit [Employer]'s ability remove [Employer] data and information from the device.
- User's device will be remote wiped if: (i) you lose the device; (ii) your employment with [Employer] ends; or (iii) IT detects a data or policy breach or virus.

ser Acknowledgment and Agreement

I Employer]'s right to restrict or rescind computing privileges or take other administrative or legal action due to failure to comply with the BYOD Policy. Violation of these rules may be grounds for disciplinary action up to and including termination.

I acknowledge, understand and will comply with the above referenced security policy and rules of behavior, as applicable to my BYOD usage of [Employer] services. I understand that the addition of [Employer]-provided third-party software may decrease the available memory or storage on my personal device and that [Employer] is not responsible for any loss or theft of, damage to, or failure in the device that may result from use of third-party software and use of the device in this program. I understand that contacting vendors for trouble-shooting and support of third-party software is my responsibility, with limited configuration support and advice provided by [Employer]. I understand that business use may result in increases to my personal monthly service plan costs. I further understand that [Employer] reimbursement of any business-related data/voice plan usage of my personal device is not provided.

Should I later decide to discontinue my participation in the BYOD Program, I will allow [Employer] to remove and disable any [Employer]-provided third-party software and services from my personal device,

Employee Name: _____

BYOD Device(s): _____

Employee Signature: _____

Date: _____

Family and Medical Leave Act (FMLA) Policy

☐ I have borrowed this policy from that which the Department of Labor (DOL) recommends [2]

Entitlement

The amily and Medical Leave Act (FMLA) requires covered employers to

For incapacity due to pregnancy, prenatal medical care or child birth;

- To care for the employee's child after birth, or placement for adoption or foster care;
- To care for the employee's spouse, son or daughter, or parent, who has a serious health condition; or
- For a serious health condition that makes the employee unable to perform the employee's job.

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[2] 29 C.F.R. § 825.300(a)(3).

Additionally, the DOL also makes available for download all of the forms you need to manage FMLA within your business. Each of these forms is available, for free download, from http://www.dol.gov/whd/fmla/index.htm#Forms.

- WH-380-E, Certification of Health Care Provider for Employee's Serious Health Condition.
- WH-380-F, Certification of Health Care Provider for Family Member's Serious Health Condition.
- WH-381, Notice of Eligibility and Rights & Responsibilities.
- WH-382, Designation Notice.
- WH-384, Certification of Qualifying Exigency For Military Family Leave.
- WH-385, Certification for Serious Injury or Illness of Covered Servicemember—for Military Family Leave.

Military Family Leave Entitlements

Eligible employees with a spouse, son, daughter, or parent on active duty or call to active duty status in the National Guard or Reserves in support of a contingency operation may use their 12-week leave entitlement to address certain qualifying exigencies. Qualifying exigencies may include attending certain military events, arranging for alternative childcare, addressing certain financial and legal arrangements, attending certain counseling sessions, and attending postdeployment reintegration briefings.

A also includes a special leave entitlement that permits eligible employees

. A covered servicemember is a current member of
Forces, including a member of the National Guard or Reserves,

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Protections

During FMLA leave, the employer must maintain the employee's health coverage under any "group health plan" on the same terms as if the employee had continued to work. Upon return from FMLA leave, most employees must be restored to their original or equivalent positions with equivalent pay, benefits, and other employment terms.

Use of FMLA leave cannot result in the loss of any employment benefit that accrued prior to the start of an employee's leave.

Eligibility Requirements

Employees are eligible if they have worked for a covered employer for at least one year, for 1,250 hours over the previous 12 months, and if at least 50 employees are employed by the employer within 75 miles.

Definition of Serious Health Condition

A serious health condition is an illness, injury, impairment, or physical or mental condition that involves either an overnight stay in a medical care facility or continuing treatment by a health care provider for a condition that either prevents the employee from performing the functions of the employee's

job, or prevents the qualified family member from participating in school or other daily activities.

Subject to certain conditions, the continuing treatment requirement may be met by a period of incapacity of more than three consecutive calendar days combined with at least two visits to a health care provider or one visit and a regimen of continuing treatment, or incapacity due to pregnancy, or incapacity due to a chronic condition. Other conditions may meet the definition of continuing treatment.

Entitlement

[E

FMLA leave. What does this mean? It means that each FMLA leave, the remaining leave entitlement is the

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. If an employee has

. If an employee used four weeks beginning February 1, 2011, four weeks beginning June 1, 2011, and four weeks beginning December 1, 2011, the employee would not be entitled to any additional leave until February 1, 2012. However, beginning on February 1, 2012, the employee would again be eligible to take FMLA leave, recouping the right to take the leave in the same manner and amounts in which it was used in the previous year. Thus, the employee would recoup (and be entitled to use) one additional day of FMLA leave each day for four weeks, commencing February 1, 2012. The employee would also begin to recoup additional days beginning on June 1, 2012, and additional days beginning on December 1, 2012.

Because of how these calculations work, employees taking FMLA leave may fall in and out of FMLA protection based on FMLA usage in the prior 12 months.

If you have any questions about how much FMLA time you have remaining, or need clarification on how this rolling calculation works, please ask [Employer]'s human resources department.

Use of Leave

An employee does not need to use this leave entitlement in one block. Leave can be taken intermittently or on a reduced leave schedule when medically

necessary. Employees must make reasonable efforts to schedule leave for planned medical treatment so as not to unduly disrupt the employer's operations. Leave due to qualifying exigencies may also be taken on an intermittent basis.

Substitution of Paid Leave for Unpaid Leave

Employees may choose or employers may require use of accrued paid leave while taking FMLA leave. In order to use paid leave for FMLA leave, employees

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mployee Responsibilities

FMLA

. When 30 days of notice is not possible,

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FMLA protection and the anticipated timing and

. Sufficient information may include that the employee is unable to perform job functions, the family member is unable to perform daily activities, the need for hospitalization or continuing treatment by a health care provider, or circumstances supporting the need for military family leave. Employees also must inform the employer if the requested leave is for a reason for which FMLA leave was previously taken or certified. Employees also may be required to provide a certification and periodic recertification supporting the need for leave.

Employer Responsibilities

Covered employers must inform employees requesting leave whether they are eligible under FMLA. If they are, the notice must specify any additional information required as well as the employees' rights and responsibilities. If they are not eligible, the employer must provide a reason for the ineligibility.

Covered employers must inform employees if leave will be designated as FMLA-protected and the amount of leave counted against the employee's leave entitlement. If the employer determines that the leave is not FMLA-protected, the employer must notify the employee.

Unlawful Acts by Employers

FMLA makes it unlawful for any employer to:

- Interfere with, restrain, or deny the exercise of any right provided under FMLA;
- Discharge or discriminate against any person for opposing any practice made unlawful by FMLA or for involvement in any proceeding under or relating to FMLA.

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DOL or may bring a private lawsuit
. FMLA does not affect any federal or state law prohibiting

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E Employment Opportunity Policy

Equal Opportunity for All Employees

It is our purpose and intent that our philosophy of equal employment opportunity, as expressed in the next paragraph, be more than words expressed in a policy but be translated into our daily actions.

It is the policy and practice of [Employer] to provide equal employment opportunity to all persons, regardless of their race, color, creed, religion, sex, sexual orientation, gender identity, age, national origin, citizenship, mental or physical disability, military status, veteran status, or other illegal factors. We must continually strive, individually and collectively, to insure that all applicants and employees receive equal consideration and treatment with respect to employment, training, promotion, compensation, transfer, layoff, recall, discipline, termination, and other conditions and terms of employment.

It is through an understanding and practice of these beliefs that [Employer] will be able to continue to engage in equal employment opportunities.

In order to ensure maximum effect, all employees are encouraged to actively support programs that implement and maintain our policy of nondiscrimination.

If any employee has a question regarding the interpretation or implementation of our equal employment opportunity policy, the question should be directed to the President of [Employer], the Vice President of Human Resources, or any other executive or management team member.

Persons with Disabilities

[Employer] is committed to providing equal employment opportunities to otherwise qualified individuals with disabilities, which may include providing reasonable accommodation where appropriate.

In general, it is your responsibility to notify an officer of [Employer] or your immediate supervisor of the need for accommodation. Upon doing so, the officer or your supervisor may ask for your input or the type of accommodation you believe may be necessary or the functional limitations caused by your . In addition, when appropriate, we may need your permission to

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Policy

mployer]'s general policy of equal employment opportunity provides, among

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. This policy not only prohibits sexual harassment, but also harassment based on race, color, creed, religion, sexual orientation, gender identity, age, national origin, citizenship, mental or physical disability, military status, and veteran status.

Sexual harassment has been defined as unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature which (i) is made either explicitly or implicitly a term or condition of employment, (ii) is used as a basis for employment decisions affecting an individual, or (iii) has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment. An employee does not have to suffer a negative tangible job action (such as termination, demotion, denial of promotion or pay increase, assignment to an undesirable job, etc.) to have been a victim of sexual harassment. [Employer] will not tolerate conduct of this nature by any of its employees at any level of the organization. Any employee who believes that he or she has been subjected to such harassment should bring it to the attention of management at the earliest possible time.

Similar kinds of conduct, when not based upon sex, is also not acceptable at work. [Employer] also does not condone, and will not tolerate, harassment of our employees for any unlawful reason.

To bring a complaint of sexual harassment or a complaint of harassment for any other unlawful reason, please address the complaint directly to the President of [Employer].

You are encouraged to report any incident of harassment. There will be no negative action taken against any person because he or she has used this policy, in good faith, to make a complaint to [Employer].

If you are faced with harassment, please report it to management. Do not assume that [Employer] is aware of what is going on.

U Employer] will conduct an investigation at the . The investigation may include interviews with all

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Employer]'s policy against

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have engaged in an act of retaliation shall also be subject to immediate discipline, up to and including the possible termination of his or her employment.

Checklist of Potential Handbook Provisions

■ **Note:** This list is intended to be a comprehensive list of all possible policies and provisions for you to consider in your organization's employee handbook. However, it is neither a recommendation that you need each of these policies, nor a guarantee that this list is complete under the laws of your particular state. Again, as with all of these model policies and forms, your mileage might vary depending on the law of your particular jurisdiction, and you should consult with counsel before adopting, or choosing not to adopt, any of these suggested policies.

Review of Business EEO and Nonharassment Policies & Procedures

- Grievance Procedure
- Harassment Policy

- Nonretaliation Policy
- Review of Employee Training
- Open Door Policy
- At-Will
- EEO Policy
- Inclusion of all protected classes (including Genetic Information Nondiscrimination Act and state-specific military status)
- Sexual Orientation/Gender Identity
- Employer Information Report (EEO-1)[3]
- ADA and Reasonable Accommodation
- Respectful Workplace
- Family Responsibility Discrimination
- Affirmative Action Plan

ligibility

- Authorization to Hire
- Nepotism
- Nonfraternization
- Drug Testing and Drug-Free Workplace
- Orientation
- Rehire
- Transfers and Promotions
- Job Postings

[3] An EEO-1 is a federally mandated compliance survey report. It requires the categorization of employment data by race and ethnicity, gender, and job category. It must be filed annually by private-sector companies with 100 or more employees, private-sector companies with fewer than 100 employees but that are affiliated with a company with 100 or more employees, and federal contractors with 50 or more employees. A copy of the EEO-1 form is available for download at http://www.eeoc.gov/eeo1survey.

Time Off

- Bereavement
- FMLA
- Military Leave
- Paid Time Off
- Sick Leave

  Vacation

  Holiday

  Personal Leave

  Other Leave of Absence

  Jury Duty

  Time Off to Vote

- Dress and Grooming
- Corrective Action
- Code of Conduct
- Performance Reviews
- No Solicitation
- Job Descriptions

Technology and Communications

- Cell Phones/BYOD
- Text Messages
- Email
- Internet
- Social Media
- Privacy and Electronic Monitoring

Employment Relationship

- Anniversary Date
- Pay Period
- Orientation
- Introductory Period
- Classification
- Separation
- Reference Checks
- Exit Interviews

Time

- Attendance
- Punctuality
- Hours of Work
- Inclement Weather
- Flextime
- Job Sharing
- Telecommuting
- Meal and Rest Breaks
- Time Recording and Reporting
- Wage and Hour Records Access
- Light Duty

Benefits

- Eligibility
- Health Insurance
- COBRA
- 401(K)
- Retirement

Compensation

- Loans to Employees
- Paychecks
- Direct Deposit
- Payroll Errors
- Deductions and Withholding

  Salary Advances

  Shift Differential

  Overtime

  Bonuses

  Expense Reimbursement

  Travel Reimbursement

  Tuition Reimbursement

  Wage Garnishment
- On-Call Time
- Exempt and Nonexempt

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THE EMPLOYER BILL OF RIGHTS

A MANAGER'S GUIDE TO WORKPLACE LAW

Jonathan T. Hyman

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I dedicate this book to my family—
my wife, Colleen, and my two children,
Norah and Donovan. Everything I do, I do for you.
Without your support, this book
would not have happened.

About the Author

Jonathan Hyman is a partner in the Labor & Employment Group at Kohrman Jackson & Krantz in Cleveland, Ohio. On a daily basis, he puts 15 years' experience to work providing proactive and result-driven solutions to employers' workforce problems. Jon is the author of the nationally recognized and award-winning *Ohio Employer's Law Blog* (www.ohioemployerlawblog.com). He also coauthored and edited the book *Think Before You Click: Strategies for Managing Social Media in the Workplace*. Jon serves as a frequent source for the local and national media on employment law issues, having been quoted in the *Wall Street Journal, National Law Journal, Business Insurance Magazine, Crain's Cleveland Business*, and the *Cleveland Plain Dealer*. Jon is a sought-after speaker on myriad employment law topics, most recently presenting seminars on social media and employment law, the ADA, the FMLA, workplace technology, and harassment. Super Lawyers named Jon an Ohio Rising Star in the area of Employment Law five out of the last six years. He is a 1997 honors graduate of the Case Western Reserve University School of Law and a 1994 honors graduate of Binghamton University. Lastly, Jon appeared on a November 1999 episode of *Who Wants to Be a Millionaire* but, sadly, lacked the fastest fingers.

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I worked at a few jobs that were less than . To all of the people who shared those jobs with me, thank you for

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