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Office of Continuing Legal Education at the University of Kentucky College of Law

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**EMPLOYMENT
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Presented by the
**OFFICE OF CONTINUING LEGAL EDUCATION
UNIVERSITY OF KENTUCKY COLLEGE OF LAW**

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1994 General Assembly Update

Carol Pate Palmore
Secretary of Labor
Commonwealth of Kentucky

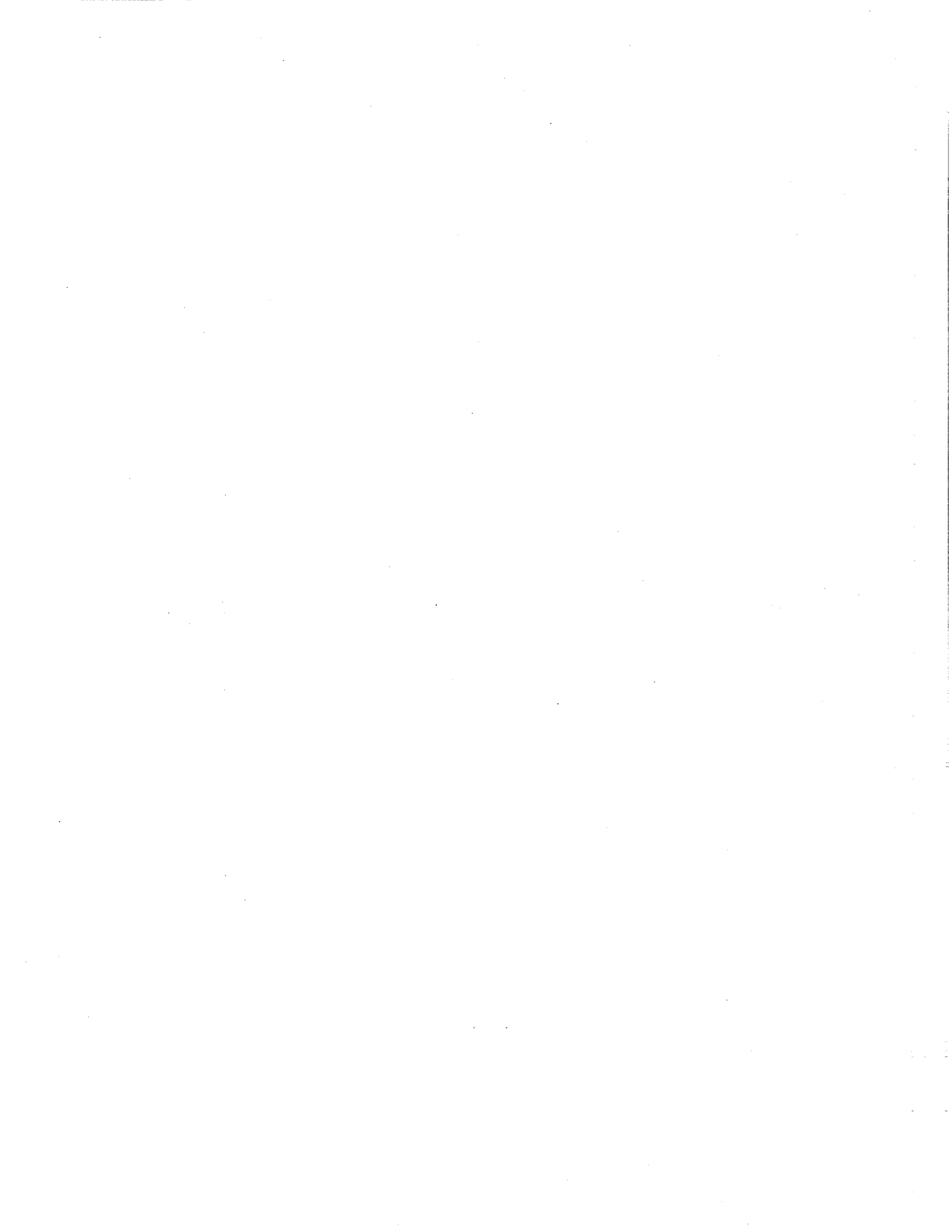


KENTUCKY LABOR AND EMPLOYMENT LAWS

1994 General Assembly Update

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PREFACE - During the 1994 Regular Session of the Kentucky General Assembly, 1309 bills and 263 resolutions were introduced. Of these, 367 were Senate bills and 942 were House bills. Of this number, 146 Senate bills and 311 House bills passed both chambers and were delivered to the Governor for signature. In addition, 54 joint and concurrent resolutions were passed.

Among the aforementioned bills were eight labor and employment bills which passed both chambers and were signed into law by the Governor. In addition, one House Concurrent Resolution dealing with OSHA compliance was passed by the House.

By far, the most sweeping of the labor and employment bills was House Bill 928, the workers' compensation reform legislation. Due to its length and complexity, it will be the last enactment covered in this outline.

HOUSE BILL 762 - The relevant section of this bill provides that no employer may require, as a condition of employment, that a prospective employee waive, agree to arbitration, or otherwise diminish any right to which the prospective employee is entitled under state or federal law. The provisions of this bill will be added as a new section to Chapter 336 of the Kentucky Revised Statutes.

This bill was in reaction to the practices of a number of large employers in Kentucky who specifically required on applications for employment, as a condition of employment, that prospective employees waive their right to sue in court and agree to binding arbitration with respect to all allegations of personal rights violations such as age discrimination, sex discrimination, race discrimination, etc...

SENATE BILL 331 - This bill mirrors House Bill 762.

HOUSE BILL 719 - Under current Prevailing Wage laws (those dealing with construction by public authorities), employees must be paid overtime for all hours worked in excess of eight hours a day and forty hours a week.

This bill increases the maximum hours from eight hours a day to ten hours a day before overtime pay is mandated in those instances in which the employer and employee voluntarily enter into a written agreement prior to the employee working any one day in excess of eight hours, or where provided for in a collective bargaining contract. The bill will be codified as an amendment to KRS 337.540.

The bill was introduced at the behest of the Associated General

Contractors of Kentucky. The executive director of AGC stated in committee hearings that many workers lived in one part of the state, worked in another and desired to work four ten hour days as opposed to five eight hour days in order to have longer weekends to spend with their families. Under current law, contractors were unwilling to allow the ten hour days because of the necessity of paying overtime for all hours in excess of eight hours a day.

HOUSE BILL 661 - This bill allows the Labor Cabinet to place a lien on all property of an employer who has failed to pay a monetary penalty imposed pursuant to the provisions of the Kentucky Occupational Safety and Health Act. This bill will be codified as a new section of Chapter 338 of the Kentucky Revised Statutes.

The lien shall not be filed until all administrative and judicial appeals have been exhausted or the time for same has expired.

HOUSE BILL 660 - This bill allows the Labor Cabinet to place a lien on all property of an employer who has failed to pay a penalty imposed pursuant to the wage and hour laws of Chapter 337 of the Kentucky Revised Statutes. This bill will be codified as a new section of Chapter 337 of the Kentucky Revised Statutes.

As in House Bill 661, the lien shall not be filed until all administrative and judicial appeals have been exhausted or the time for same has expired.

SENATE BILL 271 - KRS 337.010 currently exempts from the definition of employee "[a]ny individual employed as a babysitter in an employer's home, or live-in companion to a sick, convalescing, or elderly person whose principal duties do not include housekeeping."

The significance of these exceptions is that "employees" must be paid overtime pursuant to Chapter 337.

Over the years a problem arose with respect to the definition of "live-in companion." Wage and hour investigators have defined "live-in" a number of ways over the years. The most recent definition requires that the companion stay for at least twenty-four hours at a time in order to be considered as a "live-in". This was unfair to those persons in nursing homes who had companions who stayed with them at night only or to individuals who lived at home, but only had companions during the day.

This bill deletes the term "live-in" and therefore exempts from the definition of "employee" a companion to a sick, convalescing, or elderly person. The bill mirrors the language in federal wage and hour laws.

SENATE BILL 284 - This bill makes it unlawful and contrary to

public policy for an employer to require another employer to waive its rights under the workers' compensation laws in order to be awarded a contract. It further makes it illegal for an employer to give a preference to one employer over another for voluntarily waiving rights under the workers' compensation laws.

This bill was in response to situations in which prime contractors were making waiver of workers' compensation subrogation rights by sub-contractors a condition precedent to receiving a contract.

This bill will be codified as an amendment to KRS 342.700.

HOUSE CONCURRENT RESOLUTION NO. 60 - This resolution directs the Interim Joint Committee on Labor and Industry to perform a study with respect to the issue of independent contractors and compliance with unemployment insurance laws, income tax withholding, and workers' compensation laws. The resolution further directs the committee to report its findings to the Legislative Research Commission no later than October 1, 1995 and recommend any legislation necessary to assure compliance by employers and independent contractors with both federal and state OSHA laws.

This resolution was in response to a fear that many employees are being treated as independent contractors in an effort by their employers to circumvent employment and OSHA laws.

HOUSE BILL 928 - This bill is the workers' compensation reform legislation. The bill contained an emergency clause and became effective on April 4, 1994, the date the Governor signed it. This bill contains so many changes to prior law, that it will be divided into topic areas for the purposes of this outline.

Definitions - The bill excludes compensation claims for psychological, psychiatric or stress-related conditions unless they result from a specific physical injury. The so-called mental-mental claims will no longer be compensable. KRS 342.0011.

Reorganization - All components of workers' compensation, with the exception of the Uninsured Employers Fund, are now consolidated within the Kentucky Labor Cabinet. KRS 336.015.

Board Authority - The Workers' Compensation Board, which heretofore exercised administrative functions as well as appellate functions, is limited to deciding appeals from the Administrative Law Judges. KRS 342.215.

Additional Administrative Law Judge - The bill provides for an increase in the number of Administrative Law Judges from 15 to 16 and provides for the appointment of a Chief Administrative Law Judge. The Chief Judge shall be responsible for overseeing caseload assignments and dockets and otherwise assist the Commissioner of Workers' Compensation. KRS 342.230.

Medical disputes - In those instances in which an injured employee and the employer are in disagreement with respect to the planned performance of a medical procedure, such as surgery, the bill provides for a speedy resolution of the dispute. KRS 342.735.

Commissioner of Workers' Compensation - The Commissioner will be appointed by the Governor from a list of three nominees submitted by the Workers' Compensation Nominating Commission. Senate confirmation of the appointment is required. KRS 342.213.

Ombudsmen - The bill provides for the creation of ombudsmen positions within the Department of Workers' Claims. The ombudsmen are charged with the responsibility of advising all parties of their rights and obligations, answer inquiries, and perform such other duties as required by the Commissioner through administrative regulations. This change will appear in a new section of Chapter 342.

Alternative Dispute Resolution - The bill provides for alternative dispute resolution. This change will appear in a new section of Chapter 342.

Medical Costs Reduction - Within 100 days after the effective date of the act, the Commissioner shall promulgate a fee schedule which effects a 25% reduction in the total medical costs within the workers' compensation system. KRS 342.033

Litigation-related Fee Schedule - By December 1, 1994, the Commissioner shall establish a fee schedule for charges by medical providers for testimony presented and medical reports furnished within the course of litigation. KRS 342.033.

Twenty-four Hour Coverage - The bill allows for pilot projects for twenty-four hour coverage if approved by the Commissioner of Workers' Claims and the Commissioner of Insurance and if in conformity with administrative regulations to be promulgated by the Commissioner of Workers' Claims. This change will be codified in a new section of Chapter 342.

Permanent Partial Disability - The bill provides for the payment of functional impairment benefits rather than occupational disability benefits to an injured worker who returns to work at his or her pre-injury salary unless the worker establishes a greater degree of disability as determined by KRS 342.0011(11). In that event, benefits may not exceed two times the functional impairment rating. KRS 342.730.

If an injured employee establishes an occupational disability exceeding fifty percent, he or she will receive permanent partial disability benefits for 520 weeks rather than 425. KRS 342.730.

The provisions of Chapter 342 with respect to permanent partial disability remain the same for those injured employees who do not return to work at their pre-injury wage.

Teledyne - The bill provides that only work-related disability may be taken into consideration in determining whether an employee is totally disabled for purposes of a lifetime award. KRS 342.730.

Reduction of Benefits - The bill proves for a 10% per year reduction in benefits beginning at age 65 until the worker reaches the age of 70 at which time the benefits will be frozen at 40% of the original benefit amount. KRS 342.730.

RIB Benefits - Working miners will no longer be eligible to receive RIB benefits. KRS 342.732.

Calculation of Benefits - For purposes of computing benefits, the average weekly wage figure shall remain frozen for two years, then remain permanently two years behind the then current average weekly wage. KRS 342.143.

Competitive State Fund - The bill provides for the creation of a competitive state workers' compensation fund known as the Employers' Mutual Insurance Company which must be ready to issue policies no later than September 1, 1995. This change will be codified in a new section of Chapter 342.

Attorney's Fees - The bill caps attorney's fees for claimants' attorneys at \$15,000. KRS 342.320.

Managed Care - The act requires the Commissioner to promulgate administrative regulations incorporating managed care into the workers' compensation system. KRS 342.033.

There are many other changes contained in House Bill 928, but the above changes are the ones which seem to excite the most interest from practitioners and administrators in the workers' compensation system.



**COMPLYING WITH THE FAMILY AND
MEDICAL LEAVE ACT:**

**An Analysis Of The FMLA And Its Relationship
To The Americans With Disabilities Act
and Workers' Compensation**

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Covington, Kentucky



COMPLYING WITH THE FAMILY AND MEDICAL LEAVE ACT:

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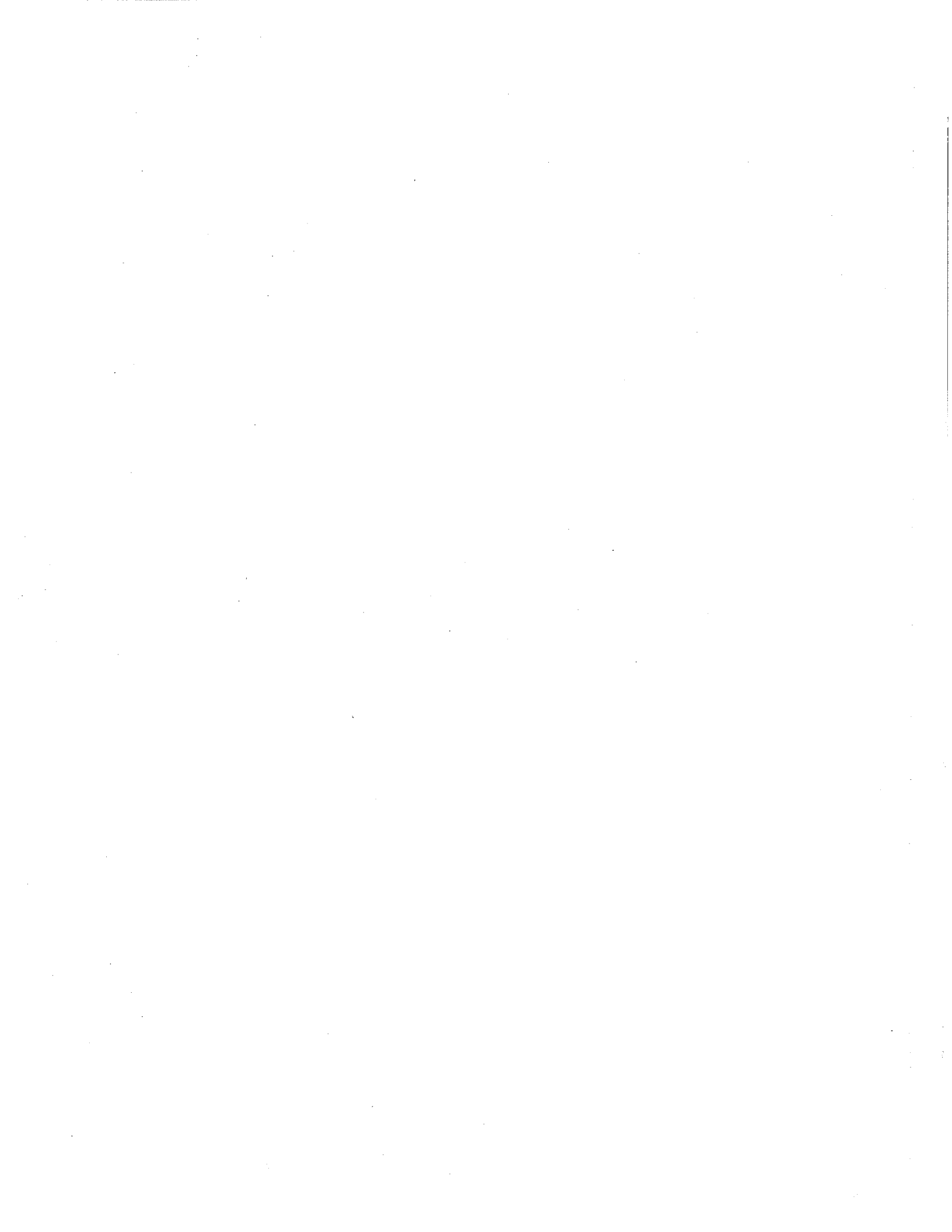
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Introduction¹

On June 3, 1993, the United States Department of Labor issued Regulations (29 CFR Part 825) designed to address questions unanswered by the text of the Family and Medical Leave Act of 1993 ("FMLA"). The following presentation is an overview of these significant regulations, together with an analysis of the FMLA's relationship to the ADA and workers' compensation.

FMLA QUESTIONS AND ANSWERS

1. Does this law apply to all employers?

No, employers are covered only if they have employed at least 50 employees for 20 or more calendar workweeks in either of the last two years. Thus, as of August 5, 1993, an employer must count the number of employees employed in both calendar years 1992 and 1993 to determine if it employed at least 50 employees during 20 or more weeks in either year.

In determining whether or not 50 or more employees have been employed for each working day during each of 20 or more calendar weeks, the Regulations state that "employ" is intended to mean maintain on the payroll. It is thus not necessary that every employee perform work on each working day to be counted. The Regulations also specify that part-time employees and employees on leaves of absence will be counted, but those on long-term or indefinite layoff will not.

2. My home office in another state has over 50 employees, yet my satellite operation has only 25 employees. Must I grant a family medical leave to each one of my employees?

Not necessarily. The law does not cover any employee of a site with fewer than 50 employees unless 50 or more employees work for that same employer within 75 miles of the employee's work site.

The 75-mile distance is based on surface miles on public roads. Also, the Regulations provide that this judgment concerning distances and numbers of employees is to be made when the employee requests the leave, although the employee is then free to renew his/her request at a later date when circumstances may have changed.

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3. Are all employees eligible for leave?

No. In order to be eligible, an employee must have worked for his/her employer for at least 12 months, with no less than 1,250 hours of work during that 12-month period.

All hours worked under federal wage/hour guidelines will be counted toward the 1,250 hour mark. Salaried exempt employees under the Fair Labor Standards Act (FLSA) are presumed to have met the 1,250 hours or work requirement where no hours-worked records have been kept.

4. When is an eligible employee entitled to leave?

There are four circumstances under which an eligible employee is entitled to family leave:

- a) Birth of a son or daughter and in order to care for the child;
- b) Placement of a son or daughter with the employee for adoption or foster care;
- c) Care for the employee's spouse, child, or parent with a "serious health condition"; or
- d) Care for the employee's own "serious health condition" that makes the person unable to perform the functions of the job.

For adoption leave, the Regulations do not require use of licensed adoption agencies. However, the definition of "foster care" requires state action rather than just an informal arrangement to take care of another person's child.

"Spouse" is to be defined under applicable state law. Unmarried, domestic partners do not qualify for family leave to care for their partner.

The "son or daughter" may be a minor or a child 18 years or over who is "incapable of self-care because of a mental or physical disability" as defined under the Americans with Disabilities Act (ADA).

5. What is a "serious health condition"?

A "serious health condition" means an illness, injury, impairment or physical or mental condition involving:

- a) A period of incapacity or treatment connected with inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential medical care facility; or

- b) A period of incapacity requiring absence of more than 3 calendar days from work, school, or other regular daily activities that also involves continuing treatment by (or supervision of) a health care provider; or
- c) Continuing treatment by (or supervision of) a health care provider for a chronic or long-term health condition that is incurable or so serious that, if not treated, would result in a period of incapacity of more than 3 calendar days; or for prenatal care.

For a "serious health condition," the health care provider may be required to certify:

- a) For family medical leave, that the employee is "needed to care for" the family member; this encompasses both physical and psychological care;
- b) For employee medical leave, that the employee is unable to perform the functions of his or her position. This encompasses the employee's inability to work at all or to perform any of the essential functions of the job within the meaning of the ADA; and
- c) For leave taken intermittently or on a reduced schedule, "the medical necessity for such leave."

6. What does "continuing treatment" by a health care provider mean?

Continuing treatment includes:

- a) Two or more visits to a health care provider;
- b) Two or more treatments by a health care practitioner (e.g., physical therapist) under orders or referral by a provider; or
- c) One visit to a health care provider that results in a regimen of continuing treatment under supervision of the provider; or
- d) A situation where the person has a serious long-term or chronic incurable condition and the person is under the continuing supervision of, but not necessarily being actively treated by, a health care provider (e.g., persons with Alzheimer's or persons in the late states of cancer).

Remember, for any condition other than one that requires inpatient care, the employee or family member must be receiving

continuing treatment by a health care provider for the employee to qualify for leave.

7. What about voluntary or cosmetic treatments? Can they be serious health conditions?

Generally, no, unless inpatient hospital care is required. However, restorative dental surgery after an accident or removal of cancerous growths would be included. Routine physical exams are explicitly excluded. Treatments for allergies, stress, and substance abuse also are included in the definition if all other conditions of the Regulations are met.

8. What is a "health care provider"?

A health care provider is either an appropriately licensed doctor of medicine or osteopathy, or any other person determined by the secretary of labor to be capable of providing health care services.

The Regulations define this second category to include only: podiatrists, dentists, clinical psychologists, optometrists, chiropractors under certain circumstances, nurse practitioners and nurse midwives, and Christian Science practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts. (Where a second or third certification is being sought by an employer, it may require that the certification be from a health care provider other than a Christian Science practitioner.)

9. How much leave is an eligible employee entitled to take?

An eligible employee may take a total of 12 workweeks of leave during any 12-month period. The employer may choose from among the four following methods to determine the "12-month period" in which the leave entitlement occurs:

- (1) Calendar year;
- (2) Any fixed 12-month "leave year" (e.g., fiscal year; year based on employee's anniversary date);
- (3) 12-month period forward from the date any employee's first FMLA leave begins (e.g., an employee would be entitled to 12 weeks of leave during the year beginning on the first date the FMLA leave is taken; the next 12-month period would begin the first time leave is taken after completion of any previous 12-month period); or
- (4) A "rolling" 12-month period measured backward from the date an employee uses any FMLA leave (may not extend back before August 5, 1993).

10. Must the employer use the same method for determining the 12-month period with every employee?

Yes. The method used to determine the 12-month period must be applied uniformly to all employees. An employer may change methods only if it gives at least 60 days' notice to all employees and does not prevent employees from retaining the full benefit of the 12 weeks of leave during the transition.

11. By what date must childbirth, adoption, or foster care leave be concluded?

Leave taken for childbirth, adoption, or foster care placement must be concluded at the end of the 12-month period following the date of the birth, adoption, or placement unless otherwise permitted by the employer or state law.

12. We have many families who work for us. Is each family member entitled to a full 12-week leave each year?

Generally, yes. However, a husband and wife who work for the same employer may take only 12 weeks of leave in the aggregate for the birth of a child, adoption, or foster placement, or for the care of a sick parent (not parent-in-law). For the employee's own or a child's serious health condition, each parent would be entitled to the full 12 weeks.

13. If husband and wife both use a portion of the total 12-week leave for the birth of a child, adoption, or foster care placement, are they entitled to take any more leave in the event of personal illness, or for the care of a sick child or the other spouse?

Yes. Each spouse would be entitled to the difference between the amount he or she has taken individually and 12 weeks.

14. Can the employer require that the 12-week leave period be taken all at once or is the employee entitled to use it intermittently?

For birth of a child, adoption, or foster placement, an employer may decide to require that the 12-week period be taken at one time. However, an eligible employee who requests the leave due to the serious health condition of the employee or a spouse, child, or parent may take the leave intermittently or on a reduced schedule leave when medically necessary. "Intermittent leave" is defined as leave taken in separate blocks of time for a single illness or injury and may include leave of periods from an hour or more to several weeks.

15. What is "reduced schedule leave"?

"Reduced schedule leave" is a leave schedule that reduces an employee's usual number of working hours per workweek or hours per workday. While there is no limit on the size of a leave increment of an intermittent or reduced schedule leave, an employer may limit such leave increments to the shortest period of time used by its payroll system to account for absences or use of leave.

16. Are there any protections for the employer when an employee requests an intermittent leave or a reduced schedule leave?

Yes, a few. If the employee's need for intermittent or reduced schedule leave is foreseeable based on planned medical treatment, the employee must make a reasonable effort to schedule the treatment so as not to "disrupt unduly the employer's operation." The employer also has the option of temporarily transferring the employee to an available alternative job that better accommodates the necessary periods of leave than the employee's regular position. The employee must be qualified to perform the alternative job and the job must have equivalent pay and benefits. It is important to note that transfer to an alternative position may require compliance with an existing collective bargaining agreement, federal law such as the ADA, and state law.

17. How is the amount of used leave determined where an employee takes leave intermittently or on a reduced schedule?

Only the amount of leave actually taken may be counted toward the 12 weeks of leave entitlement (e.g., 8 hour days: 4 hours of leave = 1/2 week of leave each week affected).

Leave for employees who work part-time schedules or variable hours is determined on a pro rata basis by comparing the new schedule with the employee's normal schedule (e.g., 30 hours per week: 10 hours of leave = 1/3 of a week).

For employees whose schedules vary from week to week, a weekly average of the hours worked over the 12 weeks prior to the beginning of the leave period is used to calculate the normal workweek.

18. Where leave is unpaid, may an employer deduct hourly amounts from an employee's salary without affecting the employee's exempt status under the Fair Labor Standards Act?

Yes. An employer may deduct from the exempt employee's salary for any hours taken as intermittent or reduced schedule FMLA leave

within a workweek without affecting the employee's exempt status for purposes of the FLSA.

19. Are employees entitled to pay for the time they are on leave?

No, but if the employer offers paid vacation, personal leave, family leave, sick or medical leave, then the employee may choose or the employer may require the employee to substitute any such accrued paid leave as applies for all or any part of the 12-week period. Unless the employer permits otherwise, paid family leave may be substituted only under circumstances permitted by the employer's family leave plan.

Only paid leave under circumstances which qualify as FMLA leave counts against the 12-week leave period. For example, paid sick leave used for a medical condition not considered to be a serious health condition does not count against the 12 weeks' leave entitlement.

An employee using paid leave must comply only with the employer's requirements for use of paid leave and not the more stringent FMLA notice or certification requirements unless the employee wishes to extend a paid leave period with unpaid FMLA leave; then the notice and certification requirements apply as of the first date of the leave period.

20. Does the employer designate whether the leave is paid or unpaid?

Yes. It is the employer's responsibility in all cases to designate at the time of the leave request whether the leave is paid or unpaid, whether it is FMLA-qualifying (based on what the employee tells the employer), and whether any paid leave must be substituted for unpaid leave.

21. Must the employer continue the employee's benefits during the leave period?

An employer must maintain the employee's insurance coverage under any group health plan throughout the period the employee is out on leave under this law. Coverage under the plan must be the same as though the employee were not on leave. An employee may choose not to retain health coverage during FMLA leave but must be reinstated to coverage upon return on the same terms as prior to taking the leave, i.e., no qualifying period, physical examination, or exclusion of pre-existing conditions. Where an employee has informed the employer of intent not to return from leave, the employee fails to return from leave or the employee has exhausted FMLA leave entitlement, the employer's obligation to maintain health benefits ceases unless COBRA applies or the employee is a "key" employee as defined below.

22. How may employees on FMLA leave pay their share of health benefit premiums?

If the leave is paid, the employee's share of premiums must be paid by the method normally used during any paid leave. If leave is unpaid, the employer may require payment at the same time as it would be made if by payroll deduction, on the same schedule as under COBRA, in accordance with a cafeteria plan, according to the employer's existing rules for payment by employees on "leave without pay" as long as such rules do not require prepayment, or any other system voluntarily agreed to by the employer and employee.

23. What happens if the employee fails to make timely health plan premium payments?

An employer may discontinue health insurance coverage if the employee's premium payment is more than 30 days late. However, the employee's failure to pay does not change any other obligations the employer has under the law, e.g., reinstatement of the employee's coverage/benefits upon return from leave equivalent to those the employee would have had if leave had not been taken or premium payment(s) had not been missed.

24. May the employer recover premiums it paid for maintaining "group health plan" coverage during FMLA leave?

Yes. Besides the circumstances discussed at 21, 22, and 23, an employer may recover any such premiums paid on the employee's behalf if he or she fails to return to work after FMLA leave has been exhausted, except where the failure to return is due to:

- (1) The continuation, recurrence, or onset of a serious health condition, unless the employer requests that the employee provide medical certification from the health providers of the employee or the employee's family members within 30 days, and the employee fails to do so.
- (2) Other circumstances beyond the employee's control, e.g., the employee's spouse's unexpected transfer to a job location more than 75 miles from the employee's worksite; a serious health condition of a relative or individual other than an immediate family member, requiring the employee to provide care; the employee's layoff while on leave; the employee's status as a "key" employee as defined in Question 28.

In all other circumstances, the employer may recover both its share and the employee's share of the health benefit premiums that the company paid during the course of the leave. No health benefit payments may be recovered for any periods of paid leave.

25. What means may the employer use for recovering health insurance premium payments made for the non-returning employee?

Under Kentucky Wage-Hour Law, if a written authorization is signed by the employee, an employer may deduct the amount due from any sums owed to the employee, e.g., vacation pay, final paycheck, etc. A self-insured employer may only recover its share of allowable "premiums" as would be calculated under COBRA, excluding the 2 percent administrative fee.

26. Is the employee guaranteed the same job upon returning from leave?

Generally, yes, but where such is not possible, the employee may be given an equivalent position involving equivalent employment benefits, pay, and other terms and conditions of employment.

27. What is an equivalent position?

An equivalent position is one having the same pay, benefits, and working conditions, including privileges, perquisites, and status, as well as the same or substantially similar duties and responsibilities entailing substantially equivalent skill, responsibility, and authority. The employee is also entitled to any new or additional benefits not dependent upon seniority or accrual during the leave period. An employee must also be given a reasonable opportunity to fulfill job requirements upon return to work where the employee's special qualifications for the position may have lapsed during the employee's leave.

28. What is a "key" employee?

A "key" employee is any salaried employee among the highest paid 10 percent of all salaried and non-salaried, eligible and ineligible employees within 75 miles of his or her worksite. If a "key" employee's job restoration would cause "substantial and grievous economic injury" to the operations of the employer, the employer need not reinstate the employee following the expiration of leave.

The determination of whether a salaried employee is among the highest paid 10 percent must be made at the time of the request for leave. In determining which employees are "key," year-to-date earnings (wages, premium pay, incentive pay, all bonuses already earned) are divided by weeks worked by the employee, including those weeks in which leave is taken.

29. What does "substantial and grievous economic injury" mean?

The test is not whether the employee's absence will cause such harm or injury, but instead whether restoring the employee to his or her position will have that effect. Factors used in determining substantial and grievous economic injury include the employer's ability to replace the "key" employee on a temporary basis; whether permanent replacement is unavoidable; and, if so, what effect it would have on company operations to reinstate the employee in an equivalent position. Minor inconveniences and costs that the employer would experience in the normal course of doing business would not constitute "substantial and grievous economic injury."

30. What are the employer's duties with respect to "key" employees?

The employer must provide written notice to the employee at the time of the leave request that the employee qualifies as a "key" employee. No later than the commencement of the employee's leave, the employer must also fully inform the employee of the potential consequences relative to reinstatement and maintenance of health benefits if the employer believes it is likely that the "key" employee will not be reinstated because of substantial and grievous economic injury to the employer's operations. Failure to provide timely notice will result in the employer's loss of its right to deny restoration for any reason.

31. What must the employer's notice contain?

The employer must serve notice, either in person or by certified mail, stating the basis for the employer's finding that substantial and grievous economic injury will result. If the employee is already on leave, the notice must provide a reasonable time to opt to return from the leave.

Unless the "key" employee indicates that he or she will not return to work after notice of non-restoration of his or her position, the employer is obligated to maintain health benefits and cannot recover its cost of health benefit premiums paid under the FMLA leave provisions. A "key" employee who opts to continue leave after notification of non-restoration of his or her position may seek reinstatement at the exhaustion of the leave period. At this point, the employer must determine whether substantial and grievous economic injury still exists and so notify the employee on writing.

32. Is an employer obliged to notify employees of their rights under this law?

Yes. Covered employers must post a notice describing the Act's provisions. Employers must also furnish notice and information to employees on their rights and obligations for FMLA

leave through applicable employee handbooks or other written policies used by an employer. If an employer does not have written policies, manuals, or handbooks, the employer must provide separate written guidance about the law to its employees at the time they request leave.

In addition, when an employee applies for FMLA leave, the employer must provide a detailed explanation of the employee's rights and obligations which may apply particularly to that employee's situation, such as any requirement to furnish medical certification substantiating a serious health condition, arrangements for paying the employee's portion of the insurance premiums during the leave period, his/her status as a "key" employee, and any requirement for medical certification of fitness to return to work.

33. Must the employee notify the employer before taking family and medical leave?

Only where the need for the leave is foreseeable due to childbirth, foster care, or planned adoption, or for planned medical treatment. In such cases, employees are generally required to give at least 30 days' advance notice or as much notice as possible. There is no notice requirement for an unforeseeable leave, but an employer may require notice provided as soon as possible under the circumstances, ordinarily within one or two business days of when the employee learns of the need for such leave. Verbal and even telephonic notice to the employer is sufficient. An employee's spouse or other family member may give such notice if the employee is unable to do so due to a serious health condition.

34. Does the employer have a right to verify the existence of a "serious health condition?"

Yes. The employer may require certification from a health care provider to support FMLA leave requests to care for a serious health condition. Employees must provide such certification in "a timely manner," defined as within 15 calendar days unless impracticable. Employers must inform employees in writing that such certification will be required.

35. May an employer question a medical certification?

Yes. If there is reason to doubt the validity of the certification, the employer may get a second opinion at its own expense. The second health provider may not be employed on a regular basis by the employer. If a conflict exists between the first and second opinions, the employer and employee may approve getting the opinion of a third medical provider at the employer's expense. Both parties must act in "good faith." If good faith is

lacking on either party's part, the medical opinion unfavorable to that party's position will be binding.

If an employee fails to provide timely certification within 15 days (where practicable) of the employer's request and the need for such leave was foreseeable, the leave request may be denied until the certification is produced. If the need for leave is not foreseeable, the employee must still attempt to provide the certification within 15 days of the employer's request, or as soon thereafter as practicable.

36. Are recertifications permissible?

Yes, as long as they are requested on a reasonable basis. The employer may request such recertification not more than once every 30 days unless (1) the employee requests an extension of leave; (2) changed circumstances occur regarding the illness or injury; or (3) the employer receives information that casts doubt upon the continuing validity of the most recent certification.

37. Can an employer require periodic reports from the employee on his present status and/or intent to return to work?

Yes. However, if the employee states an intention to return to work, even if the statement is somehow qualified, he/she remains entitled to the remainder of the leave. Where an employee gives an unequivocal notice of intent not to return to work, so ends the employer's obligations to reinstate the employee as well as to restore the employee as well as to restore the employee's medical insurance coverage (subject to COBRA).

38. Can the employer require medical evidence that the employee is capable of returning to work?

Yes, as long as the employer's policy is applied uniformly to all similarly situated employees and complies with ADA and similar laws, or any applicable collective bargaining agreement. Note that an employer may seek such fitness-for-duty certification only with regard to the particular health condition that caused the employee's need for leave. Also, the certification need only be a simple statement that the employee can return to work. Of course, an employer must comply with ADA requirements that any return-to-work physical be job-related. Notice of the need for a "fitness-for-duty" certification must be given by the employer either at the time the leave is requested or immediately after the leave commences. No second or third fitness-for-duty certifications may be required.

39. How will the Act be enforced?

Both individual employees and the Department of Labor can bring suit against an employer who does not comply with the Act.

40. What is the statutory time limit for bringing an action?

A court action must be brought within two years of the date of violation except where the violation is willful, in which case the action must be brought within three years of the date of the last event constituting the violation.

41. What happens if an employer is notified of a violation of the posting requirement?

If the Department of Labor determines that the posting violation is willful, a notice of penalty (of as much as \$100 per affected employee) will be served on the employer in person or by certified mail.

42. May an employer appeal the penalty assessment for willful violation of the posting requirement?

Yes. A review may be obtained from the Wage and Hour regional administrator for the region in which the violation occurred by filing a petition in writing containing the legal and factual bases for the petition within 15 days of receipt of the notice of penalty. The decision resulting from the petition constitutes the final order of the secretary.

43. What happens if the employer does not pay the penalty assessment?

The regional administrator may seek recovery of the unpaid final order along with interest and penalties. The final order may also be referred to the solicitor of labor for collecting, or the secretary of labor may file suit in any court of competent jurisdiction.

44. What records must be kept to comply with FMLA?

- Records containing basic payroll information similar to that required under the Fair Labor Standards Act.
- Dates of FMLA leave taken by the employee to include requests for leave, etc. (and leave must be designated as FMLA leave). The records must not include leave provided under state law or an employer's plan not covered by FMLA. Where leave is taken in increments of less than one full day, a record must be kept of the hours of the leave.

- Copies of employee notices of leave given to the employer and all notices, general and specific, given to the employees relative to FMLA leave.
- Any documents describing employee benefits or employer policies and practices regarding the taking of paid and unpaid leave.
- Premium payments of employee benefits.
- Records relative to any dispute between the employee and employer regarding matters pertaining to FMLA leave.
- Records and documents relating to medical certification, recertification, or medical histories of the employee or the employee's family members. (Such records should be treated as confidential, maintained in separate files, and released on a "need to know" basis.)
- Records must be kept for a period of three years, and an employer may not be requested to submit books or records for audit more than once a year unless the Department of Labor has reasonable cause to believe a violation exists.

45. What if an employer is not subject to the FLSA recordkeeping regulations for purposes of minimum wage or overtime compliance?

In that case, an employer need not keep a record of actual hours worked as long as:

- (1) Eligibility for leave is presumed in the case of employees who have been employed for at least 12 months; and
- (2) The employer and employee agree on an employee's normal schedule or average weekly hours worked, and such schedule is reduced to a written agreement where an employee takes leave intermittently or on a reduced schedule basis.

46. How do other laws, employer practices, and collective bargaining agreements affect employee rights under FMLA?

An employer must observe any employment benefit program or plan that provides greater family or medical leave rights than those under FMLA. Any provisions of a law or collective bargaining agreement which diminishes rights under the law are superseded by the FMLA.

Where employers are also covered by state law, such as under maternity leave statutes, etc., and the leave requested qualified

under both FMLA and the applicable state law, the leave used counts against the employee's entitlement under both laws. The converse is also true. If applicable state or local laws provide for leaves which do not qualify as FMLA leave (e.g., for care of a parent-in-law), such leave must be given in addition to the 12-week FMLA leave.

47. What about FMLA leave and the ADA?

Where the employee is "qualified disabled" under the ADA, the employer must make reasonable accommodations but at the same time afford an employee his or her FMLA rights.

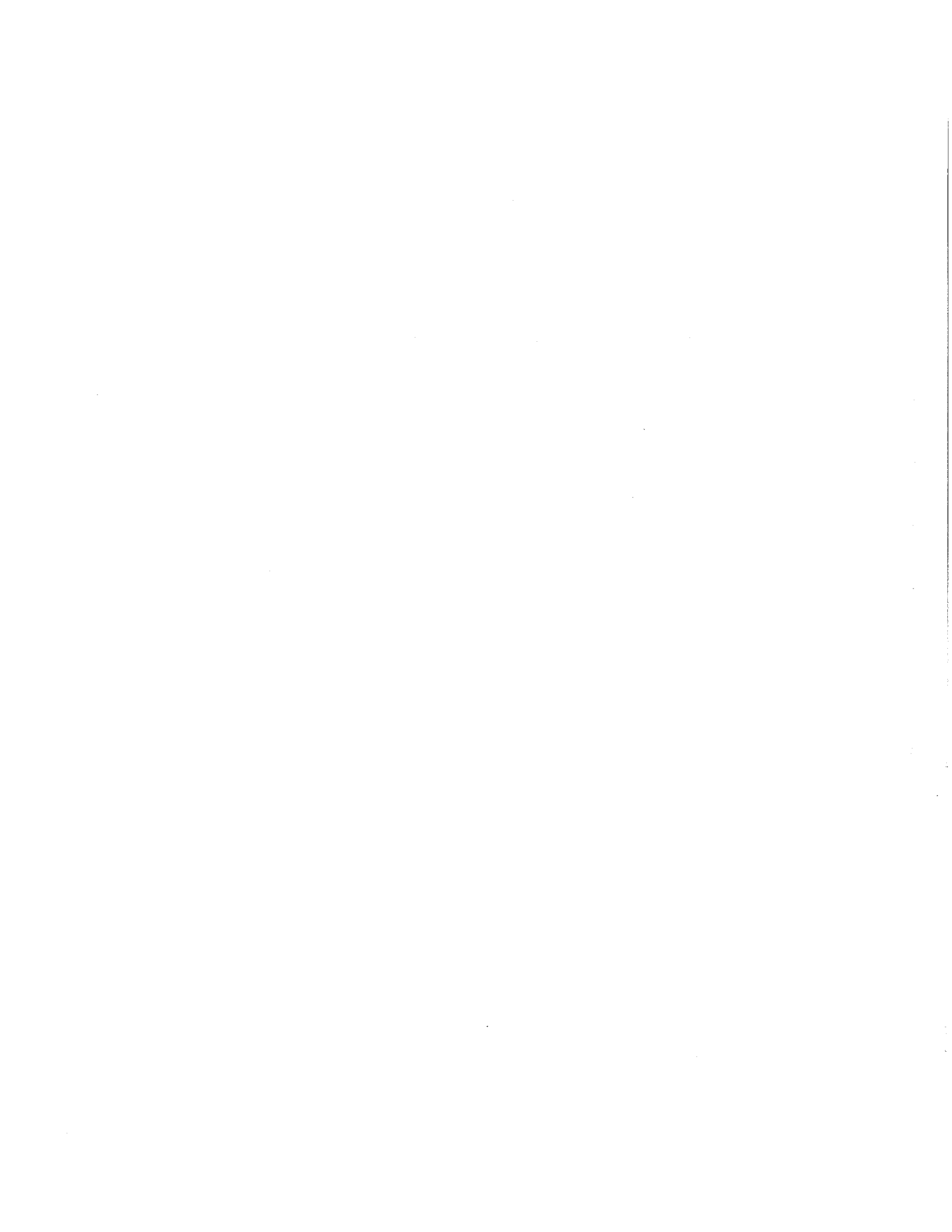
For example, if an employee became disabled, a reasonable accommodation under the ADA might be accomplished by providing the employee with a part-time job with no health benefits. However, FMLA would permit an employee to work a reduced schedule leave until 12 weeks of leave were used, with health benefits maintained during this period. At the end of the FMLA leave entitlement, an employer is required to reinstate the employee in the same or an equivalent position to that which the employee held when leave commenced, with equivalent pay and benefits. The employer's FMLA obligations would be satisfied if the employer offered the employee an equivalent full-time position. If the employee were unable to perform the equivalent position because of a disability, and the employee had exhausted his or her FMLA entitlement, the ADA might permit or require the employer to make a reasonable accommodation at that time by placing the employee in a part-time job, with only those benefits provided to part-time employees.

If FMLA entitles an employee to leave, an employer may not, in lieu of FMLA leave entitlement, require an employee to take a job with a reasonable accommodation. However, ADA may require that an employer offer an employee the opportunity to take such a position.

If an employer requires certifications of an employee's fitness for duty to return to work, as permitted by FMLA under a uniform policy, it must comply with the ADA requirement that a fitness-for-duty physical be job-related.

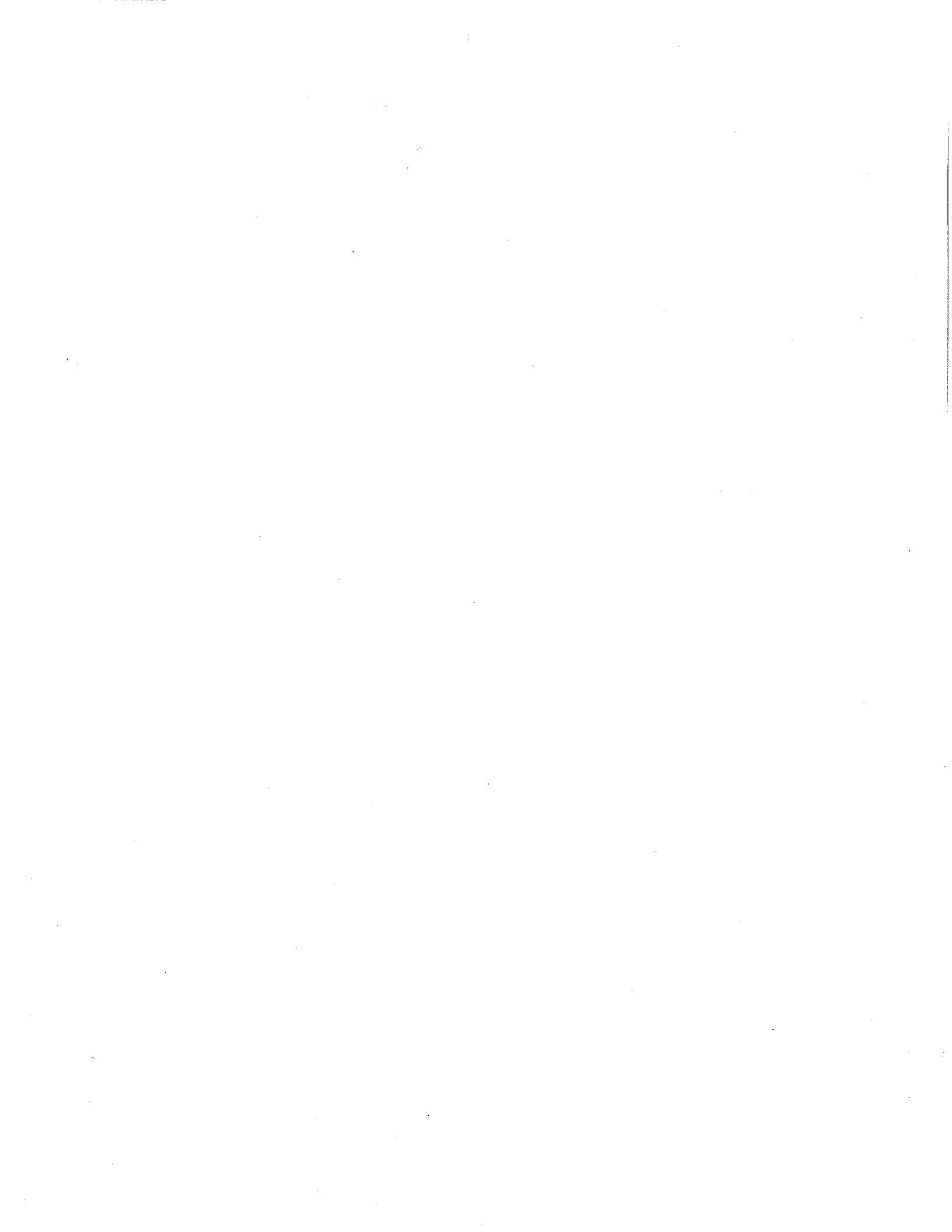
48. What about FMLA leave and workers' compensation?

The primary conflict between the FMLA and workers' compensation involves light duty work and temporary total disability benefits. If the FMLA qualifying condition is in connection with a workers' compensation claim, the employer may attempt to return the employee to work in a light duty position, thus decreasing workers' compensation payments. However, under the FMLA the employee may be entitled to refuse the light duty work and continue on unpaid leave. Of course, any such refusal should result in the termination of temporary total disability payments.



**LITIGATION UNDER THE EMPLOYEE RETIREMENT
INCOME SECURITY ACT (ERISA)**

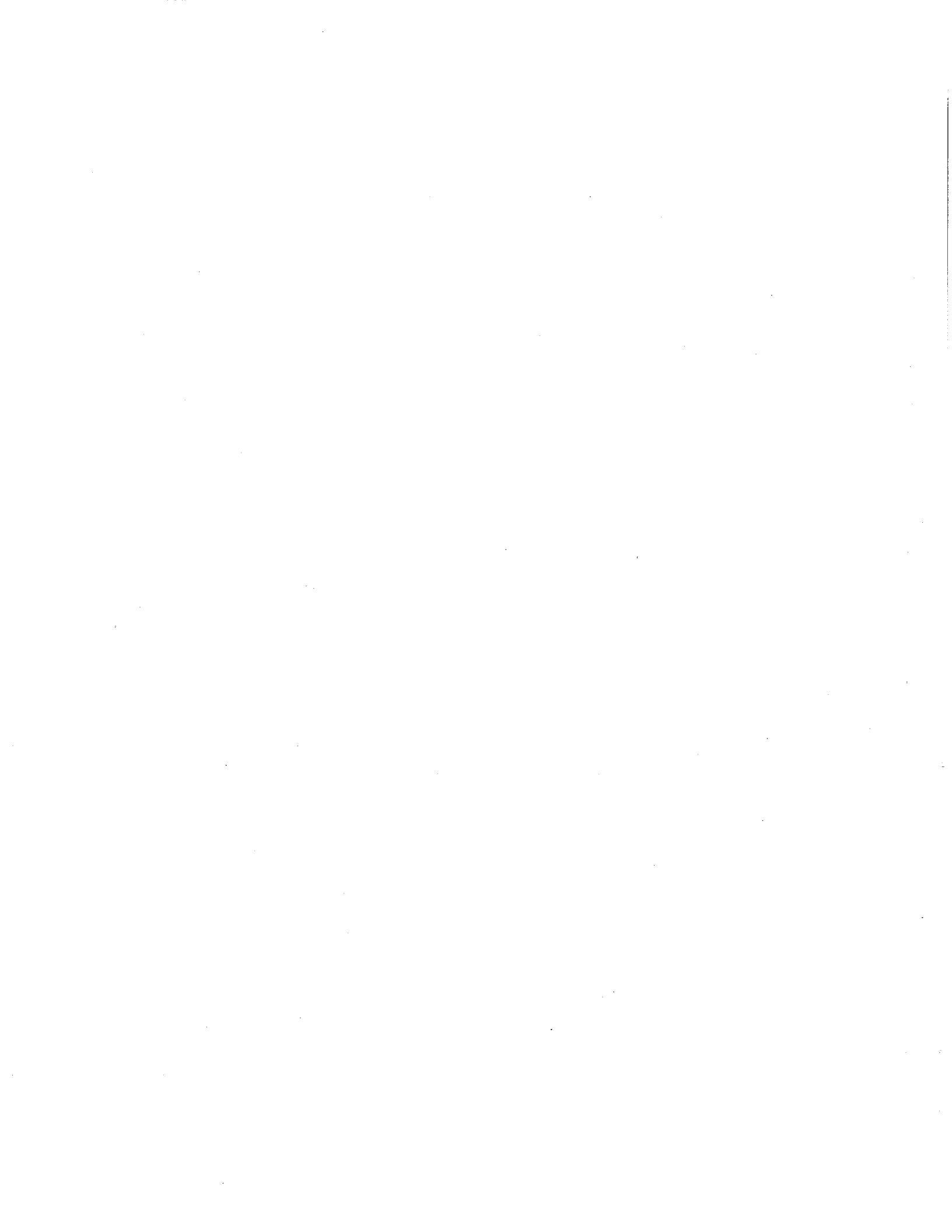
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LITIGATION UNDER THE EMPLOYEE RETIREMENT INCOME SECURITY ACT

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LITIGATION UNDER THE EMPLOYEE RETIREMENT SECURITY ACT

Whitney Wallingford
June 10, 1994

1. INTRODUCTION

1.1 General Overview. In 1974 Congress enacted the Employee Retirement Income Security Act ("ERISA") primarily in response to growing concerns regarding the inadequate standards and safeguards then applicable to the establishment, operation and funding of employee benefit plans. ERISA §2, 29 U.S.C.S. §1001b. While the initial congressional focus centered around abuses in the area of retirement plans, ERISA coverage was extended to encompass other employee benefit plan programs as well.

ERISA's broad scope can easily be detected by reviewing its table of contents. Title I is intended to protect employees and plan participants by establishing minimum standards regarding (i) reporting and disclosure (ERISA §§101-111, 29 U.S.C.S. §§1021-1031); (ii) participation and vesting (ERISA §§201-211, 29 U.S.C.S. §§1051-1061); (iii) minimum funding standards (ERISA §§301-308, 29 U.S.C.S. §§1081-1086); (iv) fiduciary responsibility (ERISA §§401-414, 29 U.S.C.S. §§1101-1114) and; (v) administration and enforcement (ERISA §§501-515, 29 U.S.C.S. §§1131-1145).

Substantive additions to Title I of ERISA were enacted in the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA") imposing continuation coverage requirements under group health plans. COBRA health care continuation requirements are contained in Part 6 of Title I of ERISA. (ERISA §§601-608, 29 U.S.C.S. §§1161-1168). Corresponding tax provisions are contained in Section 4980B of the Internal Revenue Code of 1986, as amended ("Code").

In addition to participant rights and employer obligations, Title II of ERISA also governs the tax treatment associated with employee benefit plans. In many instances you will find that a particular requirement will be codified in both the provisions of the Code and the Labor provisions of the United States Code. This means that the requirement is imposed as a condition of tax qualification and the employer or the participant has enforceable duties or rights. Examples include minimum vesting standards (ERISA §203, Code §411), the exclusive benefit rule (ERISA §402(c)(1), Code §401(c)(1)), written plan requirements (ERISA §402(b), Code §401(a)), benefit distributions forms (ERISA §205, Code §401(a)(11) and 417), and benefit accrual requirements (ERISA §204, Code §411).

Title II further establishes registration and information requirements, a declaratory judgement procedure relating the qualification of retirement plans and internal operational

requirements for the Internal Revenue Service in monitoring employee benefit issues.

Title III of ERISA governs the jurisdiction, administration and enforcement of employee benefit plans, establishes a Joint Pension, Profit Sharing and Employee Stock Ownership Plan Task Force, commissions other Congressional studies involving employee benefit issues, and establishes a Joint Board For The Enrollment of Actuaries.

A comprehensive federal insurance plan for the termination of defined benefit employee pension benefit plans is included in ERISA Title IV. Passage of ERISA created the Pension Benefit Guaranty Corporation, which is charged with the responsibility of monitoring the termination insurance program. Plans subject to Title IV are required to pay annual premiums and are subject to strict termination procedures. Additionally, employers maintaining plans subject to Title IV also risk exposure for the underfunding of terminated plans.

1.2 Plan Types. Most practitioners view ERISA as mandating legal requirements for "qualified" retirement plans. In fact, employee pension benefit plans providing retirement benefits are governed by ERISA and probably receive more attention under ERISA than other plans. Employee pension benefit plans can either be "qualified" or "non-qualified." Qualified retirement plans entitle plan sponsors, the plan and plan participants to preferential tax treatment. Non-qualified retirement plans do not afford the same degree of preferential tax treatment but are generally not subject to the stringent qualification rules otherwise imposed on qualified plans.

Many of the provisions of ERISA also apply to welfare plans, which are plans that are established and maintained for the purpose of providing medical, surgical, or hospital care benefits in the event of sickness, accident, disability, death, unemployment, vacation, apprenticeship or other training programs, day care centers, scholarship funds, or prepaid legal services. During the infancy stages of ERISA employers, employees and many governmental agencies virtually ignored or were unaware of the application of ERISA to employee welfare benefit plans. As a result of the developing crisis in the health care industry our national focus is now being shifted towards welfare benefit plans. Undoubtedly, mounting pressures resulting from the budget deficit will require a decline in federally funded benefits such as Medicare. Assuming such a trend, it is likely that Congress will implement even more far reaching changes in the welfare benefit plan area in the future.

1.3 Legal Authorities. In reviewing potential ERISA claims it is important to note that ERISA's provisions impose restrictions applicable to both substantive claims as well as the tax treatment

associated with employee benefit plans. In many instances there is an overlap between legal requirements imposed upon a plan, giving participants rights under the plan, as well as detrimental tax treatment for failure to abide by tax rules. Overall, it is easy to view ERISA as two components -- tax and non-tax. Tax components of ERISA are embodied in 29 U.S.C. while the tax provisions are embodied in the Internal Revenue Code.

Because of the overlap of tax and labor provisions, on August 10, 1978 the President issued ERISA Reorganization Plan No. 4 for the purpose of clarifying jurisdiction of issues relating to the Department of Treasury and the Department of Labor.

2. CIVIL ENFORCEMENT PROCEEDINGS

2.1 Administrative Enforcement. Section 502 of ERISA (29 U.S.C.S. §1132) authorizes the Secretary of Labor to investigate civil and criminal violations of ERISA and related laws and to forward violations to the Attorney General for appropriate action.

(a) The Secretary may sue to enjoin any act or practice which violates the reporting and disclosure requirements, or the participation, vesting and funding rules of ERISA, or to obtain any other appropriate relief necessary to enforce those rules. ERISA §502(a)(5); 29 U.S.C.S. §1132(a)(5).

(b) The Secretary may not bring an action for equitable relief for violation of the participation, vesting or funding rules of ERISA in the case of a qualified plan, or a plan for which an application for qualification is pending, unless requested to do so by the Secretary of the Treasury. ERISA §502(b)(1)(A); 29 U.S.C.S. §1132(b)(1)(A).

(c) Participants, beneficiaries or plan fiduciaries may request that the Secretary exercise enforcement authority with regard to the participation, vesting or funding rules. ERISA §502(b)(1)(B); 29 U.S.C.S. §1132(b)(1)(B).

(d) The Secretary may sue a plan fiduciary in order to secure restitution to the plan for any losses resulting from a breach of fiduciary duty and to seek the removal of the breaching fiduciary.

(e) The PBGC has authority to make investigations and may sue in federal district court for appropriate legal and/or equitable relief in order to enforce the termination insurance provisions of ERISA. ERISA §4003; 29 U.S.C.S. §1303.

(f) The Department of Labor's ("DOL") preferred method of handling ERISA violations is through voluntary compliance unless immediate action is necessary in order to preserve plan assets or

to protect participants' rights.

(g) In determining whether immediate action is necessary the DOL will consider such factors as the flagrancy of the violation and the threat of loss of plan assets or records during the voluntary compliance period.

(h) Judicial review of DOL regulatory actions is governed by the Administrative Procedures Act which is specifically incorporated into the labor provisions of Title I of ERISA.

(i) Federal district courts have exclusive jurisdiction over actions for judicial review brought under Title I of ERISA. Such actions are to be brought in the district court in the district where the plan has its principal office or in the District of Columbia federal district court. ERISA §502(f), 29 U.S.C.S. §1132(f).

2.2 Private Actions.

(a) Right to Bring Action

(i) A fiduciary, plan participant or beneficiary may bring a private action under Sections 502(a)(1) and (a)(3) of ERISA (29 U.S.C.S. §1132) in order to enjoin any act or practice which violates the provisions of Title I of ERISA, the rules for the protection of employee benefit rights, or the terms of the plan, or in order to obtain other appropriate equitable relief to redress such violations.

(ii) A civil action may be brought by a plan participant or beneficiary to recover benefits due, enforce rights under the terms of the plan, or to clarify rights to future benefits under the terms of the plan. ERISA §502(a)(1); U.S.C.S. §1132(a)(1).

(iii) Section 510 of ERISA (29 U.S.C.S. § 1140) prohibits anyone from discharging, fining, suspending, expelling, disciplining or discriminating against a participant or beneficiary for exercising rights protected by ERISA or taking part in a legal proceeding under its provisions.

(b) Standing to Sue

(i) Outside parties who deal with an employee benefit plan do not have standing to sue to enforce their rights against the plan under ERISA.

(ii) The courts have generally held that a plan participant who has received a lump sum distribution is no longer a participant with standing to bring suit under ERISA because such participant is no longer eligible to receive benefits under the

plan. In an action by a former pension plan participant the Seventh Circuit, while holding that the participant lacked standing, stated that there was "merit to the argument that a former employee who has already received vested benefits should be allowed to bring an action within a reasonable amount of time against the administrator for failure to provide information and in order to ascertain the accuracy of the amount already received." The court, however, refused to find standing as the participant waited three years from her date of termination to file suit. Winchester v. Pension Committee of Michael Reese Health Plan, etc., 942 F.2d 1190 (7th Cir. 1991).

(iii) The Fourth Circuit, invoking its prerogative to create federal common law under ERISA, held that the federal courts have jurisdiction over a suit brought by a plan administrator under Section 502(a)(1)(B) of ERISA (29 U.S.C.S. §1132). The court held that while Section 502(a)(1)(B) of ERISA provides a federal cause of action only for participants or beneficiaries, an ERISA action governed by federal common law arises under federal law where the issues in dispute are of central concern to the federal statute. Provident Life and Accident Insurance Co. v. Waller, 906 F.2d 985 (4th Cir. 1990) cert. denied, 111 S.Ct. 512 (1990).

(iv) In Kennedy v. Connecticut General Life Ins. Co., 924 F.2d 698 (7th Cir. 1991), the court held that a health care provider has standing under ERISA to sue for benefits assigned to him by a participant in an employee welfare benefit plan. The court held that in such a situation the health care provider was a beneficiary within the meaning of ERISA.

(v) The court in Hawaii Teamsters v. City Express Inc., 751 F.Supp. 1426 (D. Haw. 1990), held that where a union is the bargaining representative of plan participants, the union has standing to sue under ERISA to vindicate rights under the plan on behalf of its members.

(vi) The Supreme Court recently held in Nationwide Mutual Insurance Co. v. Darden, 60 U.S.L.W. 4242 (March 24, 1992), that the term "employee", as used in ERISA, incorporates traditional agency law principles for identifying employer-employee relationships. The court held that where a statute, such as ERISA, does not define the term "employee," it is presumed that Congress intended an agency law definition unless clearly indicated otherwise. The Court adopted a multi-factor common law test for determining who is an "employee" and held that all of the incidents of the employment relationship must be assessed and weighed, with no one factor being decisive, in order to determine whether an individual will be considered an employee under ERISA.

2.3 Statute of Limitations.

(a) ERISA does not provide a statute of limitations period for suits brought to enforce its provisions except for actions brought for breach of fiduciary duty or for actions under the special provisions relating to multi-employer plans.

(b) The controlling limitation period will be that contained in the most analogous state statute of limitations. Meade v. Pension Appeals & Review Committee, 966 F.2d 190 (6th Cir. 1992), applying an Ohio 15 year state statute in a benefit claim case. The courts will apply the statute of limitations of the state in which the operative events relating to the cause of action occurred.

(c) Generally, a participant's cause of action is said to arise when the participant becomes aware of the facts necessary to state a claim, not when the participant discovers that he or she has a possible legal claim based upon those facts.

(d) According to Section 413 of ERISA (29 U.S.C.S. §1113) claims based upon a breach of fiduciary duty, absent fraud or concealment, may not be brought after the earlier of;

(i) 3 years after the complaining party has actual knowledge of the breach or after the filing of a report with the Secretary of Labor from which the complaining party could have reasonably been expected to obtain knowledge of the breach; or

(ii) 6 years after the date of the last action constituting a breach, or, in the case of an omission, the last date by which a fiduciary could have acted to cure the breach.

Ziegler v. Connecticut Gen. Life Ins. Co., 916 F.2d 548 (9th Cir. 1990), held that not all actions for breach of fiduciary duty under ERISA require that harm occur as a result of the breach before they will accrue. The court stated that the language of Section 413 of ERISA clearly states that actual knowledge, and not harm, triggers the limitations period. The court applied a two part test in determining when the statute of limitations period should commence, looking first at the time that the alleged breach or violation occurred and secondly at the time that the plaintiff had actual knowledge of such breach or violation. The court noted that to require actual harm before an action may be brought for breach of fiduciary duty would prevent the prosecution of breaches of fiduciary duty which Congress intended should be prosecuted in enacting ERISA. Such breaches include the failure to perform fiduciary duties for the exclusive benefit of participants and their beneficiaries or the transfer of plan assets to parties in interest.

Another case which recognized the stringent requirement of actual knowledge, not merely constructive knowledge, for barring claims against fiduciaries prior to the expiration of the six year statute of limitations was Gluck v. Unisys Corp., 15 E.B.C. 1095 (3rd Cir. 1992). The court held that "actual knowledge of a breach or violation" as required under Section 413 of ERISA requires that a plaintiff have actual knowledge of all material facts necessary to understand that some claim exists. Such facts might include necessary opinions of experts, knowledge of a transaction's harmful consequences, or actual harm.

In the case of fraud or concealment, fiduciaries remain vulnerable to suit for a period of six years from the discovery of their breach or violation. The courts are divided as to whether the term "fraud or concealment" refers to the action giving rise to the ERISA claim or only to actions by the fiduciary to hide the breach.

2.4 Pre-Litigation Claims Procedure.

Section 503 of ERISA (29 U.S.C.S. §1133) requires that every employee benefit plan establish special appeal procedures which provide for written notice of a claim denial to the participant or beneficiary making the claim for benefits and a reasonable opportunity for a full and fair review of the decision denying the request.

Many courts require the exhaustion of interplan claim procedures as a prerequisite to bringing a suit for benefits under ERISA. In Baxter v. C.A. Muer Corp., 941 F.2d 451 (6th Cir. 1991), the court held that a plan participant who is not provided with a written denial of benefits, as required under ERISA, may still be required to appeal the claim denial before proceeding in federal court. The court held that even though a written denial of benefits was not issued, the participant, who had a copy of the plan document, was notified of the denial and could have sought review.

Springer v. Wal-Mart Associates' Group Health Plan, 908 F.2d 897 (11th Cir. 1990), held that a plan administrator's refusal to process a claim did not excuse a participant from the requirement that the participant exhaust the administrative remedies available under the plan prior to filing a suit for benefits.

This prerequisite may be waived if the appeals procedures would be futile or if there has been a wrongful denial of access to such procedures. In Curry v. Contract Fabricatory, Inc. Profit Sharing Plan, 891 F.2d 842 (11th Cir. 1990), the court permitted a participant to maintain an action under ERISA for the denial of benefits despite the participant's failure to exhaust the plan's administrative remedies. The plan administrator failed to provide the participant with plan documents describing the remedies available under the plan or to document the reasons for the denial of the participant's claims. The court held that the plan administrator's actions denied the participant meaningful access to

the review process and therefore exhaustion of the plan's administrative remedies was not required.

In Graphic Communications v. GCIU - Employer Retirement Plan, 917 F.2d 1184 (9th Cir. 1990), the plan stated that a claim for benefits would initially be reviewed by the plan administrator whose decision could then be appealed to the fund trustees. If a participant was dissatisfied with the trustees decision, a participant could take the remaining step in the plan's administrative process which was final and binding arbitration. A participant in the plan declined to arbitrate and instead filed suit in Federal District Court under Section 502 of ERISA (29 U.S.C.S. §1132) contending that the arbitration provisions in the plan were unenforceable. The court held that judicial review of the benefit claim denial was unavailable due to the participant's failure to follow the plan's mandatory arbitration procedures. The court stated that arbitration clauses are unenforceable when the claim in question is one that arises under ERISA, but are enforceable where the claim involves plan interpretation. The court held that ERISA does not forbid enforcement of an agreement to arbitrate questions of coverage under ERISA plans.

2.5 Jurisdiction and Venue.

(a) Except in the case of a civil action under ERISA Section 502(1)(B) by a participant or beneficiary to recover benefits, enforce rights or to clarify rights under a plan, Federal district courts have exclusive jurisdiction over civil actions brought by participants, beneficiaries or plan fiduciaries. ERISA Section 502(e)(1).

(b) The federal courts exercise concurrent jurisdiction with state courts in actions brought by participants and beneficiaries to recover benefits, enforce rights or clarify rights.

(c) Venue for civil actions under ERISA is the place where the plan is administered, where the breach that is the subject of the suit occurred, or where the defendant resides or may be found. ERISA Section 502(e)(2).

2.6 Availability of Jury Trial.

(a) ERISA has generally been regarded as an equitable statute, and since it does not expressly provide for jury trials, the Seventh Amendment's right to a jury trial has generally been held not to apply to ERISA actions.

(b) There is, however, a split of authority whether jury trials are required under the Seventh Amendment. The Third, Fifth, Seventh, Eighth and Eleventh Circuits, and a district court in the First Circuit have ruled that neither ERISA nor the Seventh Amendment guarantees the right to a jury trial in actions to recover benefits.

(c) Supreme Court cases have indicated that remedies

other than equitable ones may be available under ERISA. In Firestone Tire and Rubber Co. v. Bruch, 109 S.Ct. 948 (1989), the Court compared benefit claims to breach of contract actions which are legal in nature, and in Ingersole-Rand Co. v. McClendon, 111 S.Ct. 478 (1990), the Court indicated that compensatory damages, a legal remedy, are within the scope of ERISA. In light of these developments, courts have begun to re-examine the issue of the right to a jury trial under ERISA.

3. PREEMPTION

3.1 The Preemption Clause.

ERISA Section 514(a) provides in part: "Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) [29 USCS § 1003(a)] and not exempt under section 4(b) [29 USCS § 1003(b)]." This statute, known as the "preemption clause," cannot, according to its terms, supersede state laws if the employee benefits do not constitute an employee benefit plan. Assuming that an employee benefit plan described in section 4(a) and not exempt under section 4(b) of ERISA exists, the question then becomes whether the state law "relates to" the plan.

The Supreme Court has held that the phrase "relate to" should be given a broad common-sense meaning, "such that a state law relate[s] to a benefit plan in the normal sense of the phrase, if it has a connection with or reference to such a plan." See Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 739, 105 S. Ct. 2380, 2389 (1985) (quoting Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 97 (1983)). In fact, the Court has stated that the preemption clause was designed to displace all state laws falling within its scope, even laws that mirror ERISA's substantive provisions. Id., 105 S. Ct. at 2389 (citing Shaw, 463 U.S. at 98-99). The Court has emphasized, however, "that the pre-emption clause is not limited to state laws specifically designed to affect employee benefit plans." See Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 47-48, 107 S. Ct. 1549, 1553 (1987) (quoting Shaw, 463 U.S. at 98).

This broad interpretation of the preemption clause is consistent with the legislative history of the statute, and the Supreme Court has noted that congressional purpose is the "ultimate touchstone" in determining whether a state law is preempted by federal law. Id. at 45, 107 S. Ct. at 1552.

3.2 The Saving Clause. The preemption clause is qualified by section 514(b)(2)(A) of ERISA. That section, known as the "saving clause," provides, "Except as provided in subparagraph (B), nothing in this title shall be construed to exempt or relieve any person from any law of any State which regulates insurance . . ." 29 U.S.C.S. § 1144(b)(2)(A) (Law. Co-op. 1990). For a state law to be "saved" from the application of the preemption clause, it must, according to the Supreme Court, pass a test which may, depending on

the facts of the case, have two parts. The first prong of the test, which is present in every case, is whether a law "regulates insurance." To determine whether a law regulates insurance, the Supreme Court has devised a two-step test. First, it asks whether the statute in question regulates insurance from a "common-sense view." See Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 48, 107 S. Ct. 1549, 1553 (1987). To pass this test, "a law must not just have an impact on the insurance industry, but must be specifically directed toward that industry." See id. at 50, 107 S. Ct. at 1554. The second part of the "regulates insurance" test asks whether the law at issue meets certain criteria used to determine whether a particular practice falls within the McCarran-Ferguson Act's reference to the "business of insurance." Those criteria are: "[F]irst, whether the practice has the effect of transferring or spreading a policyholder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry." See Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 743, 105 S. Ct. 2380, 2391 (1985) (quoting Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 129, 102 S. Ct. 3002, 3008 (1982)) (emphasis in original). If a state law passes both the "common-sense" and the McCarran-Ferguson tests, it will fall under the "regulates insurance" language of the saving clause.

Even if the state law passes the "regulat[ing] insurance" hurdle, it still might not be held to be saved from preemption. In Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 52, 107 S. Ct. 1549, 1555 (1987), the Court found that because "the state cause of action seeks remedies for the improper processing of a claim for benefits under an ERISA-regulated plan, our understanding of the saving clause must be informed by the legislative intent concerning the civil enforcement provisions provided by ERISA § 502(a), 29 U.S.C. § 1132(a)." In other words, where the state law at issue is remedial in nature, the Court found that it had to consider not only the tests for meeting the "regulates insurance" language of the saving clause, "but also the role of the saving clause in ERISA as a whole." See id. at 51, 107 S. Ct. at 1555. The Court in Pilot found that the civil enforcement scheme set forth in section 502(a) was intended to be the exclusive remedy for asserting improper processing of claims, and that this exclusivity would be undermined if ERISA-plan participants and beneficiaries could obtain relief under varying state law remedies that were rejected by Congress when it crafted ERISA. In holding that the state law cause of action for improper processing of an insurance claim was not saved by the saving clause, and was therefore preempted by the preemption clause, the Court noted that the most important factor in its decision was Congress' intent that ERISA's civil enforcement provision be exclusive. See id. at 52, 54, 57, 107 S. Ct. at 1555-56, 1558. Consequently, in cases where the state law in question might affect the remedies section of ERISA, it is not enough that the state law meets the "regulating insurance" test; it must also pass the "role-of-the-saving-clause-in-ERISA-as-a-whole" test.

3.3 The Deemer Clause. Even if a state law meets all the applicable requirements of the saving clause test, it still may be preempted by virtue of section 514(b)(2)(B) of ERISA, known as the deemer clause. That clause provides:

"Neither an employee benefit plan described in section 4(a) [29 USCS § 1003(a)], which is not exempt under section 4(b) [29 USCS § 1003(b)] (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer . . . or to be engaged in the business of insurance . . . for purposes of any law of any State purporting to regulate insurance companies . . . [or] insurance contracts"

The Supreme Court has interpreted the effect of the deemer clause: "[I]f a plan is insured, a State may regulate it indirectly through regulation of its insurer and its insurer's insurance contracts; if the plan is uninsured, the State may not regulate it." See FMC Corp. v. Holliday, 111 S. Ct. 403, 411 (1990). As a result of the Court's holding in FMC, employers attempting to implement self-insured plans affecting employees in different states should not have to confront "conflicting or inconsistent State and local regulation of employee benefit plans." FMC Corp., 111 S. Ct. at 411 (quoting Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 99, 103 S. Ct. 2890, 2901 (1983)) (quoting remarks of Sen. Williams).

In summary, preemption analysis can be broken down as follows:

Step one: Determine whether the law at issue relates to an employee benefits plan. If so, go to step two; if not, the law is not preempted and the analysis is at an end.

Step two: Determine whether the law is saved by the saving clause. This determination can consist of one or possibly two tests:

1. Does the law regulate insurance? This prong of the saving clause analysis always applies and consists of two questions: (a) Taking a common-sense view of the saving clause language, is the law specifically directed towards the insurance industry?, and (b) Does the law meet any or all of the three McCarran-Ferguson Act factors: (i) whether the practice has the effect of transferring or spreading a policyholder's risk; (ii) whether the practice is an integral part of the policy relationship between the insurer and the insured; and (iii) whether the practice is limited to entities in the insurance industry? If the law passes these two tests, it regulates insurance. It may or may not be saved from preemption, however, depending on whether the second prong of the saving clause analysis applies and whether the law can

survive the second prong.

2. The second prong of the saving clause analysis, which may or may not apply depending on the facts of the case, is whether the law is consistent with the role of the saving clause in ERISA as a whole. In one case, the Supreme Court has held that allowing a state remedial law to survive preemption would defeat the civil enforcement scheme of ERISA, and the court considered this the most important factor in preempting the law.

If the state law passes all of the saving clause hurdles, it still must be determined whether or not the deemer clause preempts the law in spite of the saving clause.

Step three: Determine whether the state law purporting to regulate insurance deems an employee benefit plan to be an insurance company or other insurer or to be engaged in the business of insurance. If so, the law is preempted by the deemer clause; if not, the law survives preemption analysis. Practically, the deemer clause will apply to preempt a state law if the law attempts to regulate plans directly or to regulate self-insured plans directly or indirectly.

Although the principles set forth above seem relatively straightforward, they have proved difficult to apply in practice.

3.4 Application of Preemption Tests - Insurance.

One of the landmark cases that dealt directly with health insurance arrangements was Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 105 S. Ct. 2380 (1985). In that case, the Court considered whether a Massachusetts statute, which required minimum mental health benefits be provided to Massachusetts residents who were insured under a general insurance policy, an accident or sickness policy, or an employee health-care plan covering hospital and surgical expenses, was preempted by ERISA. See id. at 727, 105 S. Ct. 2382-83. Because the Attorney General of Massachusetts found that appellant insurers Metropolitan Life Insurance Company and Travelers Insurance Company were issuing policies outside of Massachusetts which failed to provide the requisite mental health coverage mandated by the statute, and because the insurance companies reserved the right to challenge the applicability of the statute to any policy they issued to an ERISA plan within Massachusetts, he brought suit for declaratory and injunctive relief to enforce the statute. Id. at 734-35, 105 S. Ct. at 2386. The insurers asserted, inter alia, that the mandated-benefits statute was preempted by ERISA, while Massachusetts argued that the statute, as applied to insurance companies that sell insurance to ERISA plans, was a law regulating insurance and was thereby saved by virtue of the saving clause from the operation of the preemption clause. See id. at 733-34, 105 S. Ct. at 2385-86.

The Court noted that the Supreme Judicial Court of Massachusetts had found that the statute related to a benefit plan and thus would be preempted by ERISA unless it fell under one of the exceptions to the preemption clause. The lower court found that the statute was a law which regulated insurance and therefore was not preempted by ERISA. It rejected the insurers' claim that the saving clause was intended only to save "traditional" insurance laws (such as laws directly regulating insurers and laws regulating such matters as the way insurance may be sold), finding no such limitation in ERISA's language. In so finding, however, the lower court understood the saving clause to apply only to state laws that were unrelated to ERISA's substantive provisions. Because ERISA did not regulate the content of welfare plans, the court declared that state regulation of insurance that indirectly affected the content of the plans themselves was not preempted by ERISA. Further, the lower court held that the McCarran-Ferguson Act embodied Congress' intent that federal laws should not be found to supersede state laws regulating the business of insurance. Because the statute in question affected insurance and insurance policies, the court found that it was protected by the McCarran-Ferguson Act and that therefore it was not preempted by ERISA. See id. at 735-37, 741, 105 S. Ct. at 2387, 2390.

The Court affirmed the lower court's ruling, although it employed a broader reading of the saving clause. See id. at 758, 105 S. Ct. at 2399. In arriving at its ultimate holding that the statute was not preempted by ERISA, the Court first examined whether the statute was related to ERISA within the meaning of the preemption clause. Noting that the phrase "relate to" was to be given a broad reading, the Court found that although the statute was not designated as a benefit plan law, it bore indirectly on but significantly affected all insured ERISA plans, because it required them to purchase the mandated benefits specified in the statute when they purchased certain kinds of insurance policies. Thus, the Court agreed with the lower court that the statute related to ERISA plans and thus fell within the preemption clause. See id. at 739, 105 S. Ct. at 2388-89.

The Court found that the saving clause saved the statute from preemption. See id. at 744, 105 S.Ct. at 2391. In arriving at its conclusion, the Court first examined the statute from a common sense point of view. It noted that because on its face the statute regulated the terms of certain insurance contracts, it seemed to be saved from preemption by operation of the saving clause as a law which regulated insurance. See id. at 740, 105 S.Ct. at 2389. The Court stated that its interpretation was reinforced by the deemer clause, which provides that a plan "shall not be deemed to be an insurance company for purposes of any law of any State purporting to regulate insurance companies . . . [or] insurance contracts" Id. at 740-41, 105 S. Ct. at 2389 (quoting 29 U.S.C. § 1144(b)(2)(B)) (emphasis in original). The Court continued:

By exempting from the saving clause laws regulating insurance contracts that apply directly to benefit plans, the deemer clause makes explicit Congress' intention to include laws that regulate insurance contracts within the scope of the insurance

laws preserved by the saving clause. Unless Congress intended to include laws regulating insurance contracts within the scope of the insurance saving clause, it would have been unnecessary for the deemer clause explicitly to exempt such laws from the saving clause when they are applied directly to benefit plans.

Id. at 741, 105 S. Ct. at 2389-90.

The Court then turned to the question of whether the statute met the criteria for defining the business of insurance under the McCarran-Ferguson Act. As to the first factor, the Court found that the statute effected the spreading of risk, as it was enacted to spread the risk of mental health patients through more risk pools. Second, the Court found that the statute regulated an integral part of the policy relationship between the insurer and the insured by defining the type of insurance that an insurer could sell. Finally, the Court found that the practice was limited to entities within the insurance industry, as the mandated-benefit law imposed its requirements only on insurers. In light of the fact that the statute met the common-sense definition of regulating insurance and all three McCarran-Ferguson factors, the Court held that mandated-benefit statutes such as the one in question were saved from the preemption clause by virtue of the saving clause. See id. at 743-44, 105 S. Ct. at 2391.

The Court expanded on its analysis of the saving clause in Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 107 S. Ct. 1549 (1987). In Pilot, Dedeaux, an employee of Entex, Inc. ("Entex"), injured his back in an employment related accident. Entex had in place a disability benefit plan which it established by purchasing a group insurance policy from Pilot Life Insurance Co. ("Pilot Life"). Dedeaux sought permanent disability benefits following his accident, but Pilot Life terminated his benefits two years after the accident. Subsequently, Pilot Life reinstated and terminated Dedeaux's benefits several times. Five years after the accident, Dedeaux sued Pilot Life for tortious breach of contract, breach of fiduciary duties, and fraud in the inducement. Pilot Life argued that Dedeaux's claims were preempted under ERISA, and the district court agreed, granting Pilot Life's motion for summary judgment. The Fifth Circuit reversed. Id. at 43-44, 107 S. Ct. at 1551.

The Supreme Court reversed the holding of the Fifth Circuit. Id., 107 S. Ct. at 1551. The Court quickly dispatched of the question of whether the common law causes of action related to an employee benefit plan; it held that they did. See id. at 47-48, 107 S. Ct. at 1553. The Court next turned to the question of whether the saving clause saved Dedeaux's cause of action for tortious breach of contract/bad faith. The Court found that the cause of action for bad faith did not meet the common-sense prong of the regulating insurance test. See id. at 48, 107 S. Ct. at 1553. The Court stated that in order for a law to regulate insurance, it "must not just have an impact on the insurance industry, but must be specifically directed toward that industry." Id. at 50, 107 S. Ct. at 1554. Noting that the Mississippi Supreme Court had identified the law of bad faith with the insurance

industry, the Court nevertheless held that the foundation of the law could be found in general principles of tort and contract law. Further, the Court found that the McCarran-Ferguson Act factors did not support Dedeaux's claim that the bad faith law regulated insurance. The Mississippi common law of bad faith could not be said to effect a spreading of policyholder risk, the Court noted, nor could it be said under the third factor that the law was specifically directed towards entities within the insurance industry, as the law of bad faith had derived from general principles of tort and contract law. Although the Court acknowledged that the common law of bad faith could be construed to concern the policy relationship between the insurer and the insured, it found that the relationship was tenuous. See id. at 50-51, 107 S. Ct. at 1554-55. Justice O'Connor, writing for the Court, noted:

[T]he common law of bad faith does not define the terms of the relationship between the insurer and the insured; it declares only that, whatever terms have been agreed upon in the insurance contract, a breach of that contract may in certain circumstances allow the policyholder to obtain punitive damages.

Id. at 51, 107 S.Ct. at 1555.

The Court went on to state that it had to be guided not only by the factors it considered in Metropolitan Life, but also by "the role of the saving clause in ERISA as a whole." Id., 107 S. Ct. at 1555. The Court noted that in this case, unlike Metropolitan Life, the plaintiff was seeking remedies for improper processing of a benefits claim, and therefore the court had to consider the civil enforcement provisions of ERISA. The Court found that the civil enforcement provisions of ERISA were intended to be the exclusive means by which ERISA-plan participants and beneficiaries asserting improper processing of a claim for benefits could recover, based on the language and structure of the statute and the legislative history of the statute. See id. at 51-52, 107 S. Ct. at 1555. Thus, the Court held that based on the common-sense and the McCarran-Ferguson prongs of the regulating insurance test and the congressional intent that ERISA's civil enforcement provisions be exclusive, the common law cause of action for bad faith was preempted by ERISA. See id. at 57, 107 S. Ct. at 1558.

After the Court's decision in Pilot Life, a question that many of the lower courts addressed was whether a statutory claim for improper handling of claims/unfair settlement practices would survive the preemption analysis laid down in Pilot Life. For example, one court addressed the issue of whether a statutory cause of action under the California insurance code for failure to pay claims promptly was preempted by ERISA. See Kanne v. Connecticut Gen. Life Ins. Co., 867 F.2d 489 (9th Cir. 1988), cert. denied, 492 U.S. 906 (1989). The Kannes sought reimbursement for airline fare to transport their son for surgery, as well as compensation for emotional distress caused by the delay in payments for the airline, doctor, and hospital bills. The lower court had awarded the Kannes over \$750,000 in compensatory and punitive damages. Id. at 491.

The court noted that California Insurance Code § 790.03(h) prohibited unfair insurance practices with respect to the processing of claims. Among the unfair practices listed in the statute was an insurer's failure "to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies." Id. at 493 (quoting Cal. Ins. Code § 790.03(h)(2)). The Kannes argued that the statute was not preempted by ERISA because it was saved as a law regulating insurance. The court granted them the assumption that the statute was a law regulating insurance within the meaning of the saving clause. Nevertheless, the court decided that the private right of action for violation of the statute was preempted by ERISA. Id.

In deciding that the California statute was preempted, the court noted that the Supreme Court "made [it] abundantly clear that its preemption holding [in Pilot Life] was equally based [on the regulation of insurance test and] on its acceptance of the Solicitor General's view that Congress had clearly expressed an intent that the civil enforcement provisions of ERISA § 502(a) be the exclusive vehicle for actions by ERISA-plan participants and beneficiaries asserting improper processing of a claim for benefits." Id. at 494 (quoting Pilot Life, 107 S. Ct. at 1555). In interpreting the Supreme Court's language, the court held that it could not allow a state statute like the one in question to supplement the ERISA civil enforcement provisions. As a result, the court found that the Kannes' statutory cause of action for failure to pay claims promptly was preempted. See id.

Further, the decision of the Court in Pilot Life has been extended to preempt a state common law holding that an insurer of a group employment health plan was required to notify plan participants of the cancellation or modification of the insurance policy caused by failure of the employer to pay the insurance premiums. See Presley v. Blue Cross-Blue Shield of Alabama, 744 F. Supp. 1051 (N.D. Ala. 1990). Charlotte Presley went to work for Benum Corporation ("Benum") on October 26, 1987. Benum had at that point established and maintained an ERISA plan whereby participant employees could receive health and medical benefits. Under the terms of the plan, however, an employee was not eligible to participate in the plan until 90 days after the date of employment. The plan also provided that before coverage would begin for an employee or his dependents, the application would have to be completed, submitted and accepted. Thus, Presley was not eligible to participate in Benum's health plan until January 26, 1988. Id. at 1053.

Presley had filled out an application card for health coverage under the plan for herself and her family on the date of her hire. Benum forwarded the application to Blue Cross and Blue Cross accepted Presley's application. On January 27, 1988, Larry Presley suffered a heart attack and was admitted to a hospital. On February 1, 1988, all of Benum's employees were laid off for an indefinite period, and Benum became delinquent in its premium payments to Blue Cross as of January 15, 1988. Blue Cross notified Benum's personnel manager that it would carry a laid-off employee for a period of two months and would bill in arrears for the

coverage. In the third month, if payment was made in full, then coverage would be maintained; otherwise, the employee's coverage would be cancelled effective the date of the last payment. Neither Benum nor Blue Cross contacted Presley to tell her of the payment arrangement for Benum's employees. Blue Cross paid a nominal amount of Larry Presley's bills in relation to his heart attack, but refused all other claims. Among other things, plaintiffs claimed that Blue Cross, by failing to notify the plan beneficiaries of Benum's failure to pay premiums, violated the rule laid down in an Alabama Supreme Court case that an insurer of a group employment health plan was required to notify participants in the plan of the cancellation or modification of the insurance policy due to a failure by the employer to pay the premiums due on the policy. See id. at 1053-55, 1059.

Taking into account the broad construction that the Supreme Court had given to the "relate to" phrase, the court held that it was clear that the decision of the Alabama Supreme Court was subject to the preemption clause unless it was saved by the saving clause. The court further found that the decisional rule was specifically directed towards the insurance industry, and thus met the common-sense prong of the regulating insurance test. It found, however, that the McCarran-Ferguson Act factors were less clearly resolved concerning whether the rule was one regulating the business of insurance. The court found that the rule did effect the spreading of a policyholder's risk by affording him the opportunity to maintain in effect his policy which would allow him to spread the risk insured against to the insurance industry as a whole. The court found that the second factor was not met by the rule. It stated that compliance with the rule might create a relationship between the insurer and the insured, but as there was no such direct relationship prior to the employer's default on payments of the premiums, the rule could not represent an integral part of the relationship. The third factor was met because the rule was specifically directed towards the insurance industry. The court acknowledged that the question of preemption under the circumstances of the case was a close one; however, guided by the Supreme Court's language in Pilot Life that courts should look to the role of the saving clause in ERISA as a whole, it found that the decisional rule requiring notification was preempted by ERISA and was not saved by the saving clause. See id. at 1060-61. In so holding, the court commented that, "[T]he lower courts have been instructed by the Supreme Court that they are to find state laws within the saving clause in only the clearest of circumstances." Id. at 1061.

Given that the lower courts appear extremely reluctant to find that the saving clause in fact saves an insurance statute or common law relating to insurance from preemption, the facts of the case and plaintiff's motivation for claiming damages become pivotal in a court's decision whether to preempt a state statute. For example, in Smith v. Arkansas Blue Cross and Blue Shield, 781 F. Supp. 1159 (N.D. Miss. 1991), the plaintiff sued Blue Cross for violation of state statutes involving a group health policy under which the plaintiff was insured. The plaintiff requested as damages \$30,000 for mental distress, punitive damages,

embarrassment and humiliation, together with attorneys' fees, costs and expenses. The plaintiff conceded that his damages were to some degree measured by the amount of benefits he would have received but for the defendant's alleged fraud and negligent misrepresentation. The defendants argued that because the essence of the complaint was an alleged wrongful refusal to pay benefits under an ERISA plan, the complaint fell under the exclusive remedy scheme set forth in ERISA. Id. at 1160-61. In response, the plaintiff alleged that his cause of action was in fact based on acts of fraud "in which an unlicensed insurer, BSC Life Insurance Company [("BSC")], through the defendants acting as unlicensed agents, sold policies and fraudulently assigned policies to an insolvent unlicensed insurer, Galaxia Life Insurance," in violation of the Mississippi insurance statutes. Id. at 1161.

Specifically, the complaint alleged that when the policy in question was issued, BSC did not have a license and was not registered or authorized to do business in Mississippi. Further, the complaint asserted that the plaintiff and other employees were fraudulently induced by the defendants to purchase the BSC policy because the defendants represented that defendant Blue Cross backed the policy and that BSC was licensed and authorized to do business in Mississippi, and thereby covered by the Mississippi guaranty fund. After BSC suffered operational losses, the defendants (stated the complaint) conspired to defraud plaintiff by assigning insurance policies to Galaxia and, by silence, misrepresented that Galaxia was authorized and licensed to do business in Mississippi and therefore covered by the Mississippi guaranty fund. Plaintiff also asserted that the defendants were guilty of gross negligence by their failure to investigate Galaxia's ability to underwrite the assigned policies and/or fraud in knowing that Galaxia would be unable to pay BSC claims as they came due. The complaint further alleged that defendant Ritchey, an employee and agent of Blue Cross and BSC, assisted in the solicitation and issuance of the plaintiff's policy as the soliciting agent. The complaint alleged negligence per se in violation of several statutes, one of which made it unlawful for any person as an insurance agent or broker to make, solicit or aid in the transaction of insurance except as authorized under the provisions of the chapter. The plaintiff asserted that the defendants' failure to comply with the statutes deprived him of the right to participate in the Mississippi guaranty fund intended to protect insureds in the event of an insurer's insolvency. See id. at 1162-63.

Noting that the complaint did not allege improper processing of a claim, the court found that the statutory scheme met the three McCarran-Ferguson criteria for laws regulating the business of insurance. It stated that the requirement that an insurance company be licensed to do business in the state ensured that the risk was shared through Mississippi's guaranty fund. As to the second factor, the court noted that the laws were integral to the relationship between the insurer and the insured in that they limited insurers who might lawfully enter into an insurance contract in Mississippi. Further, the court noted that with regard to the third factor, the statutes applied only to entities within the insurance industry. Consequently, the court found that there

was a possibility of a valid state law claim based on, inter alia, the Mississippi insurance statutes. See id. at 1164-65.

A review of the health insurance arrangement cases demonstrates that claimants who sue insurance companies under the state insurance codes will not usually be successful if they are suing for benefits. A plaintiff's state law claims, however, might survive ERISA preemption analysis if they are framed in such a way as to implicate the insurer's actions above and beyond a claim for improper processing of benefits.

State laws can also escape preemption if they fall under the "too tenuous, remote and peripheral" exception to preemption analysis. For example, in BeneFax Corp. v. Wright, 757 F. Supp. 800 (W.D. Ky. 1990), the court found that notwithstanding that the Kentucky administrator licensing statutes did not relate to an ERISA plan within the meaning of the preemption clause, it believed that the statutes would fall within the "too tenuous, remote and peripheral" exception to ERISA preemption. Id. at 804. BeneFax was a Kentucky corporation which served as a third-party administrator for employee benefit health plans. Plaintiffs Underwood, Harden, and Glogower were licensed third-party administrators who each owned one-third of the outstanding capital stock in BeneFax. In July, 1990, the Kentucky Commissioner of Insurance directed plaintiffs to cease doing business as third-party administrators and directed the individual plaintiffs to surrender their administrator licenses, holding that plaintiffs failed to meet the statutory requirements necessary for an administrator license. The plaintiffs then sought declaratory and injunctive relief, claiming that the commissioner had no authority to regulate their activities pursuant to the Kentucky administrator licensing statutes because the plaintiffs acted solely as third-party administrators for self-funded employer health plans. Consequently, the plaintiffs asserted that the Kentucky administrator licensing statutes were preempted by ERISA. Id. at 801-02.

The court found that it had to determine whether the statutes at issue "relate[d] to" an employee benefit plan within the meaning of the preemption clause in a manner which was not tenuous, remote, or peripheral. See id. at 803. The court noted that the administrator licensing statutes applied to everyone acting as administrators in Kentucky regardless of whether a person provided services to ERISA plans. The court then likened these statutes to licensing statutes for attorneys, physicians, chiropractors, and accountants, and noted that the statutes at issue did not relate to ERISA plans any more than the other licensing statutes did. Instead, the court found that Kentucky was regulating the conduct of administrators regardless of whether the administrators serviced ERISA plans. The court noted that the licensing statutes were not directed towards an ERISA plan, represented a traditional area of state authority, and did not affect the relationship between principal ERISA entities, i.e., the employer, the plan, the plan fiduciaries, and the plan beneficiaries. As a result, the court found that the statutes did not relate to an ERISA plan and were not preempted by ERISA in any case because their connection with

ERISA plans was too tenuous, remote, or peripheral. See id. at 803-04.

4. FIDUCIARY RESPONSIBILITY

4.1 General. Section 402(a)(1) of ERISA provides that every employee benefit plan must be established and maintained pursuant to a written instrument providing for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan. A named fiduciary is a fiduciary who is either named in the plan instrument or who may be identified pursuant to a procedure specified in the plan by the employer and/or employee organization maintaining the plan. According to Section 405(c)(1) of ERISA, a plan may expressly provide for the allocation of fiduciary responsibilities (other than trustee responsibilities) among named fiduciaries and for the named fiduciaries to designate persons other than themselves to carry out their fiduciary responsibilities.

A fiduciary is defined as anyone who exercises discretionary authority or control over the management of plan assets, renders investment advice for a fee, or has discretionary authority or responsibility in the administration of the plan.

4.2 Fiduciary Duties. Certain statutory duties are imposed upon plan fiduciaries requiring them to act (i) exclusively for the benefit of plan participants and beneficiaries, (ii) prudently, (iii) to diversify plan assets, and (iv) in accordance with the plan documents so long as the plan documents are consistent with ERISA.

There are a number of cases challenging fiduciary breaches of the exclusive benefit rule. In many instances allegations of this nature are asserted in conjunction with violations for the breach of other fiduciary obligations. Despite the lack of standards as to what constitutes adherence to the exclusive benefit rule, guidance has been issued by the Internal Revenue Service in the area of investment of plan assets allowing an employer sponsoring the plan to incidentally benefit from plan investments so long as the following conditions are satisfied: (i) the cost of the asset does not exceed the fair market value at the time of purchase, (ii) a fair return commensurate with the prevailing rate must be provided except with respect to obligatory investments in employer securities by a stock bonus plan, (iii) enough liquidity must be maintained for required distributions under the plan, and (iv) the investment must have sufficient safeguards and diversity to be prudent. Rev. Rul. 69-494, 1969-2 C.B. 88.

4.3 Fiduciary Liability. A plan fiduciary who breaches any of the fiduciary duties will be personally liable to make good to the plan any losses resulting from the breach and to restore to the plan any profits the fiduciary made through the use of plan assets. The plan fiduciary will also be subject to such other equitable or remedial relief as a court may deem appropriate, including the removal of the plan fiduciary. ERISA §409(a). Plans may not

contain any provision which relieves a fiduciary of personal liability for breach of fiduciary duties. Plans may, however, purchase insurance to cover liability losses due to acts or omissions by plan fiduciaries.

A fiduciary will not be liable for a breach of fiduciary duty committed before becoming a fiduciary or after ceasing to be a fiduciary. Nevertheless, a fiduciary may be liable for the investment decisions of another fiduciary. In Massachusetts Mutual Life Insurance v. Russell, 473 U.S. 134 (1984), the Supreme Court refused to find a right under ERISA to contribution and indemnification among plan fiduciaries. Since Russell, most courts have generally held that no right of contribution or indemnity exists under ERISA. In Chenung Canal Trust Co. v. Sovran Bank/Maryland, 14 EBC 1169 (2d Cir. 1991), the plan sponsor sued Sovran, a former fiduciary, for lack of prudence and due diligence with respect to investments made by a previous fiduciary and continued by Sovran. Sovran filed a third-party complaint against the prior fiduciary seeking contribution or indemnification. The Court determined that federal courts are authorized to develop a federal common law under ERISA, guided by the principles of traditional trust law which clearly provides for a right of contribution among fiduciaries.

Attorneys and accountants are not considered fiduciaries merely because they provide services to a plan. However, applying the principle of "knowing participation" courts have, until recently, held non-fiduciaries liable for breaches of fiduciary duty of which they had knowledge. Liability has usually been found only in situations where egregious facts have existed. See Whitfield v. Lindemann, 853 F.2d 1298 (5th Cir. 1988); Whitfield v. Tomasso, 682 F.Supp. 1287 (E.D.N.Y. 1988); Benvenuto v. Schneider, 678 F.Supp. 51 (E.D.N.Y. 1988). In the case of Diduck v. Kaszycki & Sons Contractors Incorporated, No. 83 Civ. 6346 (C.E.S.) (S. NY filed Apr. 24, 1991), the court found evidence of a tacit agreement between plan fiduciaries and non-fiduciaries to deprive plan participants of benefits and contributions to the plan fund. The court held the non-fiduciaries jointly and severally liable for the plan fiduciary's breach of duty. Other courts have refused to find that ERISA provides for a cause of action against non-fiduciaries for alleged participation in a breach of fiduciary duty. See Massachusetts Mutual Life Insurance Company v. Russell, 473 U.S. 134 (1985); Nieto v. Ecker, 845 F.2d 868 (9th Cir. 1988).

In Mack Boring & Parts v. Meeker Sharkey Moffitt, Actuarial Consultants of New Jersey, 930 F.2d 267 (3d Cir. 1991), the Third Circuit held that an insurance company was not a plan fiduciary within the meaning of ERISA where the insurer entered into a deposit authorization contract with an employer to fund the employer's defined benefit plan. The contract provided for the employer to make annual contributions to the insurer in the form of premiums which were credited to a "guaranteed fund account." This fund was a bookkeeping device in which interest was credited at a guaranteed minimum rate with the possibility of higher returns at the discretion of the insurer. The premium payments were held as part of the insurer's general assets and when a plan participant retired, the insurer issued a guaranteed annuity pursuant to the

terms of the plan. The cost of the annuity was then deducted from the guaranteed fund account. The court concluded that the deposit authorization contract was a guaranteed benefit policy because the contract provided benefits to participants, the amount of which were guaranteed by the insurer in the form of an annuity. Since Section 401(b)(2) of ERISA (29 U.S.C.S. §1101) states that amounts paid by a plan to an insurer under a guaranteed benefit policy are not considered plan assets, the court held that the insurer was not a plan fiduciary as it did not have discretionary authority or control over plan assets.

In reaching this conclusion the Third Circuit rejected the Seventh Circuit's analysis in Peoria Union Stock Yard Co. Retirement Plan v. Penn. Mut. Life Ins. Co., 698 F.2d 320 (7th Cir. 1983), in which the Seventh Circuit held that a similar contract was comprised of two phases: an accumulation phase, during which premium payments were held by the insurer in its general account for investment purposes; and a payment phase, during which the insurer made payments to plan participants in the form of annuities upon retirement. The Seventh Circuit concluded that the contract was not a guaranteed benefit policy since the premiums paid to the insurance company during the accumulation phase were not used to provide "benefits, the amount of which is guaranteed by the insurer," as required by the Section 401(b)(2) (29 U.S.C.S. §1101) exception.

The Third Circuit concluded that such contracts do not fail to satisfy the guaranteed benefit policy exception merely because the benefits provided under the contract are not delivered immediately. The court stated that the variable interest credited to the guaranteed fund does not vary benefits payable to participants, but merely shifts a portion of the investment risk from the insurer to the employer. The Third Circuit's holding suggests that the investment component of such contracts are irrelevant if the insurer guarantees the participants' benefits, regardless of the amount of control the insurer exercises over the amounts available to pay such benefits.

4.4 Liability of Non-fiduciaries. In the case of non-fiduciaries, the recent Supreme Court case of Mertens v. Hewitt Associates, 113 S. Ct. 2063 (1993), has substantially eliminated the ability to recover monetary damages against non-fiduciaries. In this case, the Petitioner represented a class of former employees of Kaiser Steel Corporation who participated in a Kaiser Retirement Plan. Hewitt Associates was the plan actuary that had assisted Kaiser, as a plan sponsor in its actuarial valuations. In the course of the litigation it was alleged that the plan actuary failed to change actuarial assumptions to reflect additional costs of the plan associated with early retirements resulting from plant shut-downs. Ultimately, plan assets became insufficient to satisfy benefit obligations and the plan was taken over by the PBGC. Plan participants were then entitled only to guaranteed benefits which were substantially lower than fully vested pension due under the plan.

The issue confronting the Supreme Court was whether ERISA authorized suits for monetary damages against non-fiduciaries who knowingly participated in a fiduciary's breach of fiduciary duty. ERISA makes fiduciaries liable for their breach of fiduciary duties and specifies remedies that are available against them. Those remedies include personal liability to make good plan losses, restitution for profits and other equitable or remedial relief as the Court may deem appropriate. The civil enforcement provisions of ERISA are limited, however, to fiduciaries. Non-fiduciary liability is imposed under ERISA Section 502(a)(3) authorizing a civil suit to join any act or practice violating ERISA, to obtain "other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of ERISA or the terms of the plan. . . ." Noting that non-fiduciaries may be liable for monetary damages in certain circumstances, the Court went on to hold that no provision of ERISA explicitly required non-fiduciaries to avoid participation, either knowingly or unknowingly, in a fiduciary's breach of fiduciary duty. Noting that monetary damages are the classic form of legal relief, the Court went on to hold that non-fiduciaries are not liable for participation in fiduciary breaches.

4.5 Prohibited Transactions. ERISA and the Code prohibit transactions between a plan and a "party in interest" (referred to as "disqualified persons" in the Code). "Parties in interest" include such individuals as the plan sponsor, a plan fiduciary, a plan service provider or plan advisor, an employee, officer, director or 10% or greater shareholder of the plan sponsor, a spouse or descendant of any of the prior parties, and a union covering plan participants. ERISA §406, Code §4975. Transactions between the plan and a "party in interest" violate ERISA even though the transaction was operated in good faith and competitively priced.

Violations of the prohibited transaction rules may be penalized by the imposition of liability, as a breach of fiduciary duty, and the imposition of statutory penalties imposed under Code Section 4975. Jurisdiction for enforcing penalties rest with the Internal Revenue Service and jurisdiction for enforcing liability rest with the U.S. Department of Labor. Reorganization Plan No. 4 of 1978. Pursuant to Reorganization Plan No. 4 of 1978 the Department of Labor has been assigned enforcement responsibility for regulations, rulings, opinions and exemptions for prohibited transactions. Section 408 of ERISA specifically authorizes the establishment of procedures permitting the issuance of individual and class exemptions from the application of the prohibited transaction rules. These exemption procedures are contained in proposed ERISA Regulation §2570, 29 C.F.R. §2570.

5. SURVIVOR RIGHTS

5.1 Pre-retirement Benefits. The Retirement Equity Act of 1984 ("REA") requires that the spouse be the named beneficiary of a portion of the death benefits payable under a qualified plan. The only way to name a non-spouse beneficiary for the benefits

otherwise payable to the surviving spouse is with the written waiver of the participant and the written consent of the spouse.

One of the most difficult decisions for a court to make involves the enforceability of antenuptial agreements. Often we are confronted with situations where spouses enter into antenuptial agreements specifically addressing the disposition of assets at death, including qualified plan assets. That was the case in Callahan v. Hutsell, 1993 U.S. App. LEXIS 34005 (6th Cir. 1993, unpublished decision), where the husband died only 2 months after his marriage. Immediately prior to marriage the participant (husband) and surviving spouse entered into an antenuptial agreement which provided that the retirement plan assets of the deceased spouse would remain separate property in the event of death. The participant died without having signed new beneficiary designation forms providing for his written waiver of spousal rights, as well as the spouses consent to the waiver. The only beneficiary designation, other than plan language, was a signed document designating a non-spouse beneficiary, which was executed prior to the marriage.

Provisions of the antenuptial agreement specifically stated that the non-participant spouse consented, effective upon marriage, to the participant's election to waive a qualified joint survivor annuity form of benefit under the participant's retirement plan. Although the antenuptial agreement contained a written acknowledgement by the surviving spouse waiving benefits under the qualified plan and agreeing to execute all further documents requested of the participant to evidence the consents and waivers contained in the agreement, there was not a waiver signed after the individual actually became the participant's spouse. After the death of the husband, the surviving spouse filed a declaratory judgment action in the Western District of Kentucky seeking a determination that the surviving spouse was entitled to death benefits under the retirement plan.

Although the plaintiff prevailed on ERISA arguments at the district court level, the initial decision by the District Court has been vacated and remanded to Federal District Court for determination of whether the surviving spouse's failure to execute a beneficiary designation form constituted a breach of obligations under the antenuptial agreement.

In contrast, an Illinois appellant court held that an antenuptial agreement was sufficient to waive a surviving spouse's right to receive benefits under the deceased participant's pension plan where the surviving spouse had not executed a spousal consent. In re Estate of Hopkins, 14 E.B.C. 1145 (Ill. App. 1991). The ante-nuptial agreement provided that each party would retain his or her separate property and would have no rights in the estate or property of the other upon the termination of the marriage by death or legal proceeding. The court held that it was clear the parties intended that the surviving spouse would waive any current or future right to the deceased participant's retirement benefits. Although the deceased participant had named a minor child from his previous marriage as the plan beneficiary the surviving spouse had

not completed a spousal consent form, the court held that the ante-nuptial agreement was a sufficient waiver of the surviving spouse's rights, since the agreement included a waiver which was in writing and notarized as required under the Retirement Equity Act of 1984 ("REA"). The court, citing to a Seventh Circuit decision, also noted that it had previously been held that a surviving spouse may waive their interest in plan benefits under REA without following its specific waiver requirements.

5.2 Beneficiary Designations. A district court in Pennsylvania held that the exercise of a general power of attorney by a participant's attorney-in-fact is ineffective to change the participant's beneficiary designation where the power of attorney does not specifically authorize changes in beneficiary designations under employee benefit plans. Clouse v. Philadelphia, B. & E.R. Co., 1992 U.S. Dist. LEXIS 2256, (E.D. Pa. 1992). The court held that the black letter law of the Restatement (Second) of Agency, regarding powers of attorney, applies to ERISA governed plans. The court followed the Restatement position that general powers of attorney are limited to acts done in connection with the act or business to which the authority primarily relates, and that any specific authorizations tend to show that more general authority is not intended.

6. COBRA CONTINUATION COVERAGE

6.1 General. The Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"), as amended by the Omnibus Budget Reconciliation Act of 1986 ("OBRA 86"), the Tax Reform Act of 1986 ("TRA 1986"), the Technical and Miscellaneous Review Act of 1988 ("TAMRA") and the Omnibus Budget Reconciliation Act of 1989 ("OBRA 89") requires continuing health care coverage at group rates for employees and their dependents who would otherwise lose health benefits upon the occurrence of certain specified events. Both the Code and ERISA contain statutory provisions added by COBRA.

The COBRA requirements are found in Section 4980B of the Code and Sections 601 through 608 of ERISA and apply to all employers. However, employers who employed fewer than 20 employees during a typical business day in the preceding calendar year will be exempt from the COBRA requirements. An employer is considered as having normally employed fewer than 20 employees during a particular calendar year if it employed less than 20 employees on at least 50% of its working days during that year. Federal and state governments, governmental agencies and instrumentalities, and charities, other than churches, will also be exempt from COBRA.

6.2 Coverage. COBRA applies to any group health plan of an employer who provides medical care to its employees, former employees, or the families of such employees or former employees, whether directly or through insurance, reimbursement or otherwise. Health Maintenance Organizations (HMOs) and Dental Maintenance Organizations (DMOs) maintained by an employer are also subject to COBRA. If an employer maintains a cafeteria plan which offers health care as one of its options, then COBRA continuation coverage

is applicable only with respect to those individuals who actually receive health care coverage under the cafeteria plan. Any individual who is or was provided coverage under such a group health plan due to the performance of services for one or more of the persons maintaining the plan will be eligible for COBRA continuation coverage. An individual who is merely eligible for coverage under a group health plan is not eligible for continuation coverage if the individual is not or has not been actually covered under the plan. Agents, independent contractors (their employees, agents and independent contractors) and corporate directors will be treated as employees if they are covered by the plan. Leased employees who provide services to an employer will also be treated as employees of that employer.

COBRA continuation coverage is available to all "qualified beneficiaries." Qualified beneficiaries are employees and former employees who are covered under a group health plan and are referred to as "covered employees." A qualified beneficiary is also any individual who, on the day before a qualifying event for a covered employee, is a beneficiary under a group health plan as the spouse or dependent child of the covered employee. [Non-resident aliens who receive no U.S. source earned income from their employer will not be considered qualified beneficiaries.]

6.3 Qualifying Events. COBRA continuation coverage is available to qualified beneficiaries upon the occurrence of any one of the following "qualifying events" which results in the loss of health insurance coverage: (i) the death of the covered employee; (ii) the voluntary or involuntary termination of the covered employee (unless terminated for gross misconduct); (iii) a reduction in a covered employee's hours of employment; (iv) the divorce or legal separation of the covered employee from the employee's spouse; (v) the covered employee's becoming entitled to Medicare coverage; (vi) the cessation of coverage for a dependent child under the terms of the plan; and (vii) bankruptcy proceedings of an employer under Title 11 of the U.S. Code, commencing on or after July 1, 1986. Effective for 1990 plans years, a loss of coverage will also be treated as a qualifying event.

6.4 Election of Continuation Coverage. The period during which continuation coverage may be elected must begin no later than the date coverage would otherwise cease due to the occurrence of a qualifying event. The election period must last at least sixty days, and may not end earlier than 60 days after coverage terminates due to a qualifying event or after the qualified beneficiary receives notice of his or her continuation rights. Where there is a choice among types of coverage under a plan each qualified beneficiary will be entitled to make a separate election from among the types of coverage offered. Any election to receive continuation coverage by a spouse or covered employee will be deemed to include an election of continuation coverage on behalf of any other qualified beneficiary dependent who would lose coverage under the plan by reason of the qualifying event. However, a decision to reject benefits by a spouse or covered employee will not be binding on other qualified beneficiaries. A qualified

beneficiary who, during the election period, waives COBRA continuation coverage may revoke the waiver at any time prior to the end of the election period and elect to receive continuation coverage. If a qualified beneficiary waives COBRA continuation coverage and later revokes the waiver and elects coverage, coverage is not required to be provided retroactively.

6.5 Claims During Election Period. According to the proposed regulations under Section 4980B of the Code, claims incurred by a qualified beneficiary during the election period are not required to be paid before an election is made by the beneficiary. Group health plans that provide health services, such as HMOs or walk-in clinics, can require that a qualified beneficiary who has not elected and paid for COBRA continuation coverage choose between either electing and paying for the coverage or paying the reasonable and customary charge for the plan services if a claim is made prior to the election. A qualified beneficiary who chooses to pay for the services must be reimbursed within thirty (30) days if they later elect COBRA continuation coverage.

6.6 Type of Coverage Provided. The continuation coverage provided must consist of coverage which, as of the time the coverage is provided, is identical to the coverage provided to similarly situated beneficiaries under the plan with respect to whom a qualifying event has not occurred. If coverage is modified under the plan for any group of similarly situated beneficiaries, such coverage must also be modified in the same manner for those individuals receiving continuation coverage. While the group of qualified beneficiaries who are entitled to elect COBRA continuation coverage is closed as of the day before the qualifying event family members of COBRA beneficiaries may be added as dependents to the same extent and under the same terms as family members of active employees. Family members who are added in this manner will not, however, become qualified beneficiaries.

6.7 Period and Cost of Continuation Coverage. The continuation coverage period begins with the date of the qualifying event. However, beginning with 1990 plan years, a group health plan may choose to provide that the period of coverage begins with the date of coverage loss. The duration of the continuation coverage will depend on the qualifying event that triggered the loss of coverage.

If loss of coverage was triggered by the termination of the employee or a reduction in the employee's employment hours, continuation coverage may be elected for up to 18 months. For plan years beginning on or after December 19, 1989, qualified beneficiaries who are determined to have been disabled at the time of the termination or reduction in work hours by the Social Security Administration may elect to extend the continuation coverage for an additional 11 months.

The spouse and certain dependents of the covered employee may elect up to 36 months of coverage if loss of coverage is triggered by the death of the covered employee, if the covered employee becomes entitled to Medicare benefits, or if an employer, from

whose employment the covered employee retired at any time, commences bankruptcy proceedings under Title 11 of the U.S. Code. If the covered employee's dependent child loses dependent status under the Plan such child may elect up to 36 months of continuation coverage.

If an additional qualifying event, other than bankruptcy, occurs within the initial 18 month period of continuation coverage (or during the extended 29 month period for disabled qualified beneficiaries), coverage must be provided for an additional 18 months for a total of 36 months (or 47 months for a disabled qualified beneficiary) of continuation coverage after the initial qualifying event. Continuation coverage may not be terminated upon coverage of a qualified beneficiary under the group health plan of an employer, other than the employer providing the continuation coverage, if such plan contains any exclusion or limitation with respect to any preexisting condition of the qualified beneficiary.

COBRA continuation coverage may not be conditioned upon evidence of insurability. If coverage provided to similarly situated active employees is modified or eliminated but the employer continues to maintain one or more group health plans, the employer must permit the qualified beneficiary receiving COBRA continuation coverage to elect to be covered under any of the remaining group health plans maintained by the employer for similarly situated active employees.

6.8 Cost of Coverage. An employer may require an employee to pay the cost of the continuation coverage, even if the employer subsidizes some or all of the coverage for active employees and their dependents. If the plan is insured, this premium charge may not exceed 102% of the applicable premium. The applicable premium is the cost to the plan for the period of coverage for a similarly situated employee for whom a qualifying event has not occurred. For self insured plans the applicable premium is equal to a reasonable estimate of the cost of providing coverage for the period to a similarly situated individual. In situations where a qualified beneficiary is determined to have been disabled, employers may charge 150% of the applicable premium for the additional eleven (11) months coverage which must be provided. A plan may not require the payment of any premium until 45 days after the day on which the qualified beneficiary made the initial election for continuation coverage and a plan must permit a qualified beneficiary to elect to pay the premium on a monthly basis.

6.9 Loss of Coverage. A qualified beneficiary will lose the right to continuation coverage should the beneficiary fail to make timely payment under the plan or become covered under another group health plan that does not contain limitations or exclusions for preexisting conditions. A qualified beneficiary will also lose the right to continuation coverage in the event the beneficiary becomes entitled to medicare benefits or if the employer no longer maintains any group health plan.

6.10 COBRA Litigation. For the most part, COBRA Litigation has focused on rights of employees in the context of COBRA notification, coverage and elections. In Swint v. Protective Life Insurance Co., 779 F. Supp. 532 (S.T. Ala. 1991), a dependent child brought an action claiming that there had been insufficient notice. In this case the plan provided for coverage of a dependent to age 19 and beyond if participant continued as a full-time student. Shortly after the dependent child's 19th birthday the child was involved in a serious accident leaving him comatose and incurring large medical expenses. The insurance company initially paid all of the claims of the dependent child, but 7 months after the accident the insurance company completed an investigation which resulted in a determination that the individual was not a dependent. The insurance carrier promptly terminated coverage, returned all premiums and refused to pay additional claims. In this case the court held that a COBRA election was deemed to have been made because, had the defendant given the dependent his COBRA notice at the time it should have been provided, the defendant would have made the election.

Courts have also been confronted with determining whether incapacity tolls the election. In Branch v. G. Bernd Company, 955 F. 2d 1574 (11th Cir. 1992), the Court held that the 60-day election period was tolled until a personal representative could be appointed. The participant had been shot and become semi-comatose and never regained consciousness. Despite the fact that the employer had provided sufficient notice and had signed a form declining COBRA coverage for his dependents, the legal representative was appointed more than 60 days after notice was provided to the employee.

Meadows v. Cagle's, Inc., 14 E.B.C. 2513 (11th Cir. 1992), held that an employer and its medical benefits plan insurer who failed to provide a SPD outlining the COBRA continuation coverage election requirements to an incapacitated plan participant's guardian could not rely on plan documents to deny continuation coverage. The court held that notice of benefit continuation rights to an incompetent beneficiary will be ineffective unless accompanied by relevant plan documents which allow an informed decision to be made by the person who must make the coverage election for the incapacitated beneficiary.

At the time the employer notified the participant, who had lapsed into a persistent vegetative state, about her COBRA rights her husband, who was acting as her guardian, requested an explanation of the election requirements. A representative of the employer claimed that the husband was told that the COBRA election was necessary to obtain coverage once the employer's coverage expired; however, the husband alleged that he misunderstood the need for the election. The court held that while oral statements allegedly made to the participant's husband would not prevent the employer and plan insurer from denying coverage if those representations were inconsistent with written plan documents, the fact that neither the employer nor the insurer provided the husband with a SPD made the COBRA notice invalid. The court held that for a COBRA election notice to be valid, the notice must be sent to a

person not only legally capable of acting on it, but also capable of acting intelligently on it. In this situation the husband never received the information which was necessary to evaluate whether COBRA continuation coverage should be elected for his wife.

The court in Truesdale v. Pacific Holding Co./Hay Adams, 778 F.Supp. 77 (D.D.C. 1991), held that an employer satisfied the COBRA notice requirements by twice mailing a notification and election form to a terminated employee's last known address in accordance with normal office procedures. The court stated that employers must be allowed to rely in good faith on the information provided by their employees. To require employers to confirm receipt of what they believe to be properly mailed notices is outside the requirements of COBRA. The court held that an employer or plan administrator is acting in good faith compliance when they send notice, by first class mail, to the employee's last known address.

A district court ruled that an employer will satisfy the COBRA notice requirements through the use of a computer-automated mailing system unless an employee can prove that notice was never actually received. Martin v. Marriott Corp., 1992 U.S. Dist. LEXIS 4713 (D.C. Dist. Col., 1992). The court held that one former Marriott employee was entitled to a trial on the issue of whether the COBRA continuation notice was actually received as the notice had been mailed to the wrong address and Marriott's Human Resources division had been previously informed of the employee's newer, current address. However, with regard to another employee involved in the suit the court held that Marriott was entitled to a presumption of receipt as it had proven that the COBRA continuation notice generated by the system had been mailed to the employee's correct and last known address.

In Gaskell v. Harvard Cooperative Society, 762 F.Supp. 1539 (D. Mass. 1991), the court held that an employee's 18 month COBRA continuation coverage period commenced upon the employer's actual notice of coverage rather than the date the employee experienced a reduction in hours. The court held that under ERISA, an employer is obligated not only to provide continuation coverage but to give an employee proper notice of his rights to that coverage. Unless and until such notice is given to the employee the court held, the continuation coverage period cannot begin to run.

In National Companies Health Plan v. Saint Joseph's Hospital, 929 F.2d 1558 (11th Cir. 1991), the Eleventh Circuit held that while an employer is not required to provide continuation coverage to a terminating employee who is covered under his spouse's existing group health insurance plan, if the employer represents that continuation coverage will be available and the employee detrimentally relies on that information, the employer is precluded from later denying coverage. The court noted that since COBRA continuation coverage is a part of every ERISA plan, equitable estoppel may be applied in a situation where an employee has relied on oral or informal interpretations of his COBRA rights under the plan.

Conversely, the Tenth Circuit has held that equitable estoppel cannot be used to hold plan fiduciaries to oral promises or modifications concerning COBRA continuation coverage which are not incorporated in the written terms of the ERISA plan. Leiding v. Federal Deposit Ins. Corp., 940 F.2d 1538 (10th Cir. 1991). The court stated that permitting oral modifications of ERISA plans would undermine a central policy goal of ERISA since employees would not be able to rely on written plans if their expected retirement benefits could be radically affected by funds disbursed pursuant to oral agreements.

7. STANDARD OF REVIEW

The Supreme Court addressed the issue of the proper standard of review which should be applied with respect to the denial of benefit claims in Firestone v. Bruch, 489 U.S. 101 (1989). The Court held that a denial of benefits which is challenged under Section 502(a)(1)(B) of ERISA (29 U.S.C.S. §1132(a)(1)(B)) should be reviewed under a de novo standard unless the plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan. However, the Court held that if the administrator or fiduciary is operating under a conflict of interest, the conflict must be weighed as a factor in determining whether an abuse of discretion has occurred.

The courts in applying and interpreting Firestone have generally been unable to agree on the degree of specificity necessary in the plan language to confer sufficient discretion to insure review under an arbitrary and capricious standard. In many cases, language conferring discretion on plan administrators and trustees to "construe and interpret" the plan has been deemed sufficient. See Fuller v. CBT Corp., 905 F.2d 1055 (7th Cir. 1990); DeWitt v. State Farm Ins. Co. Ret. Plan, 905 F.2d 798 (4th Cir. 1990). Other courts have required an unambiguous authorization of discretion with respect to the specific issue before the court. See e.g., Baxter v. Lynn, 886 F.2d 182 (8th Cir. 1989). In Baxter the plan stated that the trustees had "final authority" to determine all matters of eligibility for the payment of claims. The Eighth Circuit held that such language did not grant the discretionary authority necessary within the meaning of Firestone to interpret ambiguous plan terms, and therefore a de novo standard of review should be applied.

The court in Firestone did not clearly define the meaning of de novo review or the extent to which evidence not presented to plan administrators must be considered.

In Perry v. Simplicity Eng'g, 900 F.2d 963 (6th Cir. 1990) the court interpreted Firestone narrowly and limited de novo review to the evidence before the plan administrator. The Sixth Circuit stated that a primary goal of ERISA was to provide for the inexpensive and expeditious resolution of disputes concerning benefits, and that permitting courts to hear evidence not presented to plan administrators will result in employees and their

beneficiaries receiving less protection than Congress intended.

However, in Moon v. American Home Assurance Co., 888 F.2d 86 (11th Cir. 1989), the Eleventh Circuit held that Firestone permits a court conducting a de novo review to consider facts not available to the plan administrator at the time the final determination was made. According to the court, restricting the facts on review to only those which were available to the plan administrator would afford less protection to employees and their beneficiaries than existed before the enactment of ERISA.

There is a split among the Circuits as to whether a plan administrator's factual, as well as interpretive, determinations are subject to de novo review.

The Third Circuit in Luby v. Teamsters Health, Welfare, and Pension Trust Funds, 944 F.2d 1176 (3d Cir. 1991), held that the de novo standard of review should be applied to a plan administrator's fact-based determinations where the plan does not confer authority on the plan administrator to decide disputes between beneficiary claimants or require deference to the plan administrator's factual determinations. The court stated that the factual determinations of a plan administrator should not be given deference due to the fact that plan administrators are often lay persons who lack training, experience, or an understanding of ERISA, the rules of evidence, or the legal procedures necessary to assist them in fact finding.

In contrast, the Fifth Circuit in Pierre v. Connecticut General Life Ins. Co., 932 F.2d 1552 (5th Cir. 1991), held that the de novo standard of review applies only to instances of plan interpretation in which the facts are not in dispute, and that a plan administrator's factual determinations in such a situation should be entitled to deference. According to the court, the discretion to make factual determinations is inherent in the nature of the plan administrator's job and, unlike the Third Circuit, the court believed that plan administrators are qualified to make such factual determinations.

The Second Circuit has held that even where it is undisputed that a plan confers discretionary authority to determine eligibility and to interpret the plan, if an eligibility determination turns on a question of law, the reviewing court must apply a de novo standard of review. Weil v. Retirement Plan Administrative Committee of the Terson Co., 913 F.2d 1045 (2d Cir. 1990), vacated in part on rehearing, 933 F.2d 106 (2d Cir. 1991).

Under Firestone, if a plan provides the plan administrator with discretionary authority to determine eligibility for benefits and to construe the terms of the plan, decisions of the plan administrator will be reviewed under the arbitrary and capricious standard rather than the de novo standard.

Some courts have interpreted the arbitrary and capricious standard to require an evaluation of the reasonableness of a

fiduciary's determination. In Lister v. Stark, 942 F.2d 1183 (7th Cir. 1991), the Seventh Circuit held that a fiduciary's interpretation of the plan should be given deference unless it is unreasonable. The court stated that a plan administrator's decision will be considered unreasonable where the fiduciary fails to consider important aspects of the issues involved, offers an explanation for its decision that runs counter to the evidence, or where the decision is so implausible that it cannot be ascribed to a difference in view or the product of the fiduciary's expertise.

Other courts have rejected the arbitrary and capricious standard in favor of an abuse of discretion standard. While most courts use the terms arbitrary and capricious and abuse of discretion interchangeably, the court in Nunez v. Louisiana Benefit Committee, 757 F.Supp. 726 (E.D. La. 1991), rejected the arbitrary and capricious standard in favor of an abuse of discretion standard stating that the court in Firestone explicitly rejected the arbitrary and capricious standard which would require the affirmation of a plan administrator's decision if any evidence existed to support it.

In Yusuf v. Yusov, 920 F.2d 937 (9th Cir. 1990), the Ninth Circuit held that under the arbitrary and capricious standard a court may reverse a denial of benefits only where a decision is made in bad faith, is not supported by substantial evidence, or is erroneous on a question of law.

According to Firestone the existence of a conflict of interest on the part of a plan fiduciary is relevant to the determination whether the fiduciary's decisions will be entitled to deference.

In Brown v. Blue Cross & Blue Shield of Alabama, Inc., 898 F.2d 1556 (11th Cir. 1990), cert. denied 111 S.Ct. 712 (1991), the Eleventh Circuit held that "when a plan beneficiary demonstrates a substantial conflict of interest on the part of the fiduciary responsible for benefit determinations, the burden shifts to the fiduciary to prove that its interpretation of plan provisions was not tainted by self interest." Id. at 1566. Brown involved an insured group health plan which was administered by the insurer providing coverage. The court held that an inherent conflict of interest existed between the roles assumed by the insurance company, since an insurance company pays claims out of its own assets rather than out of a trust, which places the insurance company's fiduciary role in conflict with its profit making role as a business. In such a situation, the court held that the fiduciary's determination will be arbitrary and capricious if it advances the fiduciary's self interest at the expense of the beneficiary, unless the fiduciary can justify its interpretation on the basis of the benefit provided to the entire class of plan participants.

8. PUNITIVE DAMAGES

It has generally been held that ERISA does not provide for the recovery of extra-contractual damages. According to Section 409(a) of ERISA (29 U.S.C.S. §1109), which establishes liability for

breach of fiduciary duties, any fiduciary who is liable for a breach of fiduciary duty will be required to make good to the plan losses resulting from the breach, to restore to the plan any profits which the fiduciary received due to the improper use of plan assets and "shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary." Section 502(a) of ERISA (29 U.S.C.S. §1132(a)), which provides for civil enforcement procedures under ERISA, states that an action may be brought under Section 409 for breach of fiduciary duty by the Secretary of Labor, a participant, beneficiary or plan fiduciary for appropriate relief under Section 409 or for "other appropriate equitable relief." The courts have generally held that neither Section 409(a) or 502(a) of ERISA permits the recovery of extra-contractual or punitive damages.

The Supreme Court in Massachusetts Mutual Life Ins. Co. v. Russell, 105 S.Ct. 3085 (1985), held that Section 409(a) of ERISA does not provide a cause of action for extra-contractual damages by a plan participant or beneficiary. The Court held that while Section 502(a)(2) of ERISA authorizes participants or beneficiaries to bring actions against a fiduciary for violation of Section 409 of ERISA, recovery for such violations inures to the benefit of the plan as a whole and not to the individual participant or beneficiary. The Court stated that the legislative history of ERISA indicated that the primary concerns in drafting Section 409 of ERISA were the possible misuse of plan assets and remedies that would protect the entire plan rather than the rights of an individual beneficiary. Additionally, the Court noted that the statutory provisions under Section 502(a) of ERISA are silent as to the recovery of extra-contractual damages. The Court concluded that in enacting a comprehensive legislative scheme such as ERISA, which includes an integrated system of procedures for enforcement, Congress deliberately omitted any such remedy. The Court declined to address the issue whether Section 409 of ERISA authorizes the recovery of extra-contractual compensatory or punitive damages in an action by a plan against a fiduciary.

In Drinkwater v. Metropolitan Life Ins. Co., 846 F.2d 821 (1st Cir. 1988), the First Circuit noted that while the Supreme Court's decision in Russell was limited to remedies available under Section 502 for violations of Section 409 of ERISA, the Court expressly reserved the question of whether extra-contractual damages might be a form of "other appropriate equitable relief" available under Section 502. However, the First Circuit agreed with and followed the holdings of other circuits that extra-contractual damages are unavailable under Section 502, and that the term "equitable" is meant to intend injunctive or declaratory relief.

Diduck v. Kaszycki & Sons Contractors, Inc., 737 F.Supp. 792 (S.D.N.Y. 1990), held that punitive damages could not be sought under Section 409 of ERISA. The court stated that the Section 409(a) grant of authority permitting a court to award equitable relief does not encompass extra-contractual or punitive damages. In reaching its decision the court looked to the analysis of the circuits in determining whether Section 502(a) of ERISA encompasses extra-contractual or punitive damages for fiduciary violations.

The court concluded that Congress intended for ERISA to incorporate the fiduciary principals of the law of trust, under which trustees are generally not liable for punitive damages for breach of fiduciary duty. Additionally, the court stated that ERISA's legislative history with regard to remedies for breaches of fiduciary duty contemplates traditional forms of equitable relief such as injunctions, constructive trusts, and the removal of fiduciaries.

Although the Seventh Circuit in a previous decision left open the possibility of extra-contractual recovery under Section 502 of ERISA, the court held that such damages were not available where the only extra-contractual damages sought by the plaintiff were punitive in nature and the allegations in the complaint did not support a claim for such damages. The court, relying on the Supreme Court's holding in Firestone, supra, that ERISA is to be construed consistently with the common law of trusts, denied punitive damages as such damages are generally unavailable in the trust context. Petrilli v. Drechsel, 910 F.2d 1441 (7th Cir. 1990).

In Gaskell v. Harvard Cooperative Society, 14 E.B.C. 1290 (D. Mass. 1991), the plaintiff, relying on the Supreme Court's decision in Ingersoll - Rand Co. v. McClendon 111 S.Ct. 478 (1990), in which Justice O'Connor, in dicta, suggested that compensatory and punitive damages were within the power of federal courts to provide, sought such damages in relation to an ERISA violation by his employer. However, the court held that if the Supreme Court had intended to expand the realm of potential relief available under ERISA and to overrule its prior holdings, it would have done so explicitly and not in dicta. The court refused to overrule the express holding of the First Circuit in Drinkwater, supra, without a clear indication that the law will provide for extra-contractual damages under ERISA.

In Novak v. Anderson Corp., 15 E.B.C. 1127 (8th Cir. 1992). The court found that an ESOP participant was not entitled to monetary damages due to the employer's failure to notify the participant that his plan distribution could be rolled over into a tax deferred plan. The court held that the reference in Section 502(a)(3)(B) of ERISA to "other equitable relief" does not include monetary damages. The court concluded that neither the statutory language or the legislative history permits an expansion of the traditional equitable relief available - injunctive and declaratory relief and the imposition of a constructive trust - to include monetary damages.



PRIVACY IN THE WORKPLACE

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PRIVACY IN THE WORKPLACE

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INTRODUCTION

Concern over employee privacy rights is increasing as employer techniques for employee surveillance and monitoring are growing dramatically. The clash between our society's strongly held belief in the "right to be left alone" and the increasing arsenal of employer monitoring techniques is a guarantee for litigation and legislation throughout the near future.

Consider, for example, the cautionary tale of Papa Gino's. The case is reported as O'Brien v. Pap Gino's of America, Inc., 780 F.2d 1067 (1st Cir. 1986). An employer had received information that an employee was using drugs off-duty -- not necessarily in the workplace, but on "his own time." The employer then required the employee to take a polygraph test. While some of the questions related to employment, some were outside the scope of employment concerns. When asked whether he used drugs, the employee answered that he did not. The polygraph examiner concluded that the

employee was lying in his denial. The trial jury found, and the First Circuit confirmed, that the interrogation techniques were invasive of the plaintiff-employee's privacy, and awarded damages in the amount of \$400,000.

This, however, is not the end of Papa Gino's tale of woe and difficulty. Not content merely to administer an intrusive polygraph test, company management apparently also decided to use the discharge as an example to others. The company told third parties that the employee was terminated for violating company drug policies. Even though that statement was arguably at least partially true, the jury also awarded damages to the plaintiff for defamation. The plaintiff had contended, and the jury apparently believed, that the employee had also been discharged for refusing to promote the godson of the owner. Thus, the employer allegedly misstated the reason for the discharge, relying on drug use (which apparently was viewed by the jurors as a pretextual reason), rather than truthfully stating the real

reason -- the refusal to knuckle under to management's attempt at nepotism.

This case undoubtedly created a very bad day for someone at Pap Gino's. The company believed that it had validly terminated an employee for violating its important drug policy, and it had corroboration of the drug use through the modern technique of the polygraph. Instead, it found itself liable in tort damages for both defamation and invasion of privacy to an ex-employee whom it had considered to be a drug user. The jury's "20/20 hindsight" proved to be very different from the employer's attempt to implement its drug policy. The point is not necessarily that the employer was bumbling, but rather than an investigation which management believes is well-intentioned can be judged highly critically in retrospect by a finder of fact.

The New York Times recently reported a story about a newly popular electronic investigative technique. While video cameras have been commonplace in stores and restaurants for a number of years, there has been a growing trend toward the use of hidden microphones.

See *In a Growing Number of Stores, Hidden Security Microphones are Listening*, May 28, 1994 at p. 6. The story reported that a very large customer in the Northeast was the Dunkin' Donuts chain. A security consultant commented that the system was particularly helpful in preventing employees from pocketing cash payments by customers, rather than depositing them properly in the register. While the monitoring devices raise interesting questions under federal wiretap legislation, the companies involved apparently attempted to deal with such problems by posting small stickers with disclaimers such as "Audio monitoring on the premises." A later Times story reported that the franchisor company discouraged the use of the audio surveillance, but suggested that it was apparently a choice of the individually-owned franchisees whether to install them.

Such audio surveillance techniques are so new that there are apparently no reported cases. They raise interesting questions concerning the store's potential liability, not only to employees, but also to

customers who may also find their otherwise private conversations the subject of monitoring and possible recording. Nevertheless, employers seem enthusiastic. The Times quoted a Kentucky businessman who was a Dairy Queen franchisee and who supported the new surveillance techniques. He had successfully obtained confessions from twelve employees that they were giving away free food to their friends and family members.

Finally, the newspaper reported a video technique which may give consumers pause: the use of video cameras behind one-way mirrors in clothing store dressing rooms. Apparently, the venerable Bloomingdale's displays signs stating, "These dressing rooms are monitored by an inventory control checker." Whether Bloomingdale's uses cameras in changing areas or not, the liability issues raised by the use of one-way mirrors and cameras are obvious.

A. WORKPLACE INVESTIGATIONS

Employers can institute many types of practices which affect the privacy of their employees. The two

most frequently utilized by employers are workplace investigations and the testing of employees.

The most common of the employer practices are workplace investigations. They involve a struggle between the employer's right to know what is going on within the business and the employee's right to privacy, even within the workplace.

1. Questioning Employees. The first thing to consider when questioning an employee is whether the subject of the inquiry relates to the business itself. If the employer is legitimately concerned about a conflict within the business, the employer is probably allowed to question the employee on matters relating to that conflict. For example, since the Christian Science church teaches that homosexuality is against its teachings, a inquiry into a prospective employee's sexual orientation is not an invasion of privacy. Madsen v. Erwin, 395 Mass. 715, 481 N.E.2d 1160 (1985).

But if the employer does not have a business concern in mind when questioning an employee, courts have held such questioning to be a privacy invasion.

See Phillips v. Smalley Maintenance Services, Inc., 711 F.2d 1534 (11th Cir. 1983) (holding that an employer invaded employee's privacy since the employer had no business need for information regarding employee's sexual activities).

If the employer can demonstrate a business interest in the information requested from the employee, the next thing for the employer to consider is the manner in which the questioning is done. The more aggressive the manner of questioning, the more likely that the questions will be considered intrusive on the employee's rights.

Questioning must be reasonable. In Hall v. May Dep't Stores Co., 292 Or. 131, 637 P.2d 126, (1981), it was unreasonable for an employer to question and threaten an employee against whom the employer had very little evidence of wrongdoing. But several courts have held that requesting information from employees at the time they are hired is not unreasonable. In Spencer v. General Tel. Co., 551 F. Supp. 896 (M.D. Pa. 1982), an employer who requires employees to fill out an information sheet is not

violating the employee's privacy since the request for public information wouldn't be offensive to a reasonable person.

Where does all of this leave the employer? Employers may be able to justify their questions by showing an employee's consent. If an employee makes certain information public, he/she cannot later claim that questions on that information are an invasion of privacy. Moffett v. Gene B. Glick Co., 621 F. Supp. 983 (N.D. Ind. 1986). Employer may ask their employees questions, so long as they are business related and reasonably executed.

2. Workplace Searches. There is again a balancing of interests with regard to searches in the workplace. On one hand is the employer's business interest in knowing what is going on. On the other is the employee's right to privacy. The most prominent case with regard to workplace searches is O'Connor v. Ortega, 480 U.S. 709, 107 S. Ct. 1492 (1987). The basic issue in this case was to determine what an employee's "reasonable expectation of privacy" was within the workplace.

Since most employees do have some expectation of privacy, it becomes important to determine at what point employers can cross the line and institute a workplace search. The Court in Ortega held that there was a two-part test: (1) was the search justified (did there seem to be reasonable ground to suspect some wrongdoing)? and (2) was the search permissible in scope (was the method of the search reasonable)? If the answer to both of these questions is yes, the employee will have no claim for invasion of privacy.

The privacy expectation that an employee has is lowered by notice from the employer that employee's personal things are subject to random searches. Since the employee then has no reasonable expectation of privacy, there is no invasion by an employer's search. Am. Postal Workers' Union v. U.S. Postal Service, 871 F.2d 556 (6th Cir. 1989).

If the employer is to remember only one thing when conducting a search within the workplace, it should be that the search must be reasonable. There must be a reasonable suspicion of wrongdoing before a search is

done, and the intrusiveness of the search must be reasonable under the circumstances.

3. Surveillance and Monitoring of Employees.

Observation of employees is not an invasion of privacy so long as the observation is in a public place and there is a good business reason for it. Employers may watch their employees in order to monitor job performance or to investigate wrongdoing.

In several cases courts have not found violations of an employee's privacy right when the employer was observing in order to monitor performance on the job. See Catania v. Eastern Airlines, Inc., 381 So. 2d 265 (Fla. Dist. Ct. App. 1980) (holding that non-malicious surveillance in the workplace by an employer does not invade an employee's privacy).

Employers also have the right to watch employees who are being investigated for wrongdoing, whether the employee is in the workplace or in a public area while off duty. A detective who followed an employee suspected of wrongdoing and observed him in open, public places did not violate that employee's privacy. Pemberton v. Bethlehem Steel Corp., 66 Md. App. 133,

502 A.2d 1101, cert. denied, 479 U.S. 984, 107 S. Ct. 571 (1986).

The employer must be aware that these previous cases all relate to observation of an employee in a public place. In most states, it would violate a person's right to privacy to observe a member of the opposite sex in a private dressing room. White v. Davis, 120 Cal. Rptr. 94, 533 P.2d 222 (1975) (en banc).

The other method of employer surveillance is telephone monitoring. Most states and the federal government prohibit any interference with telephone communication. Listening devices for phones are also prohibited by federal law if the employee has a reasonable expectation of privacy when using the phone. There are two recognized exceptions to this general rule which would allow an employer to monitor the telephone conversations of their employees.

The first exception allows an employer to monitor calls from an extension phone for reasonable business purposes. The other exception allows wire communication service providers to monitor calls to

investigate quality control. Both of these exceptions must be for valid business reasons and must be reasonable in the invasion of private phone calls.

If the monitoring of the telephone is for business purposes, employers may not be in violation of employees privacy rights. See Schmukler v. Ohio Bell Tel. Co, 116 N.E.2d 819, 66 Ohio L. Abs. 213 (1953) (holding that the monitoring of calls to confirm proper service is not an invasion of privacy).

a. Proposed Federal Monitoring Legislation. As this short outline no doubt makes clear, the pace of advance of technology in the field of electronic workplace monitoring and surveillance has far outstripped the pace of development of legislation and common law. As a result, Congress is playing catch-up with proposed legislation to address perceived gaps in current privacy law coverage.

Currently pending in the House of Representatives is H.R. 1900 (perhaps H.R. 1984 would have been a better number to capture its sponsors' concerns). This bill, known as the Privacy for Consumers and Workers Act, has had relatively strong Democratic

support in the House. As noted below, similar legislation, S. 984, sponsored by Sen. Paul Simon, has also been introduced in the Senate.

While the final version of this legislation has yet to be determined, the bill would, if adopted in anything like its current form, present major limitations on the use of electronic monitoring in the workplace. The bill would reach broadly to the collection or recording of data concerning employees' activities by electronic means. Included would be computer based monitoring, telephone monitoring, review of performance by techniques such as keystroke assessment, remote duplication of individual workers' computer screens, the use of electronic devices indicating an individual's whereabouts, data collected from key cards, video camera surveillance, audio surveillance, and similar techniques. Whether its scope extends to such traditional methods of monitoring as "time clocks" (which often now are electronic or computer-based in nature) is also an issue.

Following are some key points surrounding the proposed legislation.

-- The legislation seeks to limit not just the techniques or the frequency of the use of information, but also the manner in which an employer can use it. As noted below, employee evaluation and discipline based on these techniques are also restricted.

-- The legislation would significantly limit the use of monitoring devices and techniques in dressing areas, locker rooms, and bathrooms.

-- Following a disclosure model, the bill would require that employers using such monitoring techniques inform the employees that they are potentially subject to monitoring and, further, that their performance may be evaluated based on monitoring.

-- Apparently because of the widespread practice of telephone monitoring, employers engaged in such practices would have to give employees access to an unmonitored phone for personal calls. This will undoubtedly produce a whole new set of management issues and headaches for companies seeking to limit personal phone calls while on the job.

-- There are limits on the frequency with which such monitoring can take place, depending on job tenure. In the present version of the bill, employees who have worked under 60 days can be monitored an unlimited number of times; those who've worked more than 60 days but under two years can be monitored up to 40 times per month; and those veterans who have survived for two or more years are

protected from any monitoring more than 15 times monthly.

-- The bill would permit continuous, contemporaneous video monitoring for security purposes, such as is common now. However, it would impose restrictions on after-the-fact review of such monitoring (presumably by systematic review of video tapes after they've been recorded). See M. Crichton, Rising Sun.

-- The bill limits exclusive reliance on quantitative data as a method of evaluation or discipline.

Ironically, such a provision could be an incentive to rely more heavily on subjective data, which raise their own kind of employment problems.

Examples would be providing raises or discipline to keyboard-based employees solely on the number of

keystrokes recorded over a computer network.

-- The bill would impose strict limitations on periodic or random monitoring. It would, for example, be difficult to monitor a single individual; rather, most monitoring would have to be a part of an overall "bona fide service observation program."

-- Discipline as a result of such monitoring would further be limited. For example, any action which may have a "significant adverse effect" may need to be undertaken within as short a period as twenty-four hours after the monitoring.

The final legislative outline is not yet clear. However, some problematic provisions also lurk in the Senate version, S. 984. Particularly unclear is a provision which would limit monitoring of employees who were in the act of "exercising First Amendment

rights." Such a provision would have the effect of importing a series of rules concerning freedom of expression which, except for union-oriented activities, are typically not protected in the private sector. The House bill does not presently contain such a provision, and it will be worth watching to see which version prevails.

b. E-mail in the Workplace. One of the more intriguing topics involving privacy in the workplace is that of E-mail. Briefly, E-mail is a system of electronic mail which connects computers within a business and allow the direct transmission of notes and memoranda over a network without the traditional printing of the memo and physical sending and receipt. E-mail is more typical among larger businesses which have computer networks, although it is becoming more common in smaller businesses and firms as network technology becomes available outside the ranks of Fortune 500 businesses.

E-mail inherently presents opportunities for employer review and monitoring of messages, because the messages are generated and transmitted through the

computer network system owned, installed, and maintained by the employer. In addition, all E-Mail systems have a feature of central storage of messages on a hard disk or file server somewhere in the system. Thus, while there appears to be an "original" message on the computer of the recipient, and a copy in the "outbox" of the sender, the message is always physically stored centrally in a computer file. Moreover, all networks are serviced and maintained by systems operators ("sysops") who have high levels of "security" which allow them access to files throughout the system, including E-mail.

E-mail also has a certain allure for those who are not technophobes. Users can quickly send messages, reply to messages, copy them, and communicate in apparent privacy. There is not the opportunity for physical eavesdropping that a phone presents, although a message can always be read by a supervisor or co-worker off the screen where it's being sent or received. E-mail offers the seductive opportunity for an apparently private, surreptitious note to a co-worker. Not surprising, E-mail messages can be

antiestablishmentarian, expressing opinions contrary to the public posture and propriety of a larger business. Intercepted personal E-mail can be embarrassing to the sender, may indicate disloyalty or an "attitude," or may actually disclose illegal acts by an employee. Conversely, E-mail presents a temptation to the curious employer or supervisor with security access to the system: an apparently risk-free way to read other people's mail, to browse through others' messages from the security of one's own terminal: mail interception without breaking and entering.

Employers do have legitimate interests in having access to the system. First, their system operators have a real need to service and maintain the system. Second, the system represents a major capital investment by them, probably much larger than the telephone system. Third, personal use of the E-mail for non-business related reasons presents significant problems to the business. At the least, time spent sending, reading, and receiving personal E-mail messages is a diversion of time and resources away

from the business' activities, just like personal telephone calls. Moreover, the personal messages take up "disk space" on the system -- always a scarce commodity in a growing network. Finally, to the extent that E-mail is being used to implement breaches of company security, theft, or other illegal activity, the business has some legitimate interest in seeing that its capital investment is not used against its own interest.

The law on employer surveillance of E-mail right now is decidedly murky. Again, this phenomenon presents a perfect example of technology rapidly outrunning the law. There is in place a relatively recent statute, the Electronic Communications Privacy Act of 1986 ("ECPA"), 18 U.S.C. §§ 2510-2520. EPA was an amendment to Title III of the Omnibus Crime Control and Safe Streets Act of 1968.

The statute creates both civil and criminal penalties for the intentional interception, disclosure, or use of wire, oral or electronic communications. 18 U.S.C. § 2520(b); § 2511. There are, however, exceptions to and exemptions from the

act which provide potential broad defenses to the review of E-mail by company supervisors.

Perhaps most important is the provision in the Act which excepts from its coverage communications where one party to the communication has given his or her consent. See 18 U.S.C. § 2511(2)(d). Interestingly, only one side to the communication need consent, not both, so an employer would have two bites at the consent apple: one with the sender and the other with the receiver of E-mail.

At least one court has construed consent to include implied consent. Griggs-Ryan v. Smith, 904 F.2d 112 (1st Cir. 1990). Thus, an employer could develop a strong defense of consent by developing and publicizing broadly a policy that indicates that E-mail is not private, that the systems operators and other company officials reserve the right to review E-mail just as they would any regular company business file, that E-mail is not to be used for personal communications, and that the company reserves the right to monitor E-mail communications either regularly or randomly. While not bullet-proof, a

clear and well-distributed policy would go a long way toward establishing implied consent and a lack of reasonable expectation of privacy on the part of employees.

In addition, there is a statutory exception from ECPA for private communications providers in certain circumstances. When the ECPA was passed, the principal focus of the drafters was on public communications such as telephones, and not on E-mail. Thus, for private providers, there is an exception for interception or disclosure that is a "necessary incident to the rendition of ...service or to the protection of the rights or property of the provider of that service." 18 U.S.C. § 2511(2)(a)(i). While the application of this section is unclear in the context of E-mail, its language suggests that it is related to routine tasks performed by systems operators for system maintenance rather than random or focussed surveillance by supervisors for other purposes. In addition, a "business extension" exception, obviously designed for extension phones rather than E-mail, could have some application as

well. 18 U.S.C. § 2510(5)(a). Courts have generally read this interpretation rather narrowly. Watkins v. L.M. Berry & Co., 704 F.2d 577 (11th Cir. 1983); Briggs v. American Air Filter Co., 630 F.2d 414, 420 (5th Cir. 1980).

In conclusion, the law surrounding E-mail is far from clear. At the state level, appellate cases concerning whether E-mail surveillance violates any common law privacy principles have not emerged to provide reliable guidance. At the federal level, the Electronic Communications Privacy Act provides some general rules which probably apply to E-mail, even though the statute is not well-drafted to cover it. The implied consent doctrine, along with the exceptions for system maintenance by private communications systems, probably provide E-mail system owners the upper hand. However, both the case law and state and federal statutory law are sure to develop in this area.

4. Investigative Reports. Sometimes employers may hire an independent investigator to gather information on employees or prospective

employees. In order to fully protect an employer from invading the privacy of the employee and to meet the requirements of the Fair Credit Reporting Act, 15 U.S.C. § § 1681-1681t, the employer must get the consent of the applicant or employee before obtaining any personal information. The employer should be completely open with the employee about the objectives of the investigation. While the consent of the employee is usually required, it is only in the case where a person has requested a job or a promotion. If the employer investigates an employee for a promotion that the employee is not aware of, the employee's consent is not required.

B. TESTING OF EMPLOYEES.

An emerging trend in employer practices is the testing of employees. Today, employers use many tests in order to make a number of different employment decisions.

1. Drug Testing. Federal agencies have been among the first to participate in the drug testing of employees. They began by testing those in sensitive positions such as national security, health, or

safety. In fact, the Drug-Free Workplace Act of 1988, 41 U.S.C. §§ 701-707 (1988) mandated that every government contractor and grantee have a drug-free workplace.

The Americans with Disabilities Act sets out special rules concerning drug testing. First, section 104(d)(1) of the Act states that "a test to determine the illegal use of drugs shall not be considered to be a medical examination." Medical examinations are otherwise severely restricted under the provisions of section 102(d) of the Act. Moreover, the Act excludes from the definition of disability any employee currently engaged in the illegal use of drugs. Section 104(a). However, the Act eliminates from the exclusion individuals who have successfully completed a supervised rehabilitation program, or anyone participating in a supervised rehabilitation program who is no longer engaging in the illegal use of drugs. Section 104(b)(1), (2). Finally, the ADA sets out certain assurances that employer-imposed prohibitions against work-place drug use are not to be considered in violation of the Act. Section 104(c).

Most of the federal court decisions regarding the drug testing of employees deal with testing only public sector employees. The courts have held that if the testing is in the governmental interest, then it will be permitted without threatening an employee's privacy. Skinner v. Ry. Labor Executives Ass'n, 109 S. Ct 1402 (1989). See also Nat'l Treasury Employees Union v. Von Rabb, 489 U.S. 656, 109 S. Ct. 1384 (1989) (holding that an employer could test an employee even without reasonable suspicion if the employee is required to carry a gun).

Of the private sector employees the courts have held subject to drug tests are those in safety-sensitive positions. These include employees in industries that are regulated. Regardless of whether the employees are in the public or the private sector, the testing must be based on reasonable suspicion and it must serve a compelling societal interest.

2. Other Forms of Employee Testing. There are three other types of employee testing that are frequently used: (1) polygraph ("lie detector") testing, (2) honesty testing, and (3) genetic testing.

The polygraph test is otherwise known as a "lie-detector" test. It is both physically and psychologically intrusive and the results are not completely accurate. It is so unpredictable that its use is largely forbidden federally by the Employee Polygraph Protection Act, 29 U.S.C. § 2001 (Supp. 1990), with only limited exceptions. In O'Brien v. Papa Gino's of Am., 780 F.2d 1067 (1st Cir. 1986), the court went so far as to hold that the use of a lie-detector test can give an employee a cause of action for invasion of privacy. Even if the use of the test is not forbidden completely, the types of questions that can be asked are restricted so as to not get personal answers that would result in an invasion of the employee's privacy.

Another type of employee testing done by employers is honesty testing. Honesty tests avoid some of the problems of the lie-detector tests since the honesty tests are handwritten. The honesty tests are not forbidden, but questions are restricted as well. The employer must be very careful not to illicit personal

answers in response to their questions so as to invade the employee's privacy.

The third type of employer testing is genetic testing. Genetic testing leads to serious privacy problems because there is nothing more personal than the results of tests on someone's genetic makeup. There are also problems with the disclosure of those results. There must be special precautions made to ensure the employee's privacy and confidentiality are kept in a situation of genetic testing.

C. Investigating Employee Possession, Use, and Sale of Drugs.

If an employee is suspected of having, using, or selling drugs, the first thing an employer should do is gather more information. This information can be collected using many of the practices considered in the first part of this discussion. The employer should adopt a practice based on the seriousness of the problem. If the facts say that the problem is serious, the employer will be more justified in using more drastic steps in the investigation, even if the employee's privacy is invaded.

For example, if an employee is only accused of stealing \$20, a strip search is not warranted. Bodewig v. K-Mart, 54 Or. App. 480, 635 P.2d 657, review denied, 644 P.2d 11287 (Or. 1982). But the employer may use other methods of investigation, depending on the circumstances. These include: drug testing, the use of an undercover agent to discover more facts, and various types of searches.

If an employer must investigate an employee, the employer should limit disclosure only to those who "need to know" of the resulting facts in order to protect both the employee and the employer. See generally Hudson v. S.D. Warren Co., 608 F. Supp. 477 (D.C. Me. 1985) (discussing publication of information discovered during an investigation).

D. "Off Duty" Conduct.

Here is a genuine struggle between the employer and the employee. Employees often feel that what they do on their own time is their own business, while the employer's view is that an employee's off duty conduct can affect employer's reputation or employee's job performance.

In order for the employer to be justified in basing employment decisions on off duty conduct, the conduct must have an adverse effect on the employee's job performance. In Thorne v. City of El Segundo, 726 F.2d 459 (9th Cir. 1983), cert denied, 469 U.S. 979 (1984), the court held that the employer had no right to inquire into the sexual matters of job applicants if they had no relation to that person's job performance. In Fugate v. Phoenix Civil Serv. Bd., 79 F.2d 736 (9th Cir. 1986), the Court held that sexual activities that were engaged in on the job did concern job performance and could be discovered by the employer without invading the employee's privacy.

Private sector employers have generally needed to show the same type of business reasons for gaining personal off duty information regarding employees. An employer must have legitimate business reasons for firing, demoting, etc. and employee based on off duty relationship or misconduct. See Federated Rural Elec. Ins. Co. v. Kessler, 131 Wis. 189, 388 N.W.2d 553 (1986) (holding that a company can forbid an employee's relationship with another married employee,

so long as the policy applies equally to everyone);
See also Kinoshita v. Canadian Pacific Airlines, 803
F.2d 471 (9th Cir. 1986) (holding that an employer may
terminate an employee for misconduct if the misconduct
will reflect badly on the employer).

There are no bright line rules on what off duty
conduct an employer may use in making adverse
employment decisions. But an employer must be sure
that there is a connection between the employee's
misconduct and a legitimate business concern for the
employer. Otherwise, to use an employee's off duty
conduct to injure the employee is to create potential
liability for invasion of the employee's privacy.

As with many other areas of the law involving
privacy, whether employee conduct is permissible or
wrongful depends on whether it's reasonable. While
such a rule is easy to remember, its application in
planning is uncertain. All a human resources manager
or attorney can know for sure is that a group of
jurors some years later can sit in a group and second
guess his or her advice as to what's reasonable. That

sobering thought, on which we close, should be
powerful counsel for self-restraint.

**USE OF PART-TIME, TEMPORARY AND
CONTRACT EMPLOYEES**

The Legal Considerations

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USE OF PART-TIME, TEMPORARY AND CONTRACT EMPLOYEES

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INTRODUCTION

Temporary employment services is one of those industries where everyone can end up happy; the clients/employers because they get trained workers at cost-effective prices and the workers because they get experience that may lead to permanent jobs with good pay.

The temporary services industry has evolved from the white-gloved Kelly Girl office worker into a popular source of employment for women and men in fields ranging from the traditional office and custodial positions to drafting and engineering jobs. Corporations these days can find a temporary employee to replace a vacationing or ill receptionist or secretary for one day or several weeks, or they can find someone to help with a special engineering project that might last as long as two years.

Hiring temporary employees is a financially sensible move. The temp agency is responsible for recruiting, salary, and other financial matters, leaving the corporation free of paperwork and the costly burden of hiring someone full time. But before business do business with temporary service providers, they should be

mindful that the American workplace is changing and along with it, traditional employment relationships. Companies are establishing smaller "core" work forces and supplementing them with part-time, temporary, and other contract workers in a variety of flexible staffing arrangements.

The growth of staffing services has raised issues regarding the legal relationships between the staffing firm, the employees it supplies, and the customers that use their services--including the potential liability of the customer to the staffing firm's employees. "Co-employment" is the term used to refer to this relationship and its legal consequences. Although co-employment historically has not posed significant problems for users of staffing services, it remains a subject of uncertainty and confusion.

The following information reviews some of the legal and operational implications of co-employment in a number of areas such as civil rights, workers' compensation, labor relations, employee benefits, and other areas affecting the terms and conditions of employment. For an in-depth look at the general subject of co-employment, see Linder, The Joint Employment Doctrine--Clarifying Joint Legislative--Judicial Confusion, 10 Hamline Journal of Public Law and Policy 321

(1989).

"Staffing services" is used throughout as a generic reference to the range of personnel supply services, including temporary help, employee leasing, facilities management, etc. The more specific term is used when needed to clarify or to distinguish between services when laws and regulations may affect them differently.

I. DEFINITIONS

A. TEMPORARY HELP

Temporary help companies recruit, train, and test their *own* employees and assign them to clients in a wide range of job categories. Temporary employees fill in during vacations and illnesses, meet temporary skill shortages, handle seasonal or other special workloads, and help staff special projects. The National Association of Temporary Services officially defines "temporary help service" as:

... a service whereby an organization hires its own employees and assigns them to clients to support or supplement the client's work force in work situations such as employee absences, temporary skill shortages, seasonal workloads, and special assignments and projects."

This definition, or variations of it, has been adopted in a number of states exempting temporary help services from laws designed to curb employee leasing abuses in the workers' compensation area.

B. EMPLOYEE LEASING

The business purpose of employee leasing is very different from temporary help.

According to the National Staff Leasing Association:

"Employee leasing company means a company which, in a majority of its contractual relationships, for a fee, places the employees of a client company onto its payroll and leases said employees to the client company on an ongoing basis . . ."

Thus employee leasing generally involves the transfer by an employer of all or most of its work force to the payroll of an employee leasing firm. The purpose is to "completely fill the accounting and internal administration duties related to payroll". It appeals primarily to small and mid-sized employers who find it cost-effective to lease their employees rather than hire a full-time payroll and human resources staff. Employee leasing companies charge a "service fee" based on a negotiated percentage of the client's payroll costs.

Employee leasing differs from temporary help in two key ways: (1) leased employees generally are the *client's* former employees, and (2) leased employees work on a regular, *ongoing* basis. In contrast, temporary help involves providing employees as a *temporary supplement* to the customer's work force. It does not involve managing the customer's work force or assigning employees on regular, full-time basis.

Because of abuses by some employee leasing firms in the workers' compensation and health insurance areas, employee leasing is becoming a regulated industry.

Some states are enacting laws to require leasing firms to maintain separate workers' compensation policies for each customer.

C. PAYROLLING

Many temporary help companies offer a service sometimes referred to as "payrolling." Here the customer, not the temporary help company, recruits the worker and then asks the temporary help company to hire the person and assign them to perform services for the customer. Payrolling is used when the client has specialized needs and is in the best position to screen applicants for the required skills. Other uses involve employees nearing retirement who are engaged in a project that is expected to continue beyond the employee's scheduled retirement date. Such workers can be payrolled with a temporary help firm until the project is completed.

Payrolling is not the same as employee leasing because the individuals are assigned to temporary assignments or projects, and the arrangement generally does not involve taking over a customer's entire full-time work force to area of operation. But

patrolled employees may be considered lease employees under federal or state laws regulating employee leasing arrangements if they work on a long-term, open-ended basis.

D. FACILITIES MANAGEMENT

"Facilities management" (also sometimes referred to as "outsourcing") refers to arrangements in which the staffing firm contracts with a customer not just to provide personnel but to perform some specific business function that is generally peripheral to the customer's core business. Examples include operating a mail room or data processing center, supplying cafeteria services, landscaping services, guard services, or maintenance and janitorial services. In these arrangements, customers do not supervise or control the details of the work performed by the contractor's employees. Therefore, co-employment issues generally should not arise.

II. WHAT IS CO-EMPLOYMENT

Co-employment describes a legal relationship between two or more employers in which *each employer* has actual or potential legal rights and duties with respect to the same employee or group of employees. Employers have many legal obligations

to their employees. These include providing wages and benefits, payment and withholding of employment taxes, providing workers' compensation insurance, complying with civil rights and labor laws, maintaining a safe work environment, and so on. Employers also may have obligations to *third parties* if the employees' work-related activity causes harm to others.

It should be noted that courts and statutes generally do not use the term "co-employment" to describe the relationship we are discussing. "Joint employment," or, in the case of workers' compensation, "general" and "special" employer, are the terms most often used.

Staffing companies and their customers often have enough contacts with the assigned employees that *both* will be viewed as employers. The staffing company pays the employee, pays and withholds all payroll taxes, provides workers' compensation coverage, has the ultimate right to hire and fire, hears and acts on complaints from the employee about working conditions, etc. Customers, on the other hand, frequently supervise and direct the employees' day-to-day work, control working conditions at the worksite, and determine the length of the assignment. Therefore, in many staffing arrangements, co-employment is an *inherent* aspect of

the relationship between the staffing firm and its customers.

The precedents show that customer liability issues generally arise where the customer violates some law, or where the customer deals with a supplier that fails to meet its employer obligations. In one key area--workers' compensation--the customer's co-employer status often actually *protects* the customer from liability.

III. WORKER'S COMPENSATION

A. "General Employer" and "Special Employer"

As every employer knows, state workers' compensation laws provide benefits, on a no-fault basis, to employees accidentally injured on the job. The basic premise of these laws is that, in return for such protection, employees are barred from suing their employer for damages. In other words, workers' compensation generally is the employee's *exclusive* remedy for workplace injuries.

In a long line of cases, courts have extended the exclusive remedy provisions of state workers' compensation laws to customers of temporary help firms. In reaching this conclusion, courts have applied the common law "loaned" (or "borrowed") servant doctrine under which the customer is a "special employer" (the temporary

help firm being the "general employer") of the loaned worker.

The key elements in establishing a customer's special employer status are (1) that the customer supervises the work of the individual and (2) that the assigned employee has consented to the arrangement.

In another twist, a few states follow the common law rule that the employer who directs the employee's activities at the worksite is the employer for workers' compensation purposes. In such states, the customer will be directly liable to the staffing company's employees for the payment of workers' compensation benefits even where the staffing company has expressly agreed to provide the coverage. In states where the customer is viewed as the employer for workers' compensation, the staffing company may be exposed to liability for negligence if sued by its own employee who is injured on the job since it cannot claim immunity as an employer.

B. Speical Rules for Employee Leasing Companies

Special state laws may apply to employee leasing firms with respect to workers' compensation liability. In response to abuses involving employers transferring their employees to leasing company payrolls to avoid high experience modifications, the National Association of Insurance Commissioners (NAIC) and

the National Council on Compensation Insurance (NCCI) have adopted model regulations that are in the process of being promulgated by state insurance departments. Temporary help services generally are excluded from these rules. Under the model rules, any entity that provides workers pursuant to a leasing arrangement must register with the state insurance department or face criminal penalties. "Employee leasing" is defined broadly to include any arrangements whereby one business leases workers to another business. The rules provide that leasing company customers must secure workers' compensation benefits and maintain appropriate levels of coverage unless the leasing company secures coverage in accordance with the rules.

IV.. EMPLOYMENT TAXES (FICA, FUTA, SUTA)

As employers, staffing companies pay all employment taxes. They pay the employer's share of social security (FICA) as well as federal and state unemployment taxes (FUTA and SUTA). Any staffing firm that doesn't do this, but instead sends its employees out as "independent contractors," exposes itself and its customers to substantial risk if the workers are held to be employees rather than

independent contracts. In general, it is unlikely that a staffing firm will be able to establish that the workers it supplies meet the IRS or Department of Labor definition of an independent contract.

If staffing firms discharge their obligations as employers by paying all employment taxes and making all appropriate withholdings, customers generally shouldn't have to worry about liability for these payments as a co-employer. Temporary help firms have been expressly recognized by the IRS as employers for employment tax purposes.

V. CIVIL RIGHTS

A. Title VII Claims

In 1984, a federal court in New York held a temporary help customer to be a co-employer for the purpose of a suite brought by a temporary employee under Title VII of the Civil Rights Act of 1964. (*Amarnae v. Merrill Lynch*, 611 F. Supp 344 (DCNY 1984)). The temporary alleged that the customer discharged her from her temporary assignment and refused to hire her on permanent basis because of her sex, race, and national origin. The customer moved to dismiss the case,

arguing that it had to employer-employee relationship with her. The employee asserted that the customer was an employer because the customer "controlled her work hours, workplace, and work assignments; hired, trained, and assigned her; and ultimately discharged her."

The court agreed that there was enough of an employer-employee relationship to support a Title VII claim against the customer.

B. Americans with Disabilities Act

The ADA makes clear that staffing firms cannot discriminate against their disabled employees or applicants which includes accepting discriminatory customer orders.

For example, if a customer refuses to accept a qualified individual because of his or her disability, it would be unlawful for the staffing firm to fill the order. The staffing firm must make reasonable accommodations to enable its disabled employees to perform the essential function of the job.

In addition to Title VII and the ADA, customers may be considered co-employers under other EEO laws such as the Age Discrimination Act of 1967, the Equal Pay Act of 1963, and laws prohibiting sexual harassment.

VI. LABOR RELATIONS

Another important area in which the co-employment relationship may impose legal duties on the customer involves collective bargaining arrangements. The National Labor Relations Board (NLRB) and at least one federal court have held that the relationship between a staffing firm and its customer gives rise to a co-employment relationship and that the employees assigned to the customer may be included in the customer's collective bargaining suit.

VII. OSHA

The loaned servant principle has been applied in determining who bears responsibility for worksite safety and for maintaining records of work-place injuries under the federal Occupational Safety and Health Act (OSH Act).

All employers have a general duty under the OSH Act to maintain a safe workplace and to comply with the Act's safety and health standards.

In a pivotal case in 1976, a major staffing company was cited by OSHA as solely responsible for the safety violation that led to the death of one of its temporary

employees. This was later over-ruled by an OSHA administrative law judge saying, "it would be unconscionable" to request temporary help firms to satisfy the safety requirements of each and every work situation.

VIII. WAGE AND HOUR ISSUES

In a 1968 ruling, the Department of Labor held that temporary employees assigned to work for various customers are "typically" employed jointly by the temporary help company and its customers--and customers may be jointly held responsible for overtime and minimum wage. In the case of overtime, it's dependent on the employee having worked more than 40 hours in the week.

IX. WRONGFUL DISCHARGE

Strictly speaking, a customer can't "fire" temporary employees. It can only ask that they be removed from the assignment. Only the temporary help company has the right to hire and fire, and employees removed from an assignment at the

customer's request may be immediately reassigned to another customer. Temporary employees generally understand that even if the assignment purports to be for a specified period, the customer has an absolute right to terminate the assignment. We know of no case in which a court has held that a temporary employee has the right to bring a wrongful discharge suit against a customer.

X. BENEFITS

This is not a co-employment question. Congress, in 1982, as part of that year's tax code amendments, passed the Tax Equity and Fiscal Responsibility Act or "TEFRA". Section 414(n) does not say that the customer is a co-employer. It simply says the customer must include in its head count any contract employees who meet the service requirements. Generally, anyone working 1,500 hours in a year is considered to have worked "substantially full-time" and must be counted. Section 414(n) does not, however, give leased employees any right to benefits under the customer's plans.

XI. IMMIGRATION--I9 VERIFICATION

Regulations issued under the Immigration Reform on Control Act of 1986, makes clear that customers using contract services do not have any obligation to verify the employment status of the contracted employee. The regulation provides that "in the case of an independent contractor or contract labor or services, the term 'employer' shall mean the independent contractor or contractor and not the person or entity using the contract labor."

CONCLUSION

It wasn't that long ago when the temporary work force was limited to secretaries and other administrative personnel. Today, you can find short-term contract employees performing virtually any business task. From engineers to computer programmers to interim chief executives, the temporary help industry grew 20 percent in 1993.

The increase in temporary workers is largely due to a trend called "outsourcing," farming work out to other companies. This trend is likely to dramatically change how many of us work in the future.

Companies often outsource certain noncritical business functions to specialized firms and individuals who can perform these services cheaper and more efficiently. Mail rooms, security forces, employment departments and data processing centers have all been outsourced. In fact, it's becoming increasingly rare to find a business function that has not been outsourced by some company at some time.

As these dynamic changes take place in the American workplace, it is reasonable to expect that businesses will use even more staffing services as part of their overall human resource management strategies. As we have seen, co-employment historically has been a concern but has had minimal legal impact on the use of

staffing services. As these services evolve in response to work force changes, it is reasonable to assume that the legal environment also will change. With common sense and intelligent planning, those issues should prove to be manageable in the new workplace as they have been in the old.

SUBJECT	Number: E-7-2
OFFICE OF CONTROLLER AND TREASURER	Date Effective: 2-1-90
7. Non-Payroll Payment for	Date Issued: 2-1-90
Individual Services	Supersedes:
2. Employee versus Independent	Prepared By: TMD & RSW
Contractor	Approved: H.C.G.

A. General

It is the policy of the University of Kentucky to pay all workers in accordance with Internal Revenue Service guidelines. Payments to individuals for services shall be made through the Payroll Department utilizing the Payroll Authorization Record (PAR), when the individual is deemed to be an employee. When the individual is deemed to be an independent contractor, payment shall be made directly using a Departmental Authorization and Voucher (DAV) for amounts that do not exceed one thousand dollars (\$1,000.00). Payments in excess of one thousand dollars shall be on a Personal Service Contract, payable to a bona fide Independent Contractor.

Proper classification of a worker as an EMPLOYEE or an INDEPENDENT CONTRACTOR is mandated by Internal Revenue Service guidelines, and failure to do so may result in significant penalties to the University. The remainder of this section details the University's policies and procedures for classification of workers.

B. Policy

1. The department head or the employing official shall determine whether a worker is an "Employee" or and "Independent Contractor " prior to any performance of work or service.
2. Each Sector Personnel Office shall provide guidance and assistance in the classification of workers in their respective sectors.
3. The University shall adhere to the "Common Law Factors" as the primary source of information to assist in the classification of a worker. ("The Common Law Rule" and the "Common Law Factors" are stated in detail in the following procedures.)
4. The Controller/Treasurer Division, Accounts Payable Department and Payroll Department shall perform the final review of all classifications before approval for payment.

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7. Non-Payroll Payment for	Date Issued: 2-1-90
Individual Services	Supersedes:
2. Employee versus Independent	Prepared By: TMD & RSW
Contractor	Approved: H.C.O.

5. Selected groups of workers have been classified as follows. These workers should be classified and paid accordingly when employed to perform the services described.

- a. Continuing Education Instructors: Categorically, individuals hired to teach continuing education courses shall be paid as Independent Contractors.

C. Procedures

1. Classification of workers, as an employee or independent contractor, shall be in accordance with the "Common Law Rule" and "Common Law Factors" as stated by the Internal Revenue Service and listed below. Employing departments may also seek information and assistance from their Sector Personnel Office and the Controller/Treasurer Division, Accounts Payable Department.
2. Internal Revenue Service Guidelines for Classifying a Worker as Employee or Independent Contractor.
 - a. The Common Law Rule: For all three employment tax laws, a worker is an employee under the common law rules if the person for whom he/she works has the right to direct and control him/her in the way he/she works, both as to final results and as to the details of when, where and how the work is to be done. However, the employer need not actually exercise the control; it is sufficient that he/she has the right to do so. Where the employer does not possess that right, the individual is an independent contractor, not an employee.
 - b. There are a number of factors that may aid in the determination of whether or not the requisite right of direction and control exists in a given situation. No one or small group of these factors is necessarily controlling. The factors are to be weighed against those that indicate an independent contractor status.

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OFFICE OF CONTROLLER AND TREASURER	Date Effective: 2-1-90
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Individual Services	Supersedes:
2. Employee versus Independent	Prepared By: TMD & RSW
Contractor	Approved: H.C.O.

Note that the relative importance of any one factor may vary depending on the occupation under consideration. The following is a list of some of the factors that might be considered:

- (1) A person who is required to comply with instructions about when, where and how the person is to work is ordinarily an employee. Again, it is the employer's right to instruct, not the exercise of that right, that is important. Instructions may be oral or in written procedures or manuals.
- (2) Training of an individual by an experienced employee who works with the worker (or individual) is a factor of control because it indicates that the employer wants the services performed in a particular method or manner. Independent contractors ordinarily use their own methods and receive training from the one who purchases their services.
- (3) Integration of the person's services in the business operations generally shows that the worker is subject to direction and control. That is, when the success or continuation of a business depends to an appreciable degree on the performance of certain kinds of services, those performing the services must necessarily be subject to a certain amount of control by the owner of the business.
- (4) If services must be rendered personally and if the employer is interested in who does the job as well as in getting the job done, it indicates that the employer is interested in the methods used as well as the result of the services rendered.
- (5) Hiring, supervising and payment by an employer generally show control over the persons on the job. Sometimes one worker will hire, supervise and pay other workers under a contract in which the one worker is responsible for the attainment of a given result. In such a case, that worker is an independent contractor, not an employee.

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- (6) The existence of a continuing relationship between an individual and the person for whom the individual performs services is a factor tending to indicate the existence of an employer-employee relationship. Services may be continuing even though they are performed at irregular intervals, on a part-time basis, seasonally, or over a short term.
- (7) The establishment of set hours of work by the employer is a factor indicative of control since such a condition bars the worker from being the master of the worker's own time, which is a right of an independent contractor.
- (8) If the worker must devote full time to the business of the employer, rather than engaging in other gainful work, then the worker is probably an employee. An independent contractor, on the other hand, is free to work when, for whom and for as many employers as the worker pleases. Note that full time does not necessarily mean an eight-hour day or a five-day work week. Its meaning will vary depending on the intent of the parties.
- (9) Doing the work on the employer's premises is not, of itself, indicative of control but it does imply control, especially if the work is of such a nature that it could be performed elsewhere. One who works in the employer's place of business is at least physically within the employer's direction and supervision. Conversely, however, the fact that work is done off the employer's premises does not, of itself, mean that no right to control exists.
- (10) If a person must perform services in a prescribed sequence, it shows that the person may be subject to control. Here, too, it is the right to set the sequence, not the exercise of that right, that controlling.
- (11) Regular reports, submitted by the worker, indicate control.

SUBJECT OFFICE OF CONTROLLER AND TREASURER 7. Non-Payroll Payment for Individual Services 2. Employee versus Independent Contractor	Number: E-7-2 Date Effective: 2-1-90 Date Issued: 2-1-90 Supersedes: Prepared By: TMD & RSW Approved: H.C.O.
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- (12) Payment for work done by the hour, week or month is usually the manner for compensating employees; independent contractors are customarily paid by the job in a lump sum or on a commission basis. The guarantee of a minimum salary or the granting of a drawing account over earnings tends to indicate the existence of an employer-employee relationship.
- (13) Payment by the employer of the worker's business and/or traveling expenses is a factor indicating control over the worker. But, a lack of control is indicated where the worker is paid on the job basis and has to take care of all the workers expenses.
- (14) The furnishing of tools, materials and the like by the employer is indicative of control over the worker. If the worker furnishes tools and equipment, it indicates a lack of control subject to recognition of the fact that in some jobs it is customary for the employees to use their own hand tools.
- (15) A significant investment by persons in facilities used by them in performing services for another tends to show an independent contractor status. Facilities include, generally, equipment or premises necessary for the work, but not tools, instruments, clothing and the like that are provided by employees as common practice in their trade.
- (16) A person who is in a position to realize a profit or suffer a loss as a result of the person's services is generally an independent contractor, while an employee is not in such a position.
- (17) The fact that a person makes services available to the general public is usually indicative of an independent contractor status. "Making services available" may include hanging out a "shingle", holding business licenses, supplying advertising and telephone directory listings, etc.
- (18) The right to discharge is an important factor in determining whether the one possessing that right is an employer of an employee. An employee exercises control through threat of dismissal. An independent contractor, on the other hand, cannot be fired so long as a result that measures up to the contract specifications results. The fact that a right to

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discharge may be limited under a collective bargaining agreement does not detract from the existence of an employer-employee relationship.

- (19) An employee has the right to end the relationship with the employer at any time without incurring liability. An independent contractor usually agrees to complete a specific job and is responsible for its satisfactory completion or is legally obligated to make good for failure to complete the job.

3. Payment to an Employee

Payments to employees must be made in accordance with the University of Kentucky Business Procedures E-14

4. Payments to Independent Contractors (\$1,000.00)

- a. Contracts in excess of One Thousand Dollars (\$1,000.00)

Payments to Independent Contractors for amounts in excess of One Thousand dollars (\$1,000.00) must be on a Personal Services Contract, and in accordance with University of Kentucky Business Procedure B-9-11. (See B-9-11 for Details)

- b. Contracts of One Thousand Dollars (\$1,000.00) or Less

Payments to Independent Contractors for One Thousand dollars (\$1,000.00) or less, may be made by Departmental Authorization and Vouchers as follows:

1. Prepare a Departmental Authorization and Voucher (DAV), payable to the Individual.
2. The description on the DAV must contain the following:
 - a. What work was completed. (A description of the actual task performed)
 - b. When the work was performed.

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-
- c. Where the work was performed. (Were University facilities, tools, and equipment used?)
 - d. How the amount paid for the work was determined. (Was the Contractor paid an hourly amount, or a contracted amount?)
5. The following statement must be on the DAV, and signed by the responsible University official.
- "I have reviewed the University of Kentucky procedures for classifying an Employee/Independent Contractor, and I believe this individual meets the criterion to be classified as an Independent Contractor."
6. Attach a completed "1099 Information Sheet" to the DAV (See University of Kentucky Business Procedure E-7-1 for details) Attachment A.
7. Attach a complete copy of the "University of Kentucky Agreement Between Independent Contractor and Client". Attachment B.
8. Forward the completed DAV to the Accounts Payable Department for final review.

UNIVERSITY OF KENTUCKY
AGREEMENT BETWEEN
INDEPENDENT CONTRACTOR AND CLIENT

WHEREAS, _____ ("CLIENT") intends to contract with
_____ (independent contractor -- "IC") for the performance of certain tasks;

WHEREAS, IC's principal place of business is located at the following address:
_____ ; IC's Employee Identification Number _____

WHEREAS, CLIENT's principal place of business is located at the following address: _____ ;

WHEREAS, IC declares that IC is engaged in an independent business and has complied with all federal, state and local
aws regarding business permits and licenses of any kind that may be required to carry out the said business and the
asks to be performed under this agreement;

WHEREAS, IC declares that IC is engaged in the same or similar activities for other clients and that CLIENT is not IC's
ole and only client or customer.

THEREFORE, IN CONSIDERATION OF THE FOREGOING REPRESENTATIONS AND THE FOLLOWING TERMS AND
CONDITIONS, THE PARTIES AGREE:

1. SERVICES TO BE PERFORMED. CLIENT engages IC to perform the following tasks or services:

2. TERMS OF PAYMENT. CLIENT shall pay IC according to the following terms and conditions:

IC shall submit invoices to CLIENT for the payments called for in this paragraph.

3. INSTRUMENTALITIES. IC shall supply all equipment, tools, materials and supplies to accomplish the
designated tasks except as follows: _____

4. CONTROL. IC retains the sole and exclusive right to control or direct the manner or means by which the
work described herein is to be performed. CLIENT retains only the right to control the ends to insure its
conformity with that specified herein.

5. PAYROLL OR EMPLOYMENT TAXES. No payroll or employment taxes of any kind shall be withheld or
paid with respect to payment to IC. The payroll or employment taxes that are the subject of this
paragraph include but are not limited to FICA, FUTA, federal personal income tax, state personal income
tax, state disability insurance tax, and state unemployment insurance tax.

6. WORKERS' COMPENSATION. No workers' compensation insurance has been or will be obtained by the
CLIENT on account of IC or IC's employees. IC shall comply with the workers' compensation laws with
respect to IC and IC's employees.

7. TERMINATION. This agreement shall end on _____ and may not be terminated earlier
(except for cause) without _____ days prior written notice form one party to the other.

Agreed to this _____ day of _____, 199____, at _____, State of _____.

CLIENT:

INDEPENDENT CONTRACTOR:

By: _____
Name and Title

By: _____
Name and Title

UNIVERSITY OF KENTUCKY
1099 INFORMATION SHEET

Please Type or Print

1. NAME: _____
(First) (Middle In.) (Last)

2. HOME ADDRESS: _____

ZIP CODE: _____

3. VOUCHER NUMBER: _____

4. ACCOUNT NUMBER: _____ OBJECT CODE: _____ USER CODE: _____

DOCUMENT NUMBER:

5. DAV., P.O., etc. _____ SOCIAL SECURITY NO: _____

6. REASON FOR PAYMENT: _____

7. AMOUNT: _____ DATE: _____

8. 1099 CODE: _____

9. ORIGINATING DEPARTMENT: _____

Instructions:

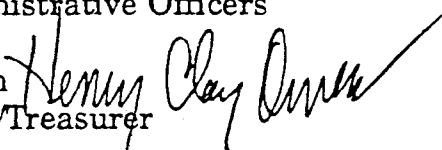
1. The University Department requesting payment must complete all items above except item No. 3 and item No. 8.
2. Items No. 3 and No. 8 will be completed by the Accounts Payable Department.
3. Attach the completed form to the paying document. (DAV or P.O.)

331 Peterson Service Building
University of Kentucky
Lexington, Kentucky 40506-0005
606-257-1402
Fax Number 606-257-4805

January 16, 1992

MEMORANDUM

TO: Deans, Directors, Departmental Chairpersons,
and Administrative Officers

FROM: H.C. Owen 
Controller/Treasurer

RE: Nonresident Alien Contractors

This memorandum is to clarify federal tax withholding requirements on compensation for services performed by nonresident alien contractors. These payments generally are for guest lectures, speaking engagements, consulting services, honoraria, and other activities.

Federal Tax Withholding Requirements

1. The University is required by federal tax law to withhold taxes equal to 30% of the gross amount paid for services unless specifically exempted by tax treaty between the nonresident alien's country of residence and the United States of America.
2. Tax withholdings will be deposited with the Internal Revenue Service under the name and social security number of the individual. (A tax identification number will be assigned by the Office of the Controller Treasurer if the individual does not provide the University with a social security number.)
3. Internal Revenue Service Publication 515 provides tax information relating to payments for services performed by nonresident alien contractors. Publication 515 can be obtained directly from the Internal Revenue Service.

Procedures for Payment by Department Authorization Voucher (DAV)

1. Review University of Kentucky Business Procedures Manual Section E-7-2 to determine that the individual meets the tests to qualify as an independent contractor.
2. Complete a DAV with the individual as payee. Include complete mailing address.
3. Provide a complete description of the services performed and state the reason for requested payment by DAV.
4. Attach a completed 8233 form (original and one copy) when the individual claims to be exempt from withholding. *See note below.
5. Attach a copy of the individual's Visa.
6. Forward the DAV and attachments to the Accounts Payable Department, Room 331, Peterson Service Building 0005.

* Note: A sample of form 8233 is attached. Additional forms may be obtained from the I.R.S. or the University Payroll Department.

Form **8233**
 (Rev. August 1990)
 Department of the Treasury
 Internal Revenue Service

**Exemption From Withholding on Compensation
 for Independent Personal Services of a
 Nonresident Alien Individual**

OMB No. 1545-0795
 Expires 7-31-93

This exemption is applicable for compensation for calendar year 19____, or other tax year beginning _____, 19____, and ending _____, 19____.

Part I Nonresident Alien Individual (Students, teachers, and researchers: See General Instructions.)

Name _____	Taxpayer identification number _____ (see instructions)
Address (number and street) in the United States _____	United States visa number (if any) _____
City, state, and ZIP code _____	

Citizens of Canada or Mexico complete either lines 1a and 1b or line 2; all other filers complete lines 1a, 1b, and 2.

1a Country issuing passport _____	2 Permanent foreign address _____
b Passport number _____	

3 Compensation for independent personal services:

a Description (see instructions) _____

b Amount (see instructions) \$ _____

c If compensation is exempt from withholding because of a U.S. tax treaty, provide:

(1) Tax treaty and provision under which you are claiming exemption from withholding _____

(2) Your country of residence _____

d Is your compensation otherwise exempt (or will it be otherwise exempt) from income tax during the tax year? Yes No
 (If you checked "Yes," attach a statement explaining why.)

e Additional facts to justify the exemption from withholding _____

4 Number of personal exemptions you are claiming (see instructions) ▶ _____	5 Number of days in the period during which independent personal services are to be performed in the United States ▶ _____
--	---

Under penalties of perjury, I declare that I have examined this form and any accompanying statements, and, to the best of my knowledge and belief, they are true, correct, and complete. I also declare, under penalties of perjury, that I am not a citizen or resident of the United States.

Signature of nonresident alien individual ▶ _____ Date ▶ _____

Part II Withholding Agent Certification

Name _____	Employer identification number _____
Address (number and street) _____	
City, state, and ZIP code _____	Telephone number _____ ()

Under penalties of perjury, I certify that I have examined this form and any accompanying statements, that I am satisfied that an exemption from withholding is warranted, and that I do not know, or have reason to know that the nonresident alien individual's compensation is not entitled to the exemption or that the eligibility of the nonresident alien's compensation for the exemption cannot be readily determined.

Signature of withholding agent ▶ _____ Date ▶ _____

General Instructions

(Section references are to the Internal Revenue Code unless otherwise indicated.)

Paperwork Reduction Act Notice.—We ask for the information on this form to carry out the Internal Revenue laws of the United States. If you want to receive exemption from withholding on compensation for independent personal services, you are required to give us the information. We need it to ensure that you

are complying with these laws and to allow us to figure and collect the right amount of tax.

The time needed to complete and file this form will vary depending on individual circumstances. The estimated average time is:

Recordkeeping	26 mins.
Learning about the law or the form	12 mins.
Preparing and sending the form to IRS	41 mins.

If you have comments concerning the accuracy of these time estimates or suggestions for making this form more simple, we would be happy to hear from you. You can write to both the Internal Revenue Service, Washington, DC 20224, Attention: IRS Reports Clearance Officer, T:FP, and the Office of Management and Budget, Paperwork Reduction Project (1545-0795), Washington, DC 20503.

DO NOT send the tax form to either of these offices. Instead, give it to your withholding agent as specified in the instructions under "Purpose of Form."

Students, Teachers, Researchers.—Form 8233 should be used by nonresident alien students, teachers, and researchers to claim exemption from withholding on compensation for services that is exempt from taxation under a U.S. tax treaty. Students must provide the information required by Revenue Procedure 87-8, 1987-1 C.B. 366. Teachers and researchers must provide the information required by Revenue Procedure 87-9, 1987-1 C.B. 368. All these individuals must also provide the information required by Form 8233, disregarding references to *independent personal services*. Then, they should submit the form to their withholding agent.

Purpose of Form.—In general, section 1441 requires that 30% of amounts paid to a nonresident alien individual as compensation for independent personal services (i.e., services performed where there is no employer-employee relationship) be withheld by the person paying the amount (the withholding agent) to the individual. This form is used by nonresident alien individuals to claim exemption from withholding on compensation for independent personal services (under section 1441 and its regulations) if the exemption is based on a U.S. tax treaty or on the personal exemption amount. The form is completed by the nonresident alien individual claiming exemption and presented to the withholding agent for review. If the withholding agent accepts Form 8233, the withholding agent so certifies on the same form and forwards it to the Director, Office of Compliance, Assistant Commissioner (International), at the address shown under Part II on this page. An accepted Form 8233 is effective only for the tax year shown on the form. **Do not use Form 8233** if you have an office in the United States regularly available to you for performing personal services. If you have an office in the United States regularly available to you, contact the Director, Office of Compliance, Assistant Commissioner (International), for more information.

Definitions

Nonresident Alien Individual.—Any individual who is not a resident or citizen of the United States is a nonresident alien individual. The term also includes a nonresident alien fiduciary. An alien individual meeting either the "green card test" or the "substantial presence test" for the calendar year is a resident. Those not meeting either test are nonresident alien individuals.

Note: *Nonresident alien individuals married to U.S. citizens or resident aliens may choose to be treated as resident aliens for income tax purposes (e.g., for purposes of filing a joint income tax return). However, these individuals are considered nonresidents for purposes of withholding taxes on nonresident aliens.* For further information on resident and nonresident alien status, the tests for residence, and the exceptions to them, see Publication 519, U.S. Tax Guide for Aliens, available from the IRS.

Nonresident Alien Fiduciary (Estates and Trusts).—A nonresident alien fiduciary is a nonresident alien guardian, trustee, executor, administrator, receiver, conservator, or other person acting in any fiduciary capacity for any person. However, a nonresident alien fiduciary is not a nominee.

Compensation for Independent Personal Services.—Independent personal services are personal services performed in the United

States by an independent nonresident alien contractor, rather than by a nonresident alien employee. Included in compensation are payments for professional services, such as fees of an attorney, physician, or accountant made directly to the person performing the services, consulting fees, and payments for performances by public entertainers, such as artists, actors, musicians, and athletes. For further information, see Publication 515.

Withholding of Tax on Nonresident Aliens and Foreign Corporations, available from the IRS.
Withholding Agent.—Any person required to withhold tax on payments made to a nonresident alien individual is a withholding agent. Generally, the person who pays or conveys the item of U.S. source income to the nonresident alien individual (or to his or her agent) is liable for the tax and must withhold. The withholding agent may be an individual, corporation, partnership, trust, association, or any other entity. For further information, see Publication 515.

Specific Instructions

Part I

Taxpayer Identification number.—If you are a nonresident alien individual (other than a nonresident alien estate or trust) and you have a social security number or you are required to get a social security number, you must use it when an identification number is required for Federal tax purposes. If you do not have a social security number, apply for one on Form SS-5, Application for a Social Security Card, which you can get at Social Security Administration offices. When the number is received, promptly give it to the withholding agent. In some cases, if you do not have a social security number or are not otherwise required to get one, you may use an IRS-issued identification number. If an application has been made for a number but it has not been received, write "TIN applies for" and the date you applied in the space provided on this form. For (non-resident alien) estates or trusts, use your employer identification number.
Lines 1a, 1b, and 2.—All filers must complete lines 1a, 1b, and 2, except citizens of Canada or Mexico, who can complete either lines 1a, 1b, or line 2.

Line 3a.—Describe the independent personal services for which the compensation is being (or will be) received, and describe the manner of compensation (e.g., lump sum, monthly payments, etc.).

Line 3b.—Enter the amount of compensation for independent personal services you will be receiving during the tax year to which this Form 8233 applies. Enter an estimated amount if the exact amount is not known.

Line 3d.—If the exemption from income tax withholding is (or will be) based on other than a U.S. tax treaty (e.g., the personal exemption amount), explain this in an attached statement.

Line 4.—For determining the amount of compensation exempt from 30% withholding because of the personal exemption amount, one personal exemption is allowed a nonresident alien individual who is not a resident of Canada or Mexico, or is not a U.S. national during the tax year. However, a nonresident alien individual covered by a U.S. tax treaty with his or her country may be entitled to exemptions for a spouse and dependents under certain circumstances. See the applicable tax treaty for further information. A nonresident alien individual who is a resident of Canada or Mexico or is a U.S. national is generally allowed the same personal exemptions as a U.S. citizen or resident. (For further information, see Publication 519.) Each allowable exemption

must be prorated according to the number of days in the period during which the personal services are to be performed in the United States (line 5 on Form 8233). To figure the daily proration amount for each allowable exemption, divide the personal exemption amount (for example, \$2,050 if the individual's tax year begins in 1990) by 365 (366 for a leap year). Round off the result to the nearest cent. **Note:** *The personal exemption amount for any year can be obtained from the IRS.*

Signature.—The nonresident alien individual, or his or her legally authorized representative, must sign and date Form 8233 in the appropriate place.

Part II

Withholding Agent's Responsibilities Regarding Form 8233.—When the nonresident alien individual gives you Form 8233, review it to see if you are satisfied that the exemption from withholding is warranted. If you are satisfied, based on the facts presented, certify that you accept the Form 8233 by completing and signing Part II.

Within 5 days of your acceptance, forward Form 8233 and any attachments to:

Assistant Commissioner (International)
Director, Office of Compliance
IN:C:E:62
Internal Revenue Service
950 L'Enfant Plaza South, S.W.
Washington, DC 20024

Give a copy of the completed Form 8233 to the nonresident alien individual. Attach a copy of Form 8233 to the Form 1042, Annual Withholding Tax Return for U.S. Source Income of Foreign Persons, that you file with the IRS. Keep a copy of Form 8233 for your records.

Note: *Each copy of Form 8233 must also include any attachments originally submitted by the nonresident alien individual.*

The exemption from withholding becomes effective for payments made at least 10 days after you have mailed Form 8233 to the IRS. (See the instructions for Part I, line 4, for information on amounts exempt from withholding because of the personal exemption amount.)

You must **not** accept Form 8233 if either of the following applies:

- If you know or have reason to know that any of the facts or statements on Form 8233 may be false; or
- You know or have reason to know that the eligibility of the nonresident alien individual's compensation for the exemption cannot be readily determined (e.g., if you know or have reason to know that a nonresident alien individual has an office in the United States regularly available for performing personal services).

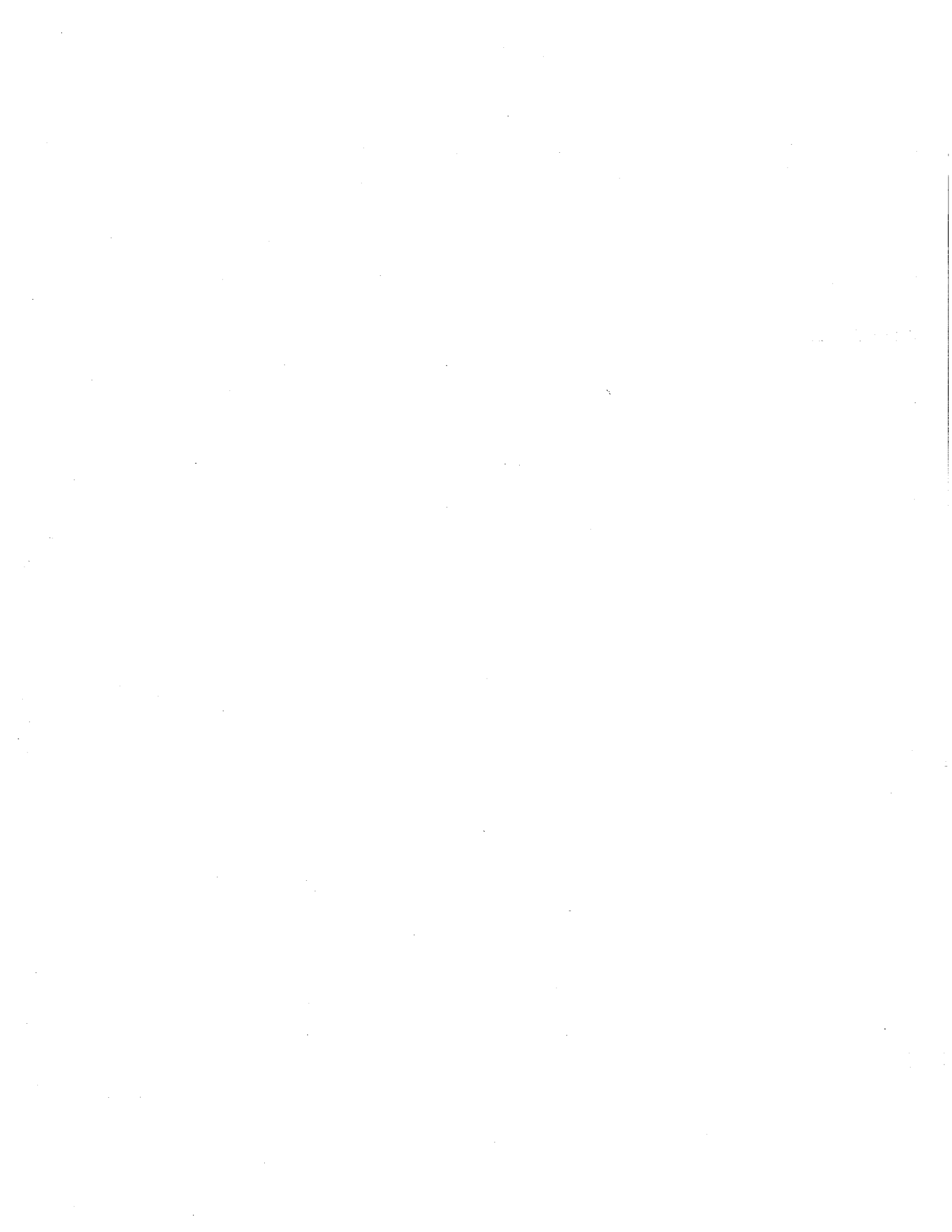
If you accept Form 8233 and subsequently find that either of the situations described immediately above applies, you must promptly notify the Director, Office of Compliance, Assistant Commissioner (International), in writing, and you must withhold on any amounts not yet paid. If you are notified by that office that the eligibility for the exemption of the nonresident alien individual's compensation is in doubt or that the compensation is ineligible for the exemption, you must withhold. See Regulations section 1.1441-4(b)(2)(iii) for examples illustrating these rules.

Signature.—The withholding agent, or a duly authorized agent of the withholding agent, must sign and date Form 8233 in the appropriate place. (See Regulations section 1.1441-7(b) for further information regarding duly authorized agents.)

1. The first part of the document discusses the importance of maintaining accurate records of all transactions and activities. It emphasizes the need for transparency and accountability in financial reporting.

HUMAN RESOURCES MANAGEMENT
Pitfalls and Preventive Practices

Richard G. Griffith
Stites & Harbison
Lexington, Kentucky



HUMAN RESOURCES MANAGEMENT

Pitfalls and Preventive Practices

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HUMAN RESOURCES MANAGEMENT:
PITFALLS AND PREVENTIVE PRACTICES

Richard G. Griffith
STITES & HARBISON

I. INTRODUCTION.

The unveiling of allegations that the President of our country engaged in workplace misconduct before taking office graphically demonstrates the increased scrutiny of employers' actions in today's business climate. In that same vein, the enactment of significant and comprehensive federal and state statutes that address numerous workplace issues and the steady, and often dramatic, annual increases in the number of workplace claims filed by employees have led many employers to the breaking point. There can be no doubt that an employer's survival in this era of multi-million dollar verdicts in employment law cases may depend upon its ability to manage its human resources effectively.

This outline is designed to provide an overview of some of the most significant issues faced by human resource professionals and to provide suggestions concerning the manner in which these issues should be addressed.

II. THE NEED TO BE AWARE OF LEGAL OBLIGATIONS.

No employer can hope to have effective human resources management without a general understanding of the laws that govern its operations. Although a comprehensive review of all laws that touch on human resource issues is beyond the scope of this outline, every employer needs to be aware of certain basic obligations and principles.

A. Issues Relating To Employment Terminations.

1. The Employment-At-Will Doctrine. Kentucky Courts have long endorsed the employment-at-will doctrine, under which a person's employment may be terminated for any reason or even no reason. See, e.g., Firestone Textile Co. Div. v. Meadows, Ky., 666 S.W.2d 730, 731 (1984) ("Ordinarily an employer may discharge his at-will employee for good cause, for no cause, or for a cause that some might view as morally indefensible.").

Though the doctrine is still viable, its reach has been significantly eroded in recent years through the evolution of certain common law principles and the enactment of numerous statutes and ordinances.

2. The Principal Exceptions To The Employment-At-Will Doctrine:

a. Employment Contracts.

(1) Express Contracts. It is beyond question that an employer generally is free to enter into an express, written contract with an employee. Thus, an employer may choose to obtain from an employee a covenant not to compete, an agreement not to disclose confidential information and virtually any other type of contractual commitment. An employer also may choose to alter contractually an employee's at-will status by, for example, agreeing that it can terminate the person's employment only under certain conditions.

(2) Implied Contracts. In recent years courts throughout the nation, including those in Kentucky, have shown an increased willingness to find the existence of implied contractual

relationships between employers and employees. Thus, even in the absence of a written employment contract an employer may be restricted by an implied contract in its ability to terminate a person's employment. See, e.g., Shah v. American Synthetic Rubber Corp., Ky., 655 S.W.2d 489, 492 (1983).

b. The Tort Of Wrongful Discharge. In Kentucky it is unlawful for an employer to terminate a person's employment where the motivation for the termination is the person's "failure or refusal to violate a law in the course of employment" or the "employee's exercise of a right conferred by well-established legislative enactment." Grzyb v. Evans, Ky., 700 S.W.2d 399, 402 (1985). The employee does not have a viable cause of action where the legislative enactment provides both rights to the employee and a remedy for the violation of those rights. Id. at 401. Examples of statutes that do not prescribe a remedy, and therefore may provide a basis for a wrongful discharge claim, are: KRS 38.460 (prohibiting retaliation against a member of the Kentucky National Guard on active militia because of military duties); KRS 118.035(2) (prohibiting retaliation against an employee for properly exercising his or her right to vote); KRS 311.800(5)(6) (prohibiting retaliation against employees and other who refuse to participate in the performance of an abortion); KRS 427.140(4)(a) (prohibiting the discharge of an employee whose earnings are garnished for one indebtedness); KRS 436.165 (prohibiting employers from discriminating against employees who refuse to work on Sundays or their Sabbath).

c. Statutes Or Ordinances That Prohibit Discrimination. An important exception to the employment-at-will doctrine is embodied in the many statutes and ordinances that prohibit employment discrimination. The protection granted by these laws includes, but is not limited to, the prohibition of an unlawful discharge based upon the employee's specific traits, such as gender, age, national origin, etc. . . The principal statutes that Kentucky employers are governed by are cited in the endnotes.¹

B. Other Legal Issues.

1. Statutes Or Ordinances That Prohibit Discrimination. The statutes that prohibit discrimination in employment prohibit unlawful termination and unlawful discriminatory treatment in any of the terms and condition of employment.

2. Wage And Hour Laws. State² and federal³ statutes generally govern the method in which wages are paid to employees.

3. Organized Labor. Federal statutes primarily govern the regulation of organized labor relations.⁴

4. Employee Benefits. A federal statute primarily governs the area of employee benefits.⁵

5. Workplace Safety. State⁶ and federal⁷ statutes address issues pertaining to workplace safety.

6. Unemployment Compensation. State⁸ and federal⁹ statutes address issues pertaining to the rights of persons to receive unemployment benefits.

7. Workers' Compensation. A state statute primarily governs the area of Workers' Compensation.¹⁰

8. Common Law Obligations. Employers need to be aware of common law theories that impose certain restrictions on their conduct, such as the tort of wrongful discharge¹¹, breach of implied contract¹², promissory estoppel¹³, defamation, invasion of privacy, tort of outrage, tortious interference with prospective or existing business relations and negligent hiring and retention.

9. Miscellaneous Statutes. There are numerous statutes that govern miscellaneous aspects of the employment relationship. Examples of the substantive issues addressed by such statutes are the right to require an employee to take a polygraph examination¹⁴, the restrictions on an employer in effecting a plant closing or mass layoff¹⁵, the obligations of an employer to provide health care continuation coverage to a departing employee¹⁶, the obligations of certain employers to adopt a drug-free workplace policy¹⁷, and the obligations of an employer to obtain basic information from prospective employees about their citizenship.¹⁸

III. THE EMPLOYMENT RELATIONSHIP FROM START TO FINISH.

A. Events That Should Precede The Employment Relationship.

An employer's best opportunity to avoid liability is before the employment relationship begins; the old adage that an ounce of prevention is worth a pound of cure is nowhere more true than in the area of employment law. Discussed below are some of the more significant steps that an employer can take to avoid serious problems.

1. Regular Review And, Where Appropriate, Revision Of Personnel Policies. Because employment laws have changed so

dramatically in recent years, and because the pace of change continues to escalate, every employer should periodically review its forms and policies. There are certain forms and policies that are particularly likely to be outdated and thus in need of revision.

a. Application Forms. Any employer that continues to use the same application form it used in the 1980's is almost certainly at risk. Among the high-risk questions frequently found in such forms are detailed questions about the applicant's health¹⁹, questions that elicit from the applicant, either directly or indirectly, his or her age, and questions about the applicant's arrest or conviction records.²⁰

There also are some provisions that an employer should consider inserting in its standard application form. They include:

- A provision expressly informing the applicant that if he or she becomes employed it will be on at-will basis. See discussion of disclaimers, infra.²¹
- A provision authorizing the employer to check references and run a thorough background check on the applicant.
- A provision waiving any claims against former employees arising out of the provision of information about the applicant.

b. Employee Handbooks. Employers are not required by law to utilize employee handbooks, and whether any particular employer should prepare a handbook depends upon a number of factors, including the size of the employer, the regularity of

employee turnover and the complexity of the employer's operations.

If an employer chooses to issue an employee handbook, among the most critical policies to be included in the handbook are:

(1) Equal Employment Opportunity Statement.

A clear, comprehensive equal employment opportunity statement can be a valuable piece of evidence in a discrimination suit. The statement should be reviewed periodically and revised, where appropriate, to include newly protected traits, such as a person's HIV-positive or smoking status.

(2) Disclaimer. Every employer should at least consider inserting in its handbook a disclaimer providing that the handbook does not create contractual rights and that employees continue to be terminable-at-will. The disclaimer also should provide that only one person has the authority to enter into an employment contract with employees and that the specified person may only bind the company if the contract is in writing and he or she signs it. It is generally considered advisable to include all of the above information on an acknowledgement form that each employee signs at the inception of the relationship.

(3) Anti-Harassment Policy. It is now widely recognized that every employer, large or small, should adopt and disseminate to all employees an effective anti-harassment policy. At a minimum, the policy should condemn all forms of unlawful harassment (not just sexual harassment), promise an appropriate level of confidentiality and prompt action and provide an alternative reporting mechanism (include several reporting options

and do not, under any circumstance, require the employee to report the harassment only to the person's immediate supervisor) and a specification of actions, including termination, that will be taken if harassment has occurred.

(4) Flexible Approach To Employee Discipline.

It is not unusual for an employee handbook to contain a section that sets forth in great detail the behavior the employer deems inappropriate and the process by which the employer will address that behavior. Although an employee discipline section is not always unacceptable, it is very important to draft such a section so that the employer retains discretion to handle in an appropriate manner all types of employee conduct. This can be accomplished by, among other things, clearly stating that the list of "bad acts" is not exhaustive and by expressly reserving the right to impose any form of discipline, including discharge, that is appropriate under the circumstances.

(5) Other Policies. Other policies that an employer may wish to include in a handbook are policies that set forth:

- hiring and promotion policies;
- the manner in which employees will be paid; and
- safety rules

c. Performance Appraisal Forms. The performance appraisal form may be the single most important document in the employer's formbook because of its frequent appearance on

claimants' trial exhibit lists. Notwithstanding its importance, the form is rarely scrutinized and is too often designed in such a way that it invites risk. An employer reviewing its appraisal form should at a minimum consider eliminating the following:

(1) "Satisfactory" Ratings. Experience teaches us that supervisors and others involved in the evaluation process cannot resist the temptation to give a satisfactory rating to marginal or even poor employees. The appraisal form should force a supervisor to provide a meaningful assessment. For example, the form could provide only the following performance ratings: Excellent, consistently meets expectations, needs improvement, and poor. By employing these, or similar ratings, the employer is more likely to receive meaningful information and is less likely to find itself explaining an inflated appraisal to a jury.

(2) "Overall" Ratings. Although most forms contain an overall rating, it is our experience that the use of such a rating leads to the same problems that arise from the use of a "satisfactory" rating. This is especially true where the employee who is being evaluated is generally performing at an acceptable level, but has severely deficient performance in one or two areas. If such an employee receives an acceptable overall rating, the employer will find it hard to justify a discharge even where the discharge is supported by the performance in the problem areas.²²

2. Preparation Of Lawful Advertisements And Other Forms Of Employee Solicitation. Every employer should exercise great care in the crafting of job advertisements or other forms of employee solicitation. There are many serious mistakes that employers frequently make with respect to these pre-employment communications, including the use of language that may create a binding employment contract with the persons who are solicited and the use of language that is either facially discriminatory or reflects a policy that has a discriminatory impact on a protected group.²³

3. Interviews Of Prospective Employees. As with poorly conceived advertisements, interviews, where poorly conducted, can lead to significant exposure for employers. The person conducting the interview should, among other things, avoid suggesting that the position which the applicant is seeking is guaranteed for a particular duration and should not characterize the wages or salary in annual terms.²⁴

The person conducting the interview also should avoid eliciting information that may not be lawfully relied upon in the employment decision, such as whether the applicant is pregnant, disabled, or over 40.

It is important to remember in carrying out the employee selection process that in the EEOC's view an employer does not typically ask a question unless it intends to be influenced by the answer it receives.

4. Reference Checks. Employers generally should check an applicant's references before offering that person a job. Presently, employers find themselves caught between competing concerns: the need on their part to be diligent in seeking information about applicants²⁵ and the reluctance on the part of the persons and entities who could provide information to expose themselves to defamation or related claims. Although the pursuit of information about an applicant may not yield much that can be used in the selection process, the mere fact that the employer tried to obtain information should be useful in the defense of a claim for negligent hiring or retention.

5. Negotiations With Prospective Employees. Each employer should determine before the beginning of the employee solicitation process whether it has any unique goals that it wishes to pursue or assets that must be protected as a part of the process. Among the issues that should be considered are:

- whether the employer wishes to offer the prospective employee the opportunity to purchase all or a portion of the business;
- whether the employer has trade secrets or other tangible or intangible assets that it wishes to protect during the life of and following the employment relationship; and
- whether the employer wishes to obtain a covenant not to compete from the prospective employee.

Armed with the answers to these questions, an employer will be able to negotiate with prospective employees with the reassuring knowledge that it has planned for the future effectively.

6. Offer Letters. An offer letter should be drafted carefully so that, if the offer in it is accepted, it will not be deemed to alter inadvertently the employee's at-will status. For example, an offer that sets forth the proposed wage or salary in annual terms may be construed to create a one-year employment contract. Similarly, the offer letter also should not contain an assurance that the relationship cannot be terminated except "for cause" or other such bases.²⁶

7. Creation Of Employment Contracts.

a. Express Contracts. It is beyond the scope of this outline to discuss in detail the provisions that typically should be included in an express written employment contract. It is important to recognize, however, that an employer that wishes to utilize written employment contracts should at the outset determine its objectives in light of the industry and the business climate in which it functions. Thus, a medical P.S.C. may need a markedly different contract from that of a manufacturer.

b. Implied Contracts. There has been a significant amount of litigation throughout the country during the last decade in which the issue was whether an oral statement or a statement in an employee handbook or other writing should be deemed to create an implied contract. Kentucky courts have not avoided this trend.

The Kentucky cases that have been rendered to date provide the following guidance to human resource managers and labor lawyers:

(1) It is risky to characterize the early period of employment as "probationary"²⁷ or to characterize an employee's wage or salary in annual terms.²⁸

(2) It is advisable where it will not create an undue risk of a union organizing campaign (assuming the employer wishes to maintain a union-free setting) to include a disclaimer in an employee handbook that says that the handbook is not contractual and that all employees are terminable at will.²⁹

8. Pre-Employment Physical Examinations. Historically, many employers required applicants or even new employees to take physical examinations before beginning their employment. Employers in today's legal environment must follow strictly the procedures governing such examinations that are set forth in the Americans with Disabilities Act. They are:

a. The examination should take place only after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant.

b. The offer of employment may then be conditioned on the results of the examination if:

- all entering employees are subjected to such an examination regardless of disability;
- information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is

treated in almost all respects³⁰ as a confidential medical record; and

- the results of the examination are used only in accordance with the employment title of the ADA.

B. The Employment Relationship.

1. Consistent Enforcement Of Personnel Policies. Every employer should, to the maximum extent possible, enforce its personnel policies in a consistent fashion. The failure to enforce policies consistently can lead to serious morale problems in the work force and ultimately to employment disputes. The need for consistent enforcement of policies has never been greater because virtually every employee is a member of at least one protected group and therefore any preferential treatment of an employee could be relied upon as proof of discrimination by another similarly situated, but less favorably, treated employee.

2. Performance Reviews And Promotions. As noted above, performance appraisal forms are frequently introduced as evidence at trial because too often they reflect evaluation inflation. In addition to revising the form that it uses, an employer also should consider maintaining its review program on a regular basis to be sure that the performance assessments are accurate and do not reflect the consideration of impermissible criteria.

Proper training of supervisors also is a critical component of a successful performance appraisal system. It is unrealistic to believe that supervisors will have an inherent ability to assess

the performance of subordinates accurately; in fact, the contrary is typically true.

Among the components of a satisfactory program are:

- educating the supervisors concerning the job duties of the employees whom they are evaluating and the objective performance criteria, if any, by which the employees' performance will be evaluated;
- informing the supervisors that their performance will be judged in part based on the accuracy of the evaluations they complete;
- informing the supervisors of the basic employment laws that govern their conduct and the many factors that cannot lawfully influence the appraisals; and
- informing the supervisors concerning the very various risks that can flow from inflated appraisals.

Every employer also should consider the need to devise an effective policy for handling promotions. One of the principal advantages of a formal promotion policy, especially if the policy incorporates objective criteria for advancement, is that the promotions that are given under it can be defended more easily.

3. Progressive Discipline. It is widely recognized that an employer should adopt a progressive discipline policy and follow it whenever possible. Such a policy should give each employee an opportunity to improve performance, provide to the employee a specific time frame within which the improvement should or must be made and provide to the employee a clear explanation of

the consequences that will flow from a failure to improve performance.

There are some circumstances, of course, in which it is not possible or advisable to exercise progressive discipline, such as where an employee has stolen money or engaged in other clearly improper conduct. It is for this reason that an employer must not articulate, orally or in writing, a strict progressive discipline policy that does not give it the flexibility it needs.

A critical component of any progressive discipline policy is the documentation of each step in the process. As with any other document that is generated in the employment relationship, a document that memorializes a step in the progressive discipline process should be carefully drafted so that, if necessary, it will support the employer's defense in litigation.

C. Termination Of Employment.

There are several steps that an employer should consider taking when it appears that it may need to terminate a person's employment.³¹

1. Careful Review Of Documents. The first essential step to take is to review the employee's personnel file, the employer's personnel policies, and any other tangible materials that may relate to the decision. Such materials can be powerful evidence at an administrative hearing or trial and therefore the employer should carefully consider their content before making a final decision to terminate a person's employment.

2. Unbiased Assessment Of The Facts. It is fairly common for a supervisor on whose recommendation the termination decision is based to have an emotional investment in the decision. Consequently, it is wise for the employer to appoint someone else -- typically a personnel manager -- to review the situation and make an unbiased assessment. By doing this, the employer may avoid making an ill-advised decision and will also have the benefit of demonstrating to a jury or other fact finder that its procedures are fair and include appropriate safeguards.

The employer should consider including as a part of the review process the completion of a termination checklist by the unbiased reviewer. The purpose of this step is to require certain basic questions to be answered before any employment termination is approved. The checklist could include the following items:

- Do the documents and other tangible data support the decision? This question includes, but is not limited to, whether the decision is consistent with written personnel policies and, where the decision is based on the person's unsatisfactory performance, whether the decision is supported by performance appraisals and other documents relating to performance.
- Is the decision consistent with the manner in which similar situations have been handled in the past? If not, is there a lawful explanation for the disparate approach?

- Would the decision result in the infringement of any of the person's statutory or other legal rights?
- Has progressive discipline been exercised?
- Have other, less extreme options been employed? This can be especially important if the employee is disabled and is therefore entitled to a reasonable accommodation.
- Has the employee been given an adequate opportunity to express his or her viewpoint?

3. The Termination Meeting. In most circumstances the termination meeting should be carried out in the presence of two management-level employees and in an otherwise private setting. The employees who are chosen to conduct the meeting should be prepared to explain concisely the basis for the decision. The failure to adopt and communicate a consistent basis for the discharge, beginning with the termination interview and continuing through a trial, can be damaging proof of pretext.

The employer also should admonish the employees who are chosen to conduct the meeting to remain calm at all times. It is not uncommon for a terminated employee to become upset during a termination meeting, and the failure of the employer's agents to resist the urge to respond emotionally can significantly increase the risk of litigation and related problems.

4. Separation Agreements. An issue that frequently arises at the time of an employee termination is whether to enter into a separation agreement with the employee. The principal purpose of entering into such an agreement is to obtain a release

of claims from the employee. As a general rule, an employer should consider seeking a release only if it concludes that offering the release will not increase the likelihood that the employee will file a claim and only if it is prepared to offer compensation or benefits to the employee in addition to those to which the employee otherwise would be entitled.

If the employee is over 40 years of age, a covered employer will not be able to enforce the release unless the release complies with the Age Discrimination in Employment Act of 1967, as amended by the Older Workers' Benefit Protection Act, 29 U.S.C. section 621, et seq. The Act requires the release to include numerous provisions to be effective and sets forth different procedures for obtaining enforceable releases from a single employee³² and from groups of employees³³.

The separation agreement should include, among other things, an agreement by the employee that he or she will not reapply with the Company in the future.

D. Events Following Termination.

An employer must continue to act prudently following the termination. Indeed, it is often post-termination conduct that leads to litigation.

1. The Unemployment Compensation Hearing. Although there has been a significant amount of focus on whether a decision rendered by an unemployment compensation agency should have a preclusive effect in other litigation,³⁴ that is no longer an issue in Kentucky.³⁵ Nevertheless, the events that unfold at an

unemployment compensation hearing can be quite important. As noted above, an employer can significantly increase its exposure by changing in litigation its explanation of the reason for a discharge from that offered at the unemployment compensation hearing. Accordingly, an employer that decides to contest a claim for unemployment benefits should be prepared to explain the basis for the discharge in a concise and consistent fashion.

2. Requests For References. The prevailing view continues to be that an employer should provide very limited information -- typically the dates of employment and the position held -- in response to a reference request. It is important to note, however, that this view has been questioned recently by some commentators because it arguably leads to the continued employment of poor or even dangerous employees and makes it less likely that the former employer which gives the limited reference will receive helpful information from other employers when it is making an employment decision. See Reuben, Employment Lawyers Rethink Advice, A.B.A.J., June, 1994 at 32. In addition, there is at least some academic support for the creation of a tort of negligent referral. Id. Accordingly, this is an area where the evolving law should be reviewed regularly.

Regardless of the approach the employer takes -- that is, whether it provides much or little information -- it should adopt a policy on references that requires all requests to be routed to a single person or department. If all employees believe they are free to respond to reference requests as they see fit, the employer

almost certainly will eventually find itself litigating the propriety of an employee's statements.

3. Anti-Retaliation Rules. Virtually every anti-discrimination statute contains a provision that prohibits retaliation against any person who files or otherwise participates in the pursuit of a discrimination claim.³⁶ Because of the substantial obligations imposed by the various anti-retaliation statutes, an employer should regard any person who has filed a charge or who has in any way participated in a proceeding under the relevant statutes as having a level of protection, and an adverse employment decision with respect to such a person should be carefully scrutinized.

The risks under these anti-retaliation statutes do not necessarily go away when the protected person's employment ends, even where the separation is voluntary. There is authority for the proposition, for example, that the dissemination of adverse employment references can constitute a violation of Title VII if motivated by discriminatory intent.³⁷

4. Reducing Exposure. Occasionally an employer will find itself in the unenviable position of realizing that it has violated an employee's rights and is facing significant exposure. Where this occurs, the employer should consider cutting off prospective damages by making an unconditional offer of reinstatement to a terminated employee.

Another loss reduction method that is available after litigation has commenced is the making of an offer of judgment under Rule 68 of the State or Federal Civil Rules.

ENDNOTES

1. See The Civil Rights Act of 1866, 42 U.S.C. § 1981; Equal Pay Act of 1963, 29 U.S.C. § 206; Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq.; The Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621, et seq.; The Vocational Rehabilitation Act of 1974, 29 U.S.C. § 701, et seq.; Vietnam Era Veterans Readjustment Act of 1974, 38 U.S.C. § 2012, et seq.; Veterans Reemployment Rights Act of 1974, 38 U.S.C. § 2021, et seq.; Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, et seq.; The Civil Rights Act of 1991, (amends portions of The Civil Rights Act of 1866 and Title VII of the Civil Rights Act of 1964); KRS Chapter 344; The Equal Opportunities Act, KRS 207.130, et seq.; Kentucky's Equal Pay Law, KRS 337.420, et seq.
2. See KRS Chapter 337 (relating to wages and hours); KRS 339.205, et seq. (relating to child labor).
3. See The Fair Labor Standards Act, 29 U.S.C. § 201, et seq. (relating to wages and hours).
4. See, e.g., National Labor Relations Act of 1935, 29 U.S.C. § 167, et seq.; Labor-Management Relations Act of 1947, 29 U.S.C. § 141, et seq.
5. See Employee Retirement Income Security Act, 29 U.S.C. § 1001, et seq.
6. See KRS Chapter 338.
7. Occupational Safety and Health Act, 29 U.S.C. § 651, et seq.
8. See KRS Chapter 341
9. See 26 U.S.C. § 3301, et seq.; 29 U.S.C. § 501, et seq.
10. See KRS Chapter 342.
11. See discussion at page 3 of the outline.
12. See discussion at pages 2-3 of the outline.
13. See McCarthy v. Louisville Cartage Co., Ky. App., 796 S.W.2d 10 (1990) (recognizing doctrine of promissory estoppel in non-employment context).

14. Employee Polygraph Protection Act of 1988, 29 U.S.C. § 2001, et seq. (prohibiting use by employers of results of polygraph examinations and other lie detector tests except under specific circumstances).
15. Worker Adjustment and Retraining Notification Act ("WARN"), 29 U.S.C. §2101, et seq.
16. Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"), as amended (COBRA added several new statutes and amended others).
17. Drug-Free Workplace Act of 1988, 41 U.S.C. § 701, et seq.
18. Immigration Reform and Control act of 1986 ("IRCA"), 8 U.S.C. § 1324 (a).
19. Such questions are expressly prohibited by the Americans With Disabilities Act. See 42 U.S.C. § 12112 (d)(2)(A) ("a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability"); 29 CFR Part 1630, Appendix (providing interpretive guidance on Title I [employment] of the ADA) ("An employer may not use an application form that lists a number of potentially disabling impairments and ask the applicant to check any of the impairments he or she may have.")
20. Such a question could consist of an express request for the applicant's date of birth or a detailed request for information about the applicant's educational background, which includes a request for the years of attendance.
21. The beneficial effect of such a provision is demonstrated in Novosel v. Sears Roebuck & Co., 495 F. Supp. 344 (E.D. Mich. 1980), in which the court held that the employee's recognition of at-will employment through the execution of an application form containing disclaimer language prevented the employee from successfully pursuing a wrongful discharge claim.
22. The Equal Employment Opportunity Commission ("EEOC") takes the position that a policy of declining to hire a person because that person has been convicted of a crime has an adverse impact on blacks and hispanics and therefore is violative of Title VII unless the policy can be justified by "business necessity". The EEOC is even more critical of questions about an applicant's arrest record.

23. For example, the EEOC maintains that the use of pre-selection inquiries which determine an applicant's availability to work during an employer's scheduled working hours violates Title VII "unless the employer can show that it: (1) did not have an exclusionary effect on its employees or prospective employees needing an accommodation for the same practices; or (2) was otherwise justified by business necessity." 29 C.F.R. § 1605.3.
24. Such a statement could be construed to alter the person's at-will status and imply that the employment will continue for at least one year. See Putnam v. Producers Livestock Marketing Assoc., Ky., 75 S.W.2d 1075 (1934).
25. It is generally recognized that employers face greater risks today of defending claims of negligent hiring and negligent retention than in the past. See generally Peteren and Massengill, The Negligent Hiring Doctrine - A Growing Dilemma For Employers, 15 EMPLOYEE REL. L.J. 419 (1989-90).
26. See, e.g., Shah v. American Synthetic Rubber Corp., Ky., 655 S.W.2d 489 (1983).
27. See Trusty v. Big Sandy Health Care, Inc., 38 K.L.S. 4 at 5, Motion for Discretionary Review Denied and Court of Appeals opinion ordered not to be published, 38 K.L.S. 11 at 30 ("While an employer need not establish personnel policies or practices, where an employer chooses to establish such policies and practices and makes them known to its employees the employment relationship is presumably enhanced It is enough that the employer chooses, presumably in its own interest, to create an environment in which the employee believes that, whatever the personnel policies and practices, they are established and official at any given time, purport to be fair, and are applied consistently and uniformly to each employee.").
28. See Putnam v. Producers Livestock Marketing Assoc., supra at note 24.
29. See Nork v. Fetter Printing Co., Ky. App., 738 S.W.2d 824 (1987).
30. The records may be released under certain circumstances. See 42 U.S.C. §12112 ("supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations; first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and government officials investigating compliance with this Act shall be provided relevant information on request").

31. This section of the outline focuses on involuntary employment terminations in a non-reduction in force context.

32. The waiver of a federal age discrimination claim by an individual will only be effective if it:

- (a) is part of a written agreement that is readily understandable by the employee;
- (b) refers specifically to claims under the federal act;
- (c) does not purport to waive claims arising out of future conduct;
- (d) is given in exchange for consideration over and above any benefit for payment to which the employee is entitled;
- (e) provides that the employee has been advised to consult with an attorney before signing it;
- (f) gives the employee at least 21 days to review and sign it;
- (g) gives the employee at least 7 days to revoke it after signing it.

29 U.S.C. § 626.

33. The waiver of a federal age discrimination claim in cases of a group exit incentive program must include the statements set forth in endnote 32 and in addition must:

- (a) give the employees at least 45 days to review and sign it;
- (b) disclose:
 - the group of employees eligible for the program;
 - the program requirements;
 - any time limitations under the program; and
 - the job titles and ages of all employees eligible or selected for the program and the same information for those not eligible or selected.

29 U.S.C. § 626.

34. See, e.g., Kelley v. Tyler Refractories Co., 860 F.2d 1188 (3d Cir. 1988).
35. See K.R.S. 341.420(5) ("No finding of fact or law, judgment, conclusion, or final order made with respect to a claim for unemployment compensation under this chapter may be conclusive or binding in any separate or subsequent action or proceeding in another forum, except proceedings under this chapter, regardless of whether the prior action was between the same or related parties or involved the same facts.").
36. See, e.g., 42 U.S.C. §2000e-3 ("It shall be an unlawful employment practice for an employer to discriminate against any of its employees or applicants for employment, . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."); KRS 344.280 ("It shall be an unlawful practice . . . [t]o retaliate or discriminate in any manner against a person because he has opposed a practice declared unlawful by this chapter, or because he has made a charge, filed a complaint, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under this chapter; . . .").
37. See, e.g., London v. Coopers & Lybrand, 644 F.2d 811, 817 (9th Cir. 1981).

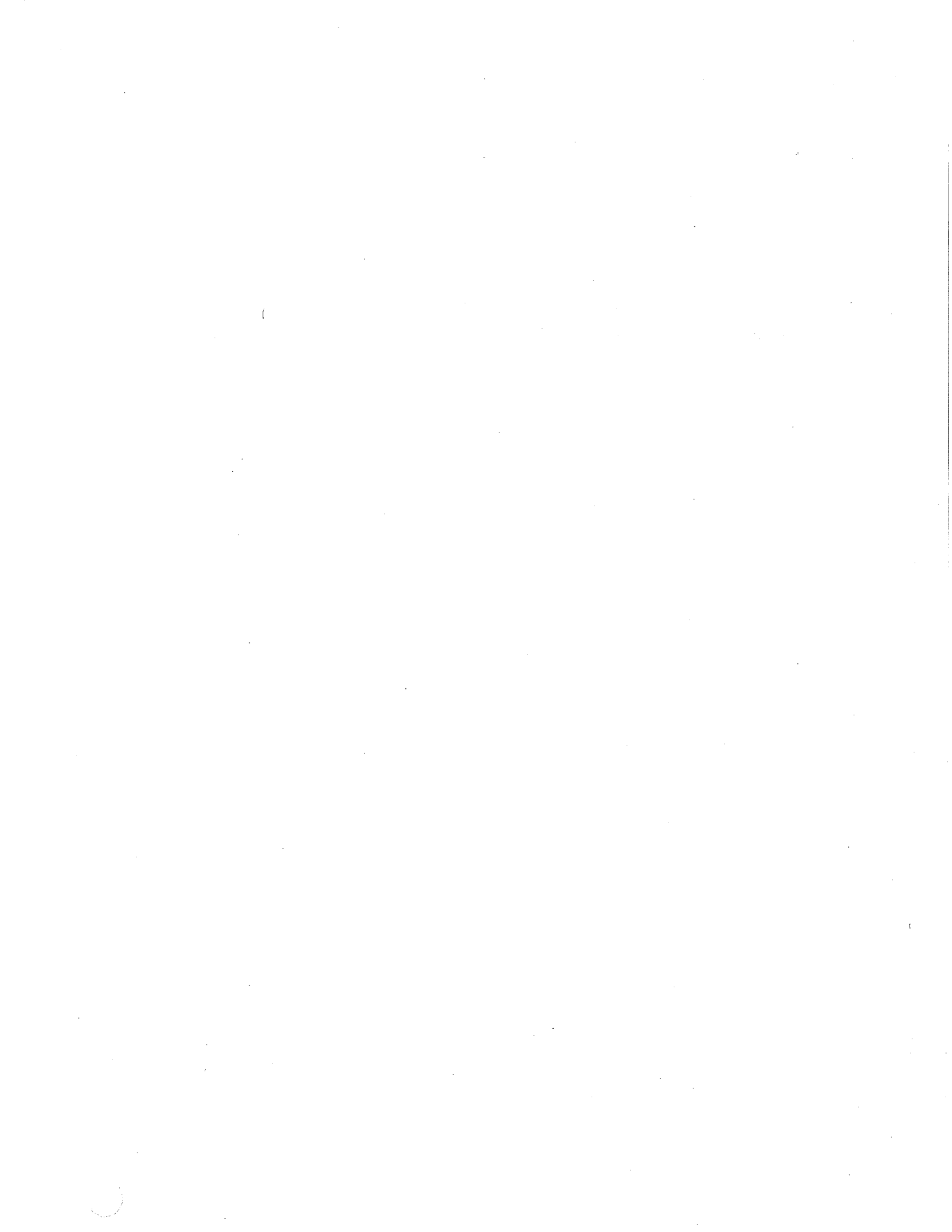
HARASSMENT: SEXUAL AND OTHERWISE

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HARASSMENT: SEXUAL AND OTHERWISE

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HARASSMENT: A PRACTITIONER'S PRIMER

I. INTRODUCTION

Since the Senate Judiciary Committee's confirmation hearings of Clarence Thomas in 1991, the issue of sexual harassment has continued to grab the attention of headline writers and the general public. The U.S. Navy, in the celebrated "Tailhook" inquiry, has undergone scrutiny of its treatment of female officers and the responsibility of senior officers for the apparent "beer party" atmosphere of the Tailhook Convention. President Clinton faces embarrassing litigation by a former Arkansas state employee who alleges then-Governor Clinton sexually harassed her. These are not isolated incidents.

While racial harassment has not received the same degree of public attention, it is equally unlawful, and courts have not failed to sanction employers who permit acts of racial harassment.

Damages assessed against offending employers can be huge. Recently, the Commonwealth of Kentucky agreed to pay six women over \$500,000 in damages for the sexual harassment of them by a male supervisor in the Cabinet of Human Resources. This settlement is not unique. Obviously, a small company might experience severe financial ramifications if found liable for even a fraction of such damages.

Further, general commercial liability policies seldom cover the expense of litigation of these cases, or the damages assessed. So-called "boutique" policies for employment-related claims are available, but only at great expense.

To prove claims of harassment, complainants generally must prove four elements:

- A. Unwelcome
- B. Conduct
- C. That causes injury or harm
- D. For which the employer bears responsibility

These elements will be discussed throughout this paper.

II. GOVERNING STATUTES

Harassment is prohibited by state and federal statutes, as well as by local ordinances in Lexington, Louisville and Jefferson County. Title VII of the Civil Rights Act of 1962, 42 U.S.C. §2000e-2(a) provides that it is unlawful for an employer:

- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
- (2) To limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Title VII applies to employers with 15 or more employees in each of twenty (20) or more calendar weeks in the current or preceding calendar year. 42 U.S.C. §2000e(b).

The Kentucky Civil Rights Act, KRS 344.040 tracks the language of Title VII. The Act applies to employers of eight or more employees within Kentucky in each of the twenty (20) or more calendar weeks in the current or preceding calendar year. KRS 344.030(1).

The Ordinances of Louisville and Jefferson County apply to employers of two or more employees in each of four or more calendar weeks in this or the preceding calendar year. An administrative complaint may be filed with the Louisville and Jefferson County Human Relations Commission within 90 days of the offending act. Louisville Ordinances §98.15-21. See also, Jefferson County Resolution No. 15, Series 1978.

Lexington/Fayette County also has a local commission to review and rule on alleged violations of its anti-discrimination ordinance.

III. EEOC GUIDELINES

Under current EEOC guidelines (29 CFR §1604.11), "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment" violative of Title VII in certain delineated situations.

The EEOC has issued new guidelines covering harassment. The comment period for these guidelines ended on November 30, 1993. No date has yet been scheduled for final action.

Generally, the proposed guidelines (Fed. Reg. Vol. 58, No. 189, p. 1266; proposed 29 CFR §1609) are more expansive than the current ones. (29 CFR §1604.11). While 29 CFR §1604.11 addresses sexual harassment,¹ the text of the proposed regulation applies to "[h]arassment on the basis of race, color, religion, gender, national origin, age, or disability . . ." and cites the Age Discrimination in Employment Act (ADEA, 29 U.S.C. §621, et seq.); The Americans With Disabilities Act (ADA; 42 U.S.C. §12101, et seq.); and the Rehabilitation Act of 1973 (29 U.S.C. 701, et seq.) in addition to Title VII.

¹A footnote stated, "The principles involved here continue to apply to race, color, religion or natural origin."

In a broad stroke, the proposed regulation defines harassment as "verbal or physical conduct that denigrates or shows hostility or aversion towards an individual because of his/her race, color, religion, gender, national origin, age or disability," and which has an effect on the individual's employment. Harassing conduct is delineated. The Commission adopts a "reasonable person" of the alleged victim's situation or class standard.

IV. FORMS OF SEXUAL HARASSMENT

Case law and the EEOC regulations recognize two forms of sexual harassment: quid pro quo harassment and hostile environment harassment.

A. Quid pro quo harassment exists where "submission to the unwelcome sexual advances of supervisory personnel was an express or implied condition for receiving job benefits or a tangible job detriment resulting from the employee's failure to submit to the sexual demands of supervisory employees." Highlander v. KFC Nat. Management Co., 805 F.2d 644, 648 (6th Cir. 1986). It must affect the "terms, conditions or privileges of employment." Henson v. City of Dundee, 682 F.2d 897, 909 (11th Cir. 1982).

B. Hostile environment harassment arises where verbal or physical conduct of a sexual nature permeates the work environment and unreasonably interferes with the employee's ability to work or creates a hostile and intimidating environment which interferes with her work. See §V infra.

V. CASE LAW

A. Meritor Savings Bank v. Vinson:

In Meritor Savings Bank v. Vinson, 477 U.S. 57, 91 L.E.2d 49, 106 S.Ct. 2399 (1986), the Supreme Court recognized that sexual harassment constitutes a violation of Title VII's prohibition against sex-based discrimination. The Vinson Court recognized the two forms of actionable sexual harassment, hostile environment (so called environmental harassment) and quid pro quo harassment.

The Vinson court firmly rejected the defense of voluntariness to allegations of harassment, "in the sense that the complainant was not forced to participate against her will." Rather, the correct inquiry is whether the [alleged victim] by her conduct indicated that the alleged sexual advances were "unwelcome. . . ." 477 U.S. at 68. Relevant to this determination, according to Vinson, are such factors as the nature of the sexual advances; the context in which they arose; and the complainant's sexually provocative speech, conduct and dress at work.

Further, the Court held that economic injury need not be present for the harassment to be actionable. "For sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" 477 U.S. at 67, citing, Henson v. City of Dundee, supra.

B. Harris v. Forklift Systems, Inc.

In its second consideration of sexual harassment, the Supreme Court reaffirmed its holding in Vinson that hostile environment harassment violates Title VII. The Court refined

its vision of actionable harassment, choosing "a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a psychological injury." 510 U.S. ____, 126 L.Ed.2d 295, 302, 114 S.Ct. ____ (1993). Rejecting the Sixth Circuit's peremptory affirmance of the District Court's requirement of psychological injury, the Court held that one need not suffer severe psychological injury to have a claim for environmental harassment.

The Court then established a two-pronged test for proof of hostile environment claims:

- (1) The conduct must be pervasive or severe enough to create a work environment which a reasonable person would find hostile or abusive (an "objectively hostile or abusive" environment), AND
- (2) The complainant must "subjectively perceive the environment to be abusive."

126 L.Ed.2d at 302.

Rejecting a "mathematically precise" test to determine the severity of the harassment, the Court directed fact finders to look at the totality of the circumstances. It aided in this analysis by listing guides to consider, including: the frequency of the conduct, its severity, whether it is physically threatening or humiliating, or merely an offensive utterance, and whether it unreasonably interferes with an employee's work performance. 126 L.Ed.2d at 302-303. Psychological injury is one factor that may be considered.

C. The Kentucky Cases

In determining claims of discrimination pursuant to KRS 344.010, et seq., our state courts look to federal precedent. Kentucky Commission on Human Rights v. Commonwealth of Kentucky Department of Justice, 586 S.W.2d 270 (Ky. Ct. App. 1979).

In Meyers v. Chapman Printing Co., Inc., 840 S.W.2d 814 (Ky. Sup. Ct. 1992), the Court (Leibson, J.) considered multiple challenges to a Fayette County jury's verdict awarding \$100,000 to a female victim of hostile environment sexual harassment. First, it analyzed whether the Kentucky Worker's Compensation Act (KRS 342.690) preempts the Kentucky Civil Rights Act and whether it is an exclusive remedy where the complainant alleges damages arising not only from emotional distress and humiliation, but also from a disabling panic disorder related to work place harassment. Justice Leibson declined to assume a causal connection between the claim for emotional distress and that for the panic disorder, and interpreted the jury's verdict as one for generally characterized "emotional distress" rather than the specific mental disability. He found support for this proposition from the fact that the instructions included the panic disorder in the "overall claim" for the emotional injury, and did not provide a separate instruction on this disorder.

Justice Leibson then dispensed with any lingering questions regarding whether future litigants might revisit this issue by applying rules of statutory construction and found that KRS 344.010, et seq. is a specific statute, thereby controlling "as contrasted with the general law on the subject in the Worker's Compensation Law." 840 S.W.2d at 819. While the "two statutes might provide alternative sources of statutory relief, the Kentucky Civil Rights Act provides an independent cause of action for damages arising out of discrimination in the workplace." Id.

Justice Leibson next considered the evidence necessary to prove sexual harassment, adopting the Vinson standard of "sufficiently severe and pervasive" conduct. The opinion deferred to the fact finder to determine the sufficiency of the severity and pervasiveness

for purposes of proof, and declined to review the trial court's finding de novo. It noted, however, that there is ample evidence of severe and pervasive harassment in the record to support the jury's verdict.

Finally, for purposes of this chapter,² the Court gave its imprimatur to the use of "but for" language in instructions on the cause of alleged retaliatory or sex-based discharge in mixed motive cases. Citing Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268, (1989) and Board of Trustees of U. of Ky. v. Hayes, 782 S.W.2d 609 (Ky. S.Ct. 1989), it found such language does not mean "solely because of," but, rather, that the illegal sexual discrimination is a "contributing and essential factor" to be considered by the jury.

In a recent case, the Kentucky Court of Appeals considered the effect of Harris v. Forklift Systems, Inc., supra, on jury instructions in a quid pro quo and hostile environment sexual harassment case brought pursuant to the Kentucky Civil Rights Act. Hall v. Transit Authority of Lexington-Fayette County, 41 K.L.S. 3, 1994 WL 83226 (Ky.App., 3/18/94). The court approved the following jury instructions as conforming to the Harris standards:

Do you believe from the evidence:

(a) that Patrick Hamric subjected Barbara Hall, because of her female sex, to unwelcomed sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature;

(b) that such conduct was so severe and pervasive that it had the purpose or effect or unreasonably interfering with a reasonable female employee's work performance or creating an intimidating, hostile, or offensive work environment for a reasonable female employee;

²The opinion also analyzes issues of statutory attorney's fees and the right to a jury trial under the Kentucky Civil Rights Act.

AND

(c) that such conduct caused injury to the psychological well-being of Barbara Hall?

There was no discussion of 3(c) of the instructions requiring a showing of psychological harm, in apparent contravention of Harris.

The Court also approved admission of evidence relating to plaintiff's well-known extra-marital affair with a co-worker as relevant and not outweighed by possible prejudicial effect.

VI. RACIAL HARASSMENT

While it has not received as much publicity as sexual harassment, racial harassment is equally violative of Title VII and KRS 344.010, et seq., and can prove just as costly to employers found to have condoned it.

The Sixth Circuit first recognized a claim of racially motivated hostile environment harassment in Erebia v. Chrysler Plastic Products Corp., 772 F.2d 1250 (6th Cir. 1985), cert. den. 475 U.S. 1015 (1986), a case presaging Vinson, but tried under 42 U.S.C. §1981 and not under Title VII. Applying a two-part standard requiring a finding of repeated racial slurs and management's tolerance of the harassment, the Court affirmed an award of both punitive and compensatory damages.

In Davis v. Monsanto Chemical Co., 858 F.2d 345 (6th Cir. 1988), cert. den., 109 S.Ct. 3166 (1988) the Court distinguished between sexual and racial harassment cases, concluding that proof of racial harassment claims may be determined by the standards set forth in Erebia, and not by the more demanding sexual harassment standards in Vinson or Rabidue v. Osceola

Refining Co., 805 F.2d 611 (6th Cir. 1986), cert. den. 481 U.S. 1041, 95 L.Ed.2d 823, 107 S.Ct. 1983 (1987). However, in Risinger v. Ohio Bureau of Workers' Compensation, 883 F.2d 475 (6th Cir. 1989), the court revised this position, and held that the same standards apply in both racial and sexual harassment cases.

In a recent racial harassment case, a District Court analyzed the claims according to the same standards as sexual harassment claims. In Gardinella v. General Electric Co., 833 F.Supp. 617 (W.D.Ky. 1993), the court applied standards enunciated in Kauffman v. Allied Signal, Inc., supra. in denying defendant's motion for summary judgment.

VII. OTHER CAUSES OF ACTION

A. Tort Claims.

Allegations of tortious conduct can be effective when pled alternatively to statutory claims. In fact, they are a necessary vehicle when an employer has fewer than eight (8) employees precluding reliance on KRS 344.010 et seq., or fifteen (15) employees precluding use of Title VII. A summary of possible tort claims include the following:

1. Outrageous Conduct Causing Severe Emotional Distress:

Kentucky recognized this tort in Craft v. Rice, 671 S.W.2d. 247 (Ky.Sup.Ct. 1984) adopting the Restatement (Second) of Torts, §46(1):

One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

The Court held that "the essence" of the tort is the right to be free of emotional distress due to acts of another. The conduct complained of must be considered truly outrageous "as to go

beyond all possible bounds of decency . . . atrocious, and utterly intolerable in a civilized community." Humana of Ky., Inc. v. Seitz, 796 S.W.2d 1,3 (Ky. Sup. Ct. 1990).

The Court of Appeals, however, in Rigazio v. Archdiocese of Louisville, 853 S.W.2d 295 (Ky. App. 1993), has attempted to limit this claim to situations where it may be used as a "gap filler" where no other traditional common law tort actions apply. Restatement (Second) of Torts §47 (1965). See, however, Capital Holding v. Bailey, ___ S.W.3d ___, 41 K.L.S. 3 (Ky. Sup. Ct. 1994) holding that no physical contact or injury is necessary to establish the tort. See also, Bednarek v. Local Union 227, 780 S.W.2d 630 (Ky.App. 1989) (the tort of outrage did not apply on the facts in a retaliatory discharge case); Stewart v. Pantry, Inc., 715 F.Supp. 1361 (W.D. Ky. 1988) (use of polygraph on employees did not constitute outrageous conduct).

2. Invasion of Privacy involves the intentional or unreasonable intrusion into the private solitude or affairs of another. There are no reported Kentucky cases involving invasion of privacy in harassment cases. However, other jurisdictions have recognized this cause of action. See, for example, Busby v. Truswal Systems Corp., 551 So.2d 322 (Ala. 1989) (finding an invasion of privacy for hostile environment harassment where defendant intruded into plaintiffs' lives in an offensive manner); Phillips v. Smalley Maintenance Services, Inc., 711 F.2d 1524 (11th Cir. 1983) (finding that questions about plaintiff's sexual proclivities constitutes intentional intrusion in to the solitude of another, and that publication is not a necessary element).

3. Assault; assault and battery: Kentucky has long recognized a civil cause of action for assault and battery involving sexually wrongful touching. Ragsdale v. Ezell, 49

S.W. 775 (Ky. 1899). Hatchett v. Blacketer, 162 Ky. 266, 172 S.W. 533 (Ky. 1915). See also, Koch v. Stone, 332 S.W.2d 529 (Ky.App., 1960); Fowler v. Mantooth, 683 S.W.2d 250 (Ky.Sup.Ct. 1984).

4. Other tort actions include (a) false imprisonment and (b) loss of consortium for the spouse of the harassed employee.

5. Statutory civil rights claims in addition to Title VII include allegations pursuant to 42 U.S.C. §§ 1981 and 1983. While a discussion of these statutes is beyond the purview of this paper, see, for example, Gardinella v. General Electric Co., supra.

VIII. EMPLOYER LIABILITY FOR ACTS OF ITS EMPLOYEES

The courts have constructed a multi-tiered structure for analysis of employer liability for the alleged sexually harassing acts of employees. An excellent overview of the Sixth Circuit's view of the law can be found in Kauffman v. Allied Signal, Inc., 970 F.2d 178 (6th Cir. 1992), cert. den., 113 S.Ct. 831 (1992).

In Kauffman, Judge Boggs reiterated the Vinson court's view that common law agency principles should be applied to determine liability, and that strict liability does not lie in all cases.³ The court then reviews precedent and outlines employer liability as follows:

A. Hostile Environment Cases

1. Co-Worker discrimination cases: Citing Rabidue v. Osceola Refining Co., 805 F.2d 611, 621 (6th Cir. 1986), cert. den., 481 U.S. 1041, 107 S.Ct. 1983, 95 L.Ed.2d 823

³In Vinson, the Court also held that "absence of notice to an employer does not necessarily insulate that employer from liability. 477 U.S. at 72.

(1987), the court will find liability where "the employer . . . knew or should have known of the charged sexual harassment and failed to implement prompt and appropriate corrective action." See also Davis v. Monsanto Chemical Co., 858 F.2d 345 (6th Cir. 1988) (no liability where employer takes reasonable steps to correct harassment by non-supervisory personnel).

2. Supervisor Harassment Cases will be decided by application of traditional agency principles. Yates v. Avco Corp., 819 F.2d 630, 636 (6th Cir. 1987). The court set up a two-pronged test for supervisory environmental claims: (1) whether the harassing actions were foreseeable or fell within the scope of the agent's employment, and, if they were, (2) whether the employer "adequately and effectively" acted to "negate liability." Kauffman at 184. (See §IX, infra.) Important for the determination of whether the acts took place within the scope of employment are: when the acts took place; where; whether the employer had prior notice of similar behavior; and whether the supervisor had "significant input over . . . conditions of employment." Kauffman, 970 F.2d at 185.

B. Under the QUID PRO QUO theory, strict liability applies to the acts of supervisory employees with "plenary authority" over hiring, advancement, dismissal, discipline or who otherwise exercise significant control over the conditions of complainant's employment. Kauffman, 970 F.2d at 186, citing, Highlander v. KFC Nat'l Management Co., 805 F.2d 644 (6th Cir. 1986). Economic loss is not required.

The Sixth Circuit has recently held that an employer's prompt remedial action in response to a complaint of hostile environment harassment relieves the employer of liability for the harassment. Reed v. Delta Air Lines, Inc., 19 F.3d 19, 1994 WL 56930 (6th Cir., 2/4/94); reh.

den., 4/24/94, Case No. 93-5031. See also, Gardinella v. General Electric Co., 833 F.Supp. 617, 620 (W.D. Ky. 1993).

IX. LITIGATION AVOIDANCE: PREVENTION OF CLAIMS

Employers can take measures to prevent claims from ever being filed. The enactment of strong harassment policies, their implementation and consistent application, and training of supervisory employees may well be the best defense an employer has to the initial filing of claims and their eventual successful resolution. Since Meritor Savings Bank v. Vinson, courts have recognized the mitigating effect of implemented harassment policies. See, for example, Kauffman v. Allied Signal, Inc., supra.

A well-written harassment policy should include:

1. A policy statement that harassment on the basis of race, color, religion, gender, national origin, age or disability is against the law and the policy of the employer;
2. A definition of harassment (see §IV, supra);
3. Examples of harassing conduct;
4. The possible sanctions for engaging in harassment, including termination;
and
5. A complaint procedure which identifies more than one individual who may take complaints in the employer's organization, and which assures prompt investigation and the confidentiality of the complainant.

The policy should be distributed in the same manner as other employment policies, and should be included in an Employee Handbook if the employer has one.

The person(s) identified to receive the complaint can include the alleged victim's supervisor, but must also include other individuals in case the supervisor is the harasser or harbors bias against the complainant. Yates v. Avco Corp., 819 F.2d 630 (6th Cir. 1987) (supervisor with responsibility for reporting harassment was the harasser; employer liability thus established). The investigation of the complaint should be initiated immediately upon notice of the complaint.⁴ It should be thorough and fair, and should include interviews with both the complainant/victim and the alleged harasser, as well as any witnesses either identifies. Paucity of witnesses should not doom a complaint since quid pro quo sexual harassment frequently is committed without witnesses.

If it is determined that harassment occurred, sanctions are advisable, depending on the severity and duration of the harassment, its likely repetition, and the effect on the victim. Minimal sanctions might include a period of suspension without pay, probation, or a transfer within the organization. More serious sanctions include demotion, geographical transfer, and termination. While separation of the harasser and victim within the organization might suffice (moving the harasser and not the victim to avoid allegations of retaliation), investigating personnel should attempt to obtain the victim's written acknowledgement of the sufficiency of this action. Mediation is also an option if the parties agree.

⁴Davis v. Monsanto Chemical Co., 850 F.2d 345 (6th Cir. 1988) (no employer liability where employer takes reasonable steps to correct or prevent harassment by nonsupervisory employees).

Investigations should be fully documented to protect the employer from subsequent formal complaints of harassment and from actions for defamation. Should the accused employee later allege defamation, an employer can claim a qualified privilege under certain circumstances. Stewart v. Pantry, Inc., 715 F.Supp. 1361 (W.D. Ky. 1988); Wyant v. SCM Corp., 692 S.W.2d 814 (Ky. App. 1985). However, to assert such a claim, the employer must confine investigatory information to those with a need to know of the investigation.

Under no circumstances should the complainant be discharged for filing his or her complaint. Title VII prohibits retaliation against complainants, even if it is later determined that the complaint is without merit.

In addition, where feasible, the employer should provide training to all employees on intercultural understanding, race and gender awareness, and the availability of the employer's procedure for the resolution of complaints.

X. CONCLUSION

With increasing racial and sexual integration at all levels of employment, harassment cases will, no doubt, provide fertile territory for litigation in the years ahead. Litigation and the harmful, costly effects of harassment can be minimized, however, by careful planning and increased emphasis on professionalism and mutual respect.

WAGE AND HOUR CONCERNS

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WAGE AND HOUR CONCERNS

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WAGE AND HOUR CONCERNS

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I. COVERAGE

- A. **Federal Law:** The Fair Labor Standards Act (FLSA) is the major federal wage hour law. In general it regulates four areas: minimum wages, equal pay, overtime and child labor standards. Employees covered by the FLSA include:
1. Employees who are engaged in interstate commerce, producing goods for interstate commerce, or handling, selling or working on goods or materials that have been moved in or produced in interstate commerce. For most employees an annual dollar volume test of not less than \$500,000 applies.
 2. Certain employees covered are covered regardless of dollar volume including hospitals; companies taking care of the sick, aged, mentally ill or disabled; schools and federal, state and local agencies.
 3. Employees who do not meet the \$500,000 annual dollar test may be covered in any workweek in which the employee is engaged in interstate commerce, the production of goods for interstate commerce, or an actively closely related and directly essential to the production of such goods.
 4. Domestic service workers are covered if they work more than 8 hours in a week for one or more employers or receive at least \$50 in wages in a calendar quarter.
 5. Certain classifications of employees are exempt from the FLSA overtime and maximum wage provisions. They include:
 - a. Executive, administrative and professional employees;
 - b. Employees of seasonal amusement or recreational companies;
 - c. Employees of small newspapers and switchboard operators of small telephone companies;
 - d. Seamen on foreign vessels;

- e. Employees engaged in fishing operations;
- f. Farm workers on small farms (i.e. less than 500 man-days in any calendar quarter); and,
- g. Casual babysitters and persons employed as companions of the elderly or disabled.

There are certain other classifications of employees who are exempt or partially exempt only from the FLSA overtime requirements.

- B. State Law - KRS Chapter 337 contains the state law provisions on wage and hour requirements.

Under KRS 337.010(2), an "employee is any person employed by (or permitted to work for) an employer, with the following exceptions:

- a. Individuals employed in agriculture;
- b. Individuals employed in bona fide executive, administrative, supervisory or professional capacity, including outside salesmen and outside collectors;
- c. Employees of the United States;
- d. Individuals employed in domestic service in a private home;
- e. Certified learners, apprentices, handicapped workers and sheltered workshop employees;
- f. Employees of certain retail stores, service industries, hotels, motels and restaurant operations;
- g. Baby-sitters and newspaper delivery persons; and,
- h. Employees of non-profit camps, religious or non-profit educational conference centers in operation for less than seven months in any calendar year.

II. Employer Obligations

A. Federal Law

1. Minimum Wages

The FLSA requires employers of covered employees who are not otherwise exempt to pay these employees a minimum wage of not less than \$4.25 an hour. Employers may pay employees on a piece-rate basis, as long as they receive at least the equivalent of the required minimum hourly wage rate. Employers of tipped employees, i.e. employees who regularly receive more than \$30.00 a month in tips, may consider the tips as part of wages. However, the tip credit may not exceed fifty (50) percent of the required minimum wage.

2. Overtime

The FLSA requires employer to pay covered employees 1 1/2 times their regular rate for each hour or fraction of an hour of work in excess of forty (40) during any given workweek. The FLSA does not require employers to pay overtime for hours worked in excess of a daily maximum, nor does it specify overtime for work performed on Saturdays, Sundays or holidays. No employee may waive his right to overtime.

a. Workweek - A workweek for FLSA purposes is a fixed and recurring period of 168 hours comprising seven consecutive 24 hour periods. It does not need to coincide with a calendar week. The schedule of payment (e.g. daily, weekly, biweekly) does not affect the workweek basis of overtime computation.

b. Regular Rate - Employers must average certain payments into an employees' hourly rate for purposes of determining an employee's "regular rate" for overtime purposes. The majority of employer's overtime problems concern the proper determination of an employee's regular rate.

1. Pay normally included in "regular rate" computation:

i. Pay for time worked-wages, salary, commissions or piece rates;

- ii. incentive bonuses;
 - iii. cost-of-living allowances;
 - iv. premiums for "dirty" work; and,
 - v. other payments considered by the employee as part of his regular compensation.
2. Pay normally excluded from "regular rate" computation:
- i. Premium pay under collective bargaining agreement, for work on Saturday, Sunday, or holidays;
 - ii. pay for time not worked - e.g. vacation, holidays, sick leave;
 - iii. pension or health insurance contributions; and,
 - iv. outright gifts.
3. Records, Notices and Inspections
- a. Records - The FLSA requires employers to make, keep and maintain records of persons employed and of wages, hours and other aspects of employment. The following records must be maintained for three years:
- i. Payroll and other records containing information required by the record-keeping regulations;
 - ii. Sales and purchase records relevant to determining whether a company meets FLSA's "business volume" test;
 - iii. Collect bargaining agreements;
 - iv. Plans, trusts, employment contracts, and union contracts involving exclusions from regular pay rates;
 - v. Contracts pertaining to "Belo-type" contracts that guarantee fixed weekly pay for fluctuating hours;

- vi. Agreements basing overtime pay on piecework, hourly, or basic rates; and,
- vii. Certificates and notices mentioned in the recordkeeping regulations, including certificates authorizing the employment of learners, apprentices, handicapped workers, students, homeworkers, and child laborers. (29 CFR 516.5).

The following records must be maintained for at least two years:

- i. Basic employment and earnings records such as timecards or "production cards";
 - ii. Hourly, daily, weekly or pay period wage rate tables, or piece-rate schedules;
 - iii. All schedules of the employer that establish the hours of days of employment of individual employees or of separate work forces. These schedules can be in any form, such as notices, company letters, or office memoranda; and,
 - iv. All customer orders or invoices, incoming or outgoing shipping or delivery records, bills of lading, and non-cash billings to customers, which the employer retains or makes in the course of its business.
- b. Investigations - Section 11(a) of the FLSA gives the Secretary of Labor the authority to investigate and gather data regarding the wages, hours and other conditions of employment. This includes the power to enter an employer's facilities, inspect records and to interview employees. An employer is obligated to produce for inspection any records which are relevant to a determination of wages paid, hours worked or tasks performed by employees.
- c. Notices - The Department of Labor has prepared a poster addressing employees' rights under the FLSA. It addresses requirements for minimum wage, overtime, child labor and training wages. The poster also specifies how the FLSA may be enforced. Employers are required to display the poster where employees can readily see it.

4. Equal Pay Act

The Equal Pay Act of 1963 was technically an amendment to the FLSA of 1938. It covers any employee who is subject to the FLSA minimum wage standards. It provides that an employer may not discriminate "between employees on the basis of sex by paying wages to employees in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production, or (iv) a differential based on any other factor other than sex...."

In a nutshell, this law prohibits an employer from paying a lower wage to women than to men or vice-versa for substantially equal work. Whether work is substantially equal depends on whether its performance requires equal skill, effort, and responsibility. Those are the key concepts in determining equality of work.

The inclusion of unequal rates of pay in a collective bargaining agreement which results in one sex being paid less for substantially equal work is a violation of the Equal Pay Act. A union cannot cause an employer to discriminate.

5. Davis-Bacon Act

- a. Coverage: Covers mechanics and laborers engaged in construction of public buildings or public works whose specifications require an expenditure of more than \$2,000.00. The Act also applies to certain other federal laws, such as the Federal Aid Highway Act and the Area Redevelopment Act.
- b. Requirements: Payment of minimum wages as established by the Secretary of Labor.
- c. Enforcement: The Comptroller General is authorized to withhold payments to the contractor if necessary to make good any underpayments to employees. In addition, if the amount withheld is insufficient to cover the back pay owing, the employee may bring an individual action against the contractor.

- d. Penalties: The names of contractors who do not observe the requirements of the Act are placed on a list of contractors who are barred from receiving federal contracts, which is distributed to all departments of the government for a period of three years.

6. Walsh-Healy Public Contracts Act

- a. Coverage: Employers who have contracted with a government agency to manufacture or supply articles in any amount exceeding \$10,000. Only those employees engaged in producing or furnishing the contract articles are covered.
- b. Requirements; The Walsh-Healy Act requires:
 - i. The payment of minimum wages as set by the Secretary of Labor;
 - ii. The payment of 1 1/2 times the basic rate for hours worked in excess of 40 a week;
 - iii. The maintenance of sanitary and non-hazardous working conditions and complete payroll records; and,
 - iv. That any minors who are employed be over 16 years old.

7. Child Labor

The child labor provisions of the FLSA are designed to protect the educational opportunities of youths and prohibit their employment in jobs and under conditions detrimental to their health and well-being.

The FLSA restricts the hours of work and occupations for youths under age 16. These provisions set forth 17 hazardous occupations orders for jobs declared by the Secretary of Labor to be too dangerous for minors under age 18 to perform. The permissible jobs and hours of work, by age, in nonfarm work are as follows:

- i. Youths 18 years or older may perform any job for unlimited hours;

- ii. Youths age 16 and 17 may perform any job not declared hazardous by the Secretary of Labor, for unlimited hours;
- iii. Youths age 14 and 15 may work outside school hours in various nonmanufacturing, nonmining, nonhazardous jobs under the following conditions: no more than 3 hours on a school day, 18 hours in a school week, 8 hours on a nonschool day, or 40 hours in a nonschool week. In addition, they not begin work before 7 a.m. nor work after 7 p.m., except from June 1 through Labor Day, when evening hours are extended until 9 p.m. Youths age 14 and 15 who are enrolled in an approved Work Experience and Career Exploration Program may be employed for up to 23 hours in school weeks and 3 hours on school days (including during school hours).

Notwithstanding the above, youths may at any age deliver newspapers, perform in radio, TV movies, etc.; work for their parents in wholly owned nonfarm businesses (except those deemed hazardous by the Secretary of Labor) or gather evergreens and make evergreen wreaths.

Employers must keep records of the date of birth of any employees under age 19, as well as daily and weekly hours worked, daily and weekly start and quitting times and the employee's occupation.

B. State Law Obligations

1. Overtime

An employee working more than forty (40) hours in a workweek must be paid for hours in excess of forty at a rate of at least of one and one-half times the hourly wage rate at which he is employed. KRS 337.285. Employers are not required to pay time and one-half for hours worked over eight in one day. (There is an exception for the construction of public works requiring payment of "prevailing wages" under KRS 337.540. See below). This provision does not apply, however, to employees of retail stores engaged in work connected with selling, purchasing and distributing merchandise, or to employees of restaurant, hotel or motel operations or to employees exempted from the overtime provision of the federal Fair Labor Standards Act, 29 U.S.C. Sections 213(b)(1),

213(b)(10) and 213(b)(17). Also exempted are employees whose function is to provide twenty-four hour residential care on the employer's premises in a parental role.

2. Minimum Wage

The minimum hourly wage in Kentucky, effective July 15, 1991, is four dollars and twenty-five cents (\$4.25) unless provided otherwise by statute. KRS 337.275. For example, a different rule applies to employees engaged in an occupation in which they customarily receive more than twenty dollars per month in tips. Also, an employee under twenty years of age may be paid minimum wage of three dollars and sixty-one cents (\$3.61) an hour until he has been employed a cumulative total of ninety days at that wage. KRS 337.275(3)(a) and (c).

3. Payment of Wages

Employers must, no less often than semi-monthly, pay employees all wages earned to a day not more than eighteen days prior to the date of payment. KRS 337.020. An employee who quits or is discharged must be paid all wages earned no later than the next normal pay period or fourteen days after leaving, whichever last occurs. KRS 337.055. It is unlawful for an employer to withhold any part of an employee's wages unless authorized to do so by local, state or federal law or when a deduction is expressly authorized in writing by the employee to cover insurance premiums, hospital and medical dues, or other deductions not amounting to a rebate or deduction from the standard wage. This includes deductions for union dues authorized by collective bargaining agreements negotiated between employers' and employees' representatives. KRS 337.060(1). However, employers may not deduct from the wages of employees any fines, cash shortages in a common money till, breakage, or losses due to defective workmanship, lost or stolen property, or damage to property if such losses are not attributable to an employee's willful or intentional disregard of employer's interest. KRS 337.060(2).

4. Records, Notices and Inspections

Every employer must keep a record of the amount paid each pay period to each employee, the hours worked each day and each week by each employee, and other information required by the Commissioner.

KRS 337.320(1). Such records must be kept on file for at least one-year after entry, and shall be open to inspection of the commissioner or his representative "at any reasonable time." KRS 337.320(2). In Cabe v. Kitchen, 415 S.W.2d 96 (Ky. 1967), it was held that the one year period is not a limitation upon the right of the Department of Labor to inspect the employment records of an employer.

Employers subject to Kentucky's wage and hour statutes must post summaries of wage and hour laws and regulations issued by the Commissioner in a conspicuous and accessible place on the premises. Such notices are furnished to employers by the state on request without charge. KRS 337.325.

Every employer must permit the Commissioner or his representative to question any of his employees at the place of employment and during work hours regarding wages paid to and hours worked by such employee or other employees. KRS 337.340.

5. Lunch and Rest Periods

Employers must grant employees a "reasonable period for lunch" as close to the middle of the employee's scheduled work shift as possible, but in no event sooner than three hours nor later than five hours after the work shift commences. KRS 337.355. However, this provision shall not negate any provision of a collective bargaining agreement or other mutual agreement between an employer and employee.

Employees must be provided a rest period of at least ten minutes during each four hours worked in addition to the regularly scheduled lunch period. No reduction in compensation may be made for such rest periods for either hourly or salaried employees. KRS 337.365.

6. Wage Discrimination Based on Sex

a. Discrimination Prohibited

Kentucky has its own Equal Pay Act, KRS 337.420 through 337.433. It is distinguishable from federal equal pay law which prohibits an employer from discriminating between employees on the basis of sex for "equal work on jobs the performance

of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions", with certain exceptions. 29 U.S.C. Section 206(d)(1).

Kentucky law, on the other hand, prohibits discrimination between employees on the basis of sex "for comparable work on jobs which have comparable requirements relating to skill, effort and responsibility." KRS 337.423(1).

While Kentucky's Equal Pay Act is certainly not the equivalent of the "comparable worth" theory (under which the value of dissimilar jobs are analyzed and compared), the statutory language is clearly more liberal than federal law in that it prohibits discrimination on the basis of sex for work which is merely "comparable," rather than "equal." The expansive reach of this statute has not been tested in the courts.

b. Coverage

The statutory coverage of KRS 337.423 does not apply to "any employer who is subject to the federal Fair Labor Standards Act of 1938, as amended, when that act imposes comparable or greater requirements than contained in KRS 337.420 to 37.433." However, an employer must file with the Commissioner of the Department of Workplace Standards a statement that it is covered by the FLSA, KRS 337.423(1). The Kentucky Department of Labor's position is that an employer covered by the FLSA is exempt from coverage under KRS 337.423.

7. Prevailing Wages

Federal and state prevailing wage laws refer to the particular wage that "prevails" in a local community for a particular classification of workers, requiring federal and state labor secretaries to conduct wage studies to determine the prevailing wage rate for particular projects governed by statute. The prevailing wage in a community with union workers will typically approximate the wages paid to unionized workers in various craft and labor classifications.

Prevailing wage laws generally have as their purpose the protection of employees of government

contractors. Kentucky's prevailing wage statutes are set forth at KRS 337.505 to 337.550.

a. Applicability

Before advertising for bids or entering into any contract for construction of public works, every public authority must notify the Department of Workplace Standards in writing of the specific public work to be constructed, and must ascertain from the Department of Labor the prevailing rates of wages for each classification of laborers, workmen and mechanics for the class of work called for in the construction of the public works in the locality where the work is to be performed. This schedule of the prevailing rate of wages must be attached to and made part of the specifications for the work, and must be printed on the bidding blanks and made a part of every contract for the construction of public works. KRS 337.510(1).

The public authority advertising and awarding the contract must include in the proposal and contract a stipulation to the effect that not less than the prevailing hourly rate of wages shall be paid to all workers performing work under the contract. It must also require in all contractors' bonds that the contract include provisions which will guarantee the performance of the prevailing hourly wage clause in the contract. KRS 337.510(2).

b. Overtime

Workers employed more than eight hours in one calendar day or more than forty hours in one week must be paid not less than one and one-half times the basic hourly rate of pay. KRS 337.540.

c. Records and Postings

Contractors and subcontractors must keep full and accurate payroll records covering all wage payments, including the hours worked by and amount paid to each employee each day. Records cannot be destroyed for one year following the completion of the public work, and must be open to inspection by the Commissioner at any reasonable time. KRS

337.530(2). Contractors and subcontractors must post and keep posted in conspicuous places at the work site a copy of the prevailing rates and working hours for the project. KRS 337.530(3).

8. Child Labor

a. What is "Gainful Occupation"?

Kentucky's child labor statutes concern "gainful occupation" by children. This term does not include employment in farm work or in domestic service in a private home; occasional employment by a householder in connection with the household such as grass cutting; the delivery of newspapers on regularly scheduled routes; employment as a performer in films, theater, radio or television; or employment of minors by their own parents. KRS 339.210.

b. Minimum Ages

No minor under fourteen years of age shall be employed in gainful occupation at any time, except in connection with an employment program sponsored by the school or school district the child attends. The program must be approved by the Department of Education. KRS 339.220. However, minors age eleven and over may be employed as caddies at golf courses, with certain restrictions. KRS 339.225.

Minors under age sixteen may not be employed during regular school hours, unless the school authorities have made arrangements for him to attend school other than the regular hours, or he has graduated from high school. KRS 339.230(1).

c. Hazardous and Special Occupations

A minor under eighteen years of age may not be employed in any occupation, or during the hours of the day, or more than the number of hours per day or days per week, which the Commissioner of Workplace Standards determines to be hazardous or injurious to the life, health, safety, or welfare of the minor; in connection with an establishment where alcoholic beverages are distilled, rectified,

compounded, brewed, manufactured, bottled, sold for consumption, or dispensed, unless permitted by regulations of the Alcohol Beverage Control Board (except in places where the sale of alcoholic beverages by package is merely incidental to the main business actually conducted). KRS 339.230(2).

There are many restrictions on the gainful occupation of minors between ages fourteen and sixteen. These restrictions are set forth in detail at 803 KAR 1:100, Section 2(1) and (4).

d. Hours of Work

There are no restrictions on hours or time of work scheduled for minors who have graduated from high school or approved vocational school equivalent to high school; minors who are no longer attending school and have not attended school for the previous sixty days; minors not required to attend school for the period described as "school not in session." Enrollees in work training programs established by a local board of education or the federal government and approved by the federal government shall be exempt for 803 KAR 1:100, Section 3(2), except under no circumstances shall a minor be employed more than eight hours per day or more than forty-eight hours per week. 803 KAR 1:100, Section 3(3).

Specific hour limitations on the employment of minors can be found in 803 KAR 1:100, Section 2(2) and Section 3.

e. Lunch Periods

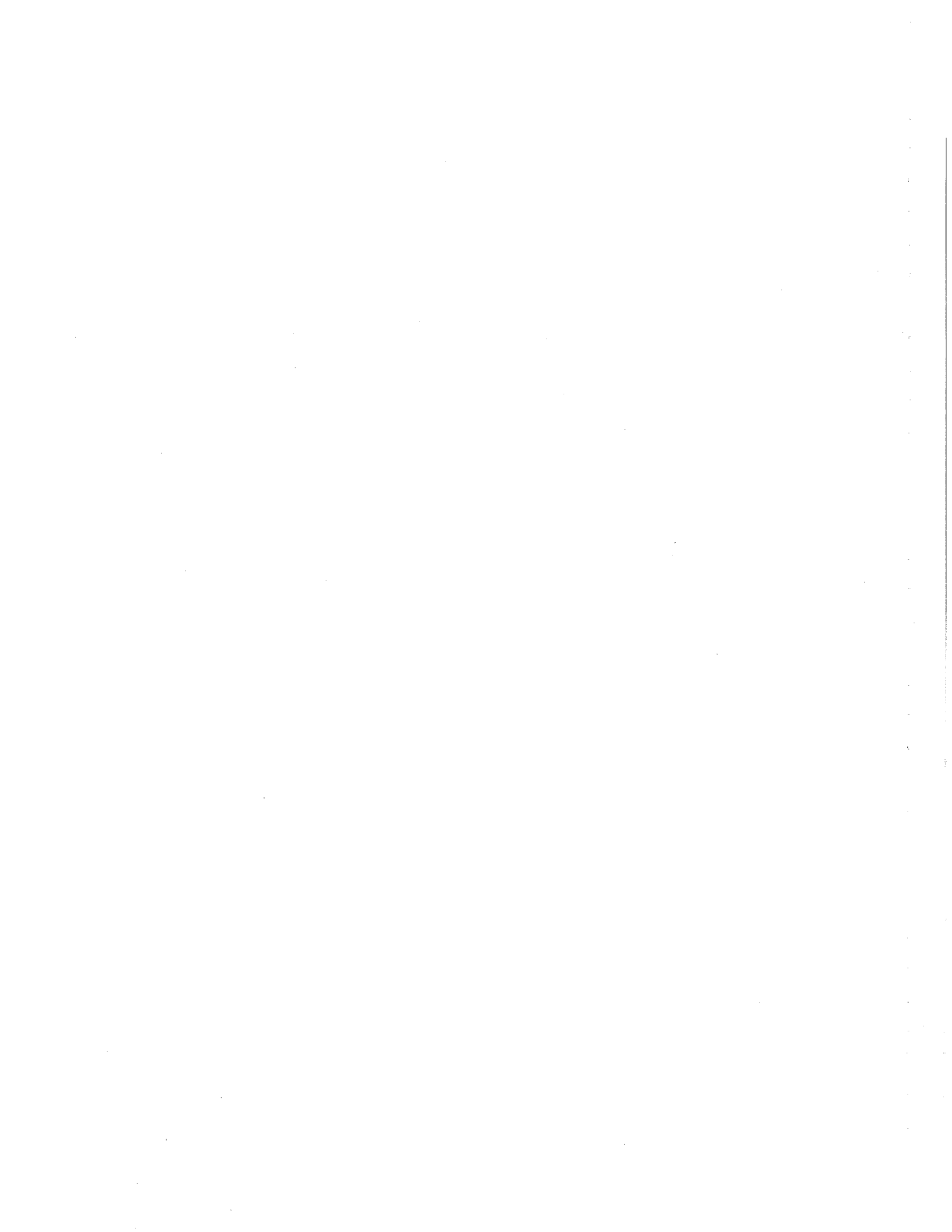
No minor under eighteen years of age may be permitted to work for more than five hours continuously without an interval of at least thirty minutes for a lunch period, and no period of less than thirty minutes shall be deemed to interrupt a continuous period of work. KRS 339.270.

f. Certificates and Records

Upon request, the local board of education must issue to any minor under the age of eighteen desiring to enter employment a

certificate of age upon presentation of proof of age. Every employer shall be required to obtain from any employee proof of age that the employee is at least eighteen years of age. KRS 339.360.

Every person employing minors under eighteen years of age must keep a separate register containing the names, ages and addresses of such employees, and the time of commencing and stopping of work for each day, and the time of the beginning and ending of the daily meal period. Also required of such persons are continuous postings in the establishment wherein any such minor is employed a printed abstract of KRS 339.210 to 339.450, with a list of the occupations prohibited to such minors and a notice stating the working hours per day for each day in the week required of them. Such records must be open at all times to the inspection of school directors, of pupil personnel and probation officers; and representatives of the Department of Labor and Department of Education. KRS 339.400.



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SECTION I

1994 EMPLOYMENT DISCRIMINATION LAW UPDATE*

by

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I. INTRODUCTION

II. TITLE VII OF 1964 CIVIL RIGHTS ACT, 42 U.S.C. §2000e et seq. [hereinafter Title VII].

A. Facial Discrimination and the BFOQ Defense

1. Background

A per se violation of Title VII occurs when an employer has a policy that on its face expressly applies only to one group (women) and not to another group of employees (men). See, e.g. **Phillips v. Martin Marietta Corporation, 400 U.S. 542 (1971)**(employer refused employment applications from women, but not men, with pre-school age children). A facially discriminatory employment policy based on sex, religion, or national origin can only be accommodated under Title VII, if at all, if the employer is able to prove that such a requirement is a bona fide occupational qualification [hereinafter BFOQ]. The BFOQ is limited to hiring and assignments, and cannot be invoked as a defense to any type of facial race discrimination.

2. **International Union, UAW v. Johnson Controls, 499 U.S. 187 (1991).**

a. The United States Supreme Court struck down as violative of §703(a) of Title VII an employer's policy of barring all women, except those medically documented as infertile, from jobs involving either actual or potential lead exposure in excess of the relevant OSHA standard. Because only women employees were required to prove their inability to reproduce, the Court held that the policy was facially discriminatory. Such policy could only have been permissible if the employer established that sex was a bona fide occupational qualification (BFOQ) under §703(a)(1).

b. The Court narrowly construed the BFOQ defense in holding that this exception to the Act's command of nondiscrimination reaches only to "certain instances" where sex discrimination is "reasonably necessary" to the "normal operation"

* The speaker acknowledges the invaluable work of Lee Guice, a third year law student at the University of Kentucky College of Law, in the preparation of this outline.

of the "particular" business. That is, the exclusion of all fertile women, but not fertile men, from a particular job is permissible if, and only if, fertility detrimentally effects female employees' abilities to perform the particular job at issue. The Court found that fertile women can participate in the manufacture of batteries as efficiently as anyone else.

c. In **Dothard v. Rawlinson, 433 U.S. 321 (1977)**(exclusion of women from position of guard in a maximum security male prison upheld because women's employment would create "real risks of safety to others if violence broke out) and **Western Airlines, Inc. v. Criswell, 472 U.S. 400 (1985)**(exclusion of persons over the age of 60 from position of flight engineer upheld because "age-connected debility" might prevent a flight engineer from assisting the pilot thereby causing a safety emergency endangering airline customer safety), the Supreme Court recognized a BFOQ for safety. However, in **Johnson Controls**, the Court rejected the employer's attempt to bring its policy within that exception. Although the employer claimed it was motivated by a desire to insure the "safety" of fetuses from the danger of lead exposure, the Court limited the "safety exception" to those instances wherein a third-party or customer's safety is "essential to the business." It held that the unconceived fetus is neither a customer nor a third party whose safety is essential to the business of battery manufacturing.

d. In **Johnson Controls**, the Court stated that Title VII does not prevent an employer from trying to lessen the potential for injury to a fetus caused by lead exposure. Title VII does prevent, however, an employer from adopting sex-specific fetal protection policies in its attempt to address that problem.

e. In response to the employer's contention that compliance with Title VII would expose the employer to potential tort-liability for injury to the fetus, the Court said that "if, under general tort principles, Title VII bans sex-specific fetal-protection policies, the employer fully informs the woman of the risk, and the employer has not acted negligently, the basis for holding an employer liable seems remote at best."

f. The specter that hiring fertile women will cost employers more because of the potential for tort-liability to their, as yet, unconceived fetuses because of lead exposure was rejected by the Court as a defense for the employer's discriminatory refusal to hire women. "The incremental cost of hiring women cannot justify discriminating against them."

g. Finally, the Court also relied on the **Pregnancy Discrimination Act of 1978, 42 U.S.C. §2000e(k)** [hereinafter the PDA] for support for its decision because the PDA clearly

establishes that discrimination based on a woman's ability to become pregnant is facially sex based.

3. Compare, Fleming v. Ayers & Associates, 948 F.2d 993 (6thCir. 1991).

The Sixth Circuit held that the discharge of a female employee motivated by the employer's desire to avoid the high future medical costs for the employee's child (the baby was born prematurely and suffered from hydrocephalus), did not violate the PDA because it was not discrimination based on the employee's gender. The Court reasoned that "[t]he fact that her pregnancy ultimately produced her child does not make actions taken with respect to the child actions "because of or on the basis of" her pregnancy." **Id. at 996.**

B. Disparate Treatment or Intentional Discrimination

1. Burden of Proof

a. The Supreme Court defines disparate treatment discrimination as encompassing those situations wherein the employer treats a particular person less favorably than others because of the person's race, color, religion, sex, or national origin. Proof of discriminatory motive or intent is critical to the success of such a claim. **International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335, n. 15 (1977).** In a series of cases over more than twenty years, the U.S. Supreme Court has attempted to develop a practical framework that provides "orderly way" to inquire into what the Court has described as the "elusive factual question of intentional discrimination."

b. In **McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1972)**, the Court held that the plaintiff must first establish a "prima facie" case by proving 1) that the plaintiff belonged to a protected group, 2) that the plaintiff was qualified for the position for which the employer was seeking applications, 3) that the plaintiff was rejected, and 4) that the position remained open and that the employer continued to seek applicants with the same qualifications as the plaintiff had. The establishment of a prima facie case creates an inference that the employer unlawfully discriminated against the plaintiff because the plaintiff has eliminated the most common nondiscriminatory reasons for failure to hire, demotion or firing: that the plaintiff was unqualified for the position or that the position was no longer available.

c. In **Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981)**, the Supreme Court stated that after the plaintiff establishes a prima facie case, the burden then shifts to

the employer to articulate, but not prove, some legitimate, nondiscriminatory reason for the employee's rejection. If the employer does so, then the plaintiff must be given the opportunity to prove, by a preponderance of all the evidence, that the articulated, nondiscriminatory reason is merely a pretext for discrimination. The **Burdine** Court concluded that the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff. The plaintiff may succeed in persuading the court that s/he has been the victim of intentional discrimination "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Id.*, at 256.

2. **St. Mary's Honor Center v. Hicks**, ___ U.S. ___, 113 S.Ct. 2742 (1993).

a. The plaintiff alleged that he was demoted and discharged from his position as a correctional officer at a halfway house because of his race. At trial, the plaintiff established a **McDonnell Douglas** prima facie case thereby giving rise to a presumption of intentional discrimination. The employer, in turn, rebutted the presumption by articulating two nondiscriminatory reasons for its actions - the severity and the accumulation of rules violations committed by the plaintiff. The plaintiff then successfully convinced the trial court that the reasons proffered by the employer were not the real reasons for the plaintiff's demotion and discharge. Nonetheless, the trial court held that the plaintiff had failed to carry his ultimate burden of proving that his race was the determining factor in his employer's decision to demote and dismiss him. It concluded that "although [the plaintiff] has proven the existence of a crusade to terminate him, he has not proven that the crusade was racially rather than personally motivated." *Id.* at 2748.

b. The U.S. Supreme Court concurred in the judgment of the trial court. It held that if the employer carries its burden of production by articulating a nondiscriminatory reason for its actions, the presumption of intentional discrimination that arose when the plaintiff made out a prima facie case "drops out of the picture." The trier of fact proceeds, then, to decide the ultimate question whether the plaintiff has proven that the employer intentionally discriminated against her/him. The factfinder's disbelief of the reasons put forward by the employer "(particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination." However, rejection by the court of the defendant's proffered reasons does not entitle the plaintiff to a judgment as a matter of law. It still remains for the factfinder to

determine whether the plaintiff's proffered reason (intentional discrimination) is correct. The trial court's determination of that ultimate question must be reviewed by the appellate court under the "clearly erroneous" standard of Federal Rule of Civil Procedure 52(a).

3. **Harris v. Forklift Systems, ___ U.S. ___, 114 S.Ct. 367 (1993).**

This case is reviewed in the material on "Harassment: Sexual and Otherwise" prepared Linda Scholle Cowan.

C. Disparate Impact Discrimination

The Supreme Court defines impermissible disparate impact discrimination as employment practices that are facially neutral in their treatment of different groups but that fall more harshly on one group than another and cannot be justified by a business necessity. Proof of discriminatory intent is not required under the disparate impact theory of impermissible employment discrimination. **International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335, n. 15.**

There are no new U.S. Supreme Court or Sixth Circuit cases to report.

D. 1991 Civil Rights Act and the Issue of Retroactivity

1. Background

a. Any new legislation raises the question whether its provisions should be applied retroactively by the courts to **pending cases** and **pre-act conduct** or only prospectively to **post-act conduct**. With the enactment of the Civil Rights Act of 1991 (Pub.L. No. 102-166, Stat. 1071-1100) [hereinafter the Act] the question of retroactivity was particularly problematic.

b. With two exceptions, the Act did not include any express direction in favor or against the retroactive application of its provisions.

c. The Congressional Record was replete with contradictory memoranda and comments from various members of Congress on the issue of the retroactive application of the Act.

d. The United States Supreme Court has two lines of seemingly contradictory cases on the appropriateness of the retroactive application of congressional enactments. Compare, **Bradley v. Richmond School Bd., 416 U.S. 696 (1974)**(New statute must be applied retroactively to a case pending on appeal

at the time of enactment "unless doing so would result in a manifest injustice or there is statutory direction or legislative history to the contrary.") and **Bowen v. Georgetown University Hosp.**, 488 U.S. 204 (1988) ("Retroactivity is not favored in the law . . . [and] congressional enactments . . . will not be construed to have retroactive effect unless their language requires this result.").

e. The Act was passed in responses to at least five 1989 decisions of the U.S. Supreme Court interpreting Title VII and **Section 1981 of the Civil Rights Act of 1866 (42 U.S.C. 1981)** [hereinafter §1981]. See, **Price Waterhouse v. Hopkins**, 490 U.S. 228 (1989)(mixed motive/disparate treatment discrimination); **Wards Cove Packing Co. v. Antonio**, 490 U.S. 642 (1989) (business necessity defense/disparate impact discrimination); **Martin v. Wilks**, 490 U.S. 755 (1989)(standing to challenge consent decrees); **Lorance v. AT&T Technologies Inc.**, 490 U.S. 900 (1989)(statute of limitations for challenges to seniority systems); and **Patterson v. McLean Credit Union**, 491 U.S. 164 (1989)(intentional discrimination under §1981).

f. In addition to amending Title VII and §1981, the Act also amended the **Age Discrimination in Employment Act of 1967 (29 U.S.C. 621- 634)**; the **Civil Rights Attorney's Fees Awards Act of 1976 (42 U.S.C. 1988)**; and the **Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.)**.

g. The Act also responded to three 1991 decisions of the U.S. Supreme Court. **EEOC v. Arabian American Oil Co.**, 499 U.S. 244 (1991)(extraterritoriality of Title VII); **West Virginia University Hospitals, Inc. v. Casey**, 499 U.S. 83 (1991) (compensation for expert's fees); and, **Gregory v. Ashcroft**, 501 U.S. 452 (1991)(mandatory retirement for state court judges is not a violation of the ADEA).

2. **Landgraf v. USI Film Products**, ___ U.S. ___, 114 S.Ct. 1483 (1994).

a. The Supreme Court articulated a test for determining the appropriateness of applying a federal statute to events that occurred prior to the law's enactment:

1.. Did Congress expressly prescribe the statute's proper reach?

2. If yes, that expression of intent is to be followed by the courts.

3. If no, the court must determine whether the new statute would have a retroactive effect. A statute does not necessarily operate "retrospectively" merely because it is applied in a case arising from conduct antedating the statute's enactment. Factors the court looks at in determining whether the rule operates retrospectively are whether the new law would impair rights a party possessed when the party acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed.

4. If the statute does have a retroactive effect, the "default rule," absent a clear expression of congressional intent to the contrary, is that the statute does not govern pre-enactment conduct.

b. The Supreme Court also expressly stated that although one provision of the 1991 Civil Rights Act might not be applied to pre-enactment conduct under this test, "there is no special reason to think that all the diverse provisions of the Act must be treated uniformly. . . ." *Id.* at ____.

3. Damages in Cases of Disparate Treatment [Intentional] Discrimination

a. Background.

1. As originally enacted, Title VII only provided for the award of equitable relief such as reinstatement to a successful complainant. Monetary damages in the form of compensation for economic loss (e.g., back pay, front pay and interest on back pay) could be awarded, but compensatory and punitive damages were unavailable. Victims of sexual harassment were particularly prejudiced by the exclusion of compensatory damages from the relief a court could grant to a successful complainant. Often the victim of sexual harassment does not suffer an economic loss as a result of this type of unlawful employment practice.

2. Section 102 of the 1991 Civil Rights Act provides that compensatory damages are available for all victims of intentional (but not disparate impact) employment discrimination in violation of Title VII and the American's with Disabilities Act (with caps). Punitive damages are also authorized if the plaintiff shows that the defendant "engaged in a discriminatory practice . . . with reckless indifference to the federally protected rights of an aggrieved individual."

3. Prior to the enactment of the 1991 Civil Rights Act, the trial court in the **Landgraf** case found that the plaintiff had been sexually harassed by a co-worker, but that the harassment was not so severe as to justify her decision to quit. Thus, she was not entitled to equitable relief because her termination did not violate Title VII, and because Title VII did not then authorize other relief, she was not entitled to compensatory and punitive damages. The 1991 Civil Rights Act became law while her appeal was pending. The Supreme Court rejected her claim that her case should be remanded for a determination of damages under the newly enacted Section 102.

b. Retroactive Application of Punitive Damages in Section 102(b)(1) Prohibited.

1. The **Landgraf** Court held that application of the punitive damage provision to pre-Act conduct would be retroactive in effect. Therefore, because there was no clear congressional expression of intent to reach such a result, the "default rule" in favor of prospective application was adopted by the Court.

2. The Court also pointed out that if there had been an express congressional declaration of intent to apply the punitive damage provision retroactively, a serious constitutional question of a potential ex post facto problem would have been created because punitive damages share key characteristics of criminal sanctions.

c. Retroactive Application of Compensatory Damages in Section 102(a)(1) Prohibited.

1. The **Landgraf** Court found that application of compensatory damage provision of the Act to pre-enactment conduct would also operate retrospectively even though it reached discriminatory conduct already prohibited by Title VII.

2. However, the Court found that compensatory damages are quintessentially backward-looking. They sanction wrongdoers by affecting the liabilities of defendants. The Court reasoned that the right to receive compensatory damages is also the type of legal change that would have an impact on private parties' planning.

3. And, in this particular case, because prior law afforded no relief for an employee in the plaintiff's situation, §102 could be seen as creating a new cause of action. Therefore, since Congress did not clearly express

an intention to make the compensatory damage provision retroactive, the Court applied the "default rule" in favor of prospective application of a new law to conduct occurring after its enactment.

4. Jury Trial

a. Background.

1. As originally enacted, Title VII did not provide for jury trials. Regardless of the type of discrimination (facial, disparate treatment, or disparate impact) or the relief sought, the plaintiff was only entitled to a bench trial.

2. The 1991 Civil Rights Act §102(c)(1) expressly provides that any party seeking compensatory or punitive damages or an employer defending against such claims for relief may demand a trial by jury.

b. Retroactive Application of Jury Trial Provisions in Section 102(c)(1) Prohibited.

The **Landgraf** Court recognized that the jury trial provision of the Act is a procedural change of the sort that would ordinarily govern trials conducted after its effective date. However, because §102(c) makes jury trials available only "[i]f a complaining party seeks compensatory or punitive damages," the jury trial option fell with the attached damages provisions.

5. Section 1981 of the Civil Rights Act of 1866.

a. Background.

1. In **Patterson v. McLean, 491 U.S. 164 (1989)**, the Supreme Court held that a plaintiff's claims of racial harassment, failure to promote, and discriminatory discharge were not actionable under Section 1981 of the Civil Rights Act of 1866. That section, according to the Court, was restricted in its scope to forbidding intentional racial discrimination in only the "making and enforcement" of private contracts. It did not provide relief for racial discrimination in post-contract formation conduct of the employer.

2. Section 101 of the 1991 Civil Rights Act clearly overrules this constricted view of §1981. The Act defines the term "make and enforce contracts" as used in §1981 to include "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits,

privileges, terms, and conditions of the contractual relationship." The Act also codifies the Supreme Court's holdings in **Johnson v. Railway Express Agency, Inc.**, 421 U.S. 454 (1975) and **Runyon v. McCrary**, 427 U.S. 160 (1976) that prohibitions of §1981 apply to private, nongovernmental contracts.

b. Rivers v. Roadway Express, ___ U.S. ___, 114 S.Ct. 1510 (1994).

1. The plaintiffs filed a complaint under §1981 alleging that the employer fired them on baseless charges because of their race and because they insisted on the same procedural protections afforded to white employees. Before trial, the U.S. Supreme Court handed down the **Patterson** decision holding that §1981 does not apply to conduct that occurred after the formation of the contract. Relying on **Patterson**, the trial court dismissed the plaintiffs' discriminatory discharge claims. While the plaintiffs' appeal was pending, the Civil Rights Act of 1991 became law amending §1981.

2. Retroactive Application of the Definitional Provision in Section 102 Prohibited.

a. In reliance on its decision in the **Landgraf** case, the Supreme Court first determined that §101 would act retrospectively if applied to pre-Act conduct because it enlarged the category of conduct that is subject to §1981 liability (all aspects of the contractual relationship, including contract terminations). The Court pointed out that **Patterson** decision did not overrule any prior decision of the Court. Its construction of §1981 was an authoritative statement of what the statute meant before as well as after the decision. Thus, §101 the Act did expand the type of conduct subject to commands of §1981.

b. The Court rejected the plaintiffs' argument that §101 should apply to their case because it was "restorative" of the understanding of §1981 that prevailed before the **Patterson** decision. "Our decisions simply do not support the proposition that we have espoused a "presumption" in favor of retroactive application of restorative statutes." The Court said that it still requires clear evidence of intent to impose even a restorative statute "retroactively." **Id. at** ____.

c. The Court also held that Congress' decision to "legislatively overrule" a Supreme Court case does not, by itself, reveal whether Congress intended the statute to apply retroactively to events that would be otherwise governed by the judicial decision. And, even assuming that the enactment of §101 reflected congressional disapproval of **Patterson's** holding, that does not demonstrate congressional intent to apply the new definition to past acts. "Even when Congress intends to supersede a rule of law embodied in one of our decisions with what it views as a better rule established in earlier decisions, its intent to reach conduct preceding the "corrective" amendment must clearly appear." **Id.** at ____.

E. Other Issues

1. Jury Trial and Principles of Collateral Estoppel

a. Background

In **Parklane Hosiery Co. V. Shore, 439 U.S. 322 (1979)**, the United States Supreme Court held that an equitable determination can have collateral estoppel effect in a subsequent legal action and that this estoppel does not violate the Seventh Amendment's guarantee of trial by jury in suits at common law. In that case, a judgment had been issued by a District Court and affirmed on appeal in a suit in which a jury trial was not constitutionally required (injunctive action by SEC alleging the issuance of a materially false and misleading proxy statement). The District Court's resolution of the issues in that case collaterally estopped relitigation of the same issues in a second, separate action, even though the plaintiff was entitled to a jury trial in the second action (stockholder's class action).

b. Lytle v. Household Manufacturing, Inc., 494 U.S. 545 (1990).

1. Plaintiff brought an action under both Title VII and §1981 alleging that the employer had engaged in both discriminatory discharge because of his race and retaliation because he filed a charge with the EEOC. Title VII claims are equitable in nature and do not require a jury trial while the right to a jury trial attaches to the legal claims arising under §1981.

2. The trial court determined that Title VII provided the exclusive remedy available to the plaintiff, dismissed the §1981 claims, conducted a bench trial, and granted the employer's motion to dismiss at the close of the plaintiff's case. On appeal, the appellate court noted that the dismissal of the §1981 claim was erroneous because Title VII and §1981 are separate, independent, and distinct. Nonetheless, the Court of Appeals held that the trial court's findings with respect to the Title VII claims collaterally estopped the plaintiff from relitigating his §1981 claims because the elements of a cause of action under the two statutes are identical.

3. The United States Supreme Court refused to extend **Parklane Hosiery** to this case and reversed. The plaintiff had properly joined his legal and equitable claims in one suit. It was only by virtue of the trial court's erroneous dismissal of the §1981 claims that enabled the court to resolve the issues common to both claims. Otherwise, the common issues would have been resolved by a jury. The Court found that it would be anomalous to hold that a district court may not deprive a litigant of the right to a jury trial by resolving an equitable claim before a jury hears a legal claim raising common issues, but that a court could accomplish the same result by erroneously dismissing the legal claim. Relitigation was the only mechanism for completely correcting the error.

c. **Korte v. Diemer, 909 F.2d 954 (6thCir. 1990).**

The Sixth Circuit held that a jury verdict in favor of a county employee on her **Equal Pay Act, 29 U.S.C. §206(d)(1)**, claim is binding as to her Title VII discriminatory compensation claim. The Court rejected the position of the Fifth and Seventh Circuits that the Equal Pay Act and Title VII, although similar, are distinct as to the proof required and the allocation of the parties' burden of proof. Instead, it held that "a finding of "sex discrimination in compensation" under one Act is tantamount to a finding of "pay discrimination on the basis of sex" under the other. Conduct that a jury finds to be "based on" sex, and not motivated by nondiscriminatory reasons, cannot later be found by a district court to lack an intent to discrimination on the basis of sex." **Id. at 959.**

2. **Statute of Limitations: Equitable Tolling Against the Government**

a. **Background**

Section 2000e-16(c) of Title VII provides that an employment discrimination complaint against the federal government under Title VII must be filed "within thirty days of receipt of notice of final action taken" by the EEOC. And, it is a well recognized principle that waiver of sovereign immunity cannot be implied, but must be unequivocally expressed. **United States v. Mitchell, 445 U.S. 535 (1980).**

b. Irwin v. Veterans Affairs, 498 U.S. 89 (1990).

1. The plaintiff filed his complaint against the VA 44 days after the EEOC notice was received at his attorney's office, but 29 days after the date on which the plaintiff claimed he received his letter. The EEOC notice expressly informed the plaintiff of his right to file a civil action within 30 days of receipt of the notice. The plaintiff claimed that the letter to his attorney arrived at the attorney's office while the attorney was out of the country so that the attorney did not actually learn of the EEOC's action until 18 days after it arrived at the office.

2. The Supreme Court held that since §2000e-16(c) only specifies that the EEOC notification be "received," receipt by the claimant's designated representative is sufficient. If Congress had intended to depart from the common and established practice of providing notification through counsel, it must do so expressly. The Court also endorsed the principle that notice to an attorney's office that is acknowledged by a representative of that office qualifies as notice to the client.

3. The Court embraced the general rule that once Congress has made a waiver of sovereign immunity, the rule of equitable tolling is applicable to suits against the government in the same way that it is applicable to private suits. However, the plaintiff gained no help from this holding. The Court found that federal courts have typically permitted equitable tolling against private litigants only sparingly in situations where the claimant actively pursued judicial remedies by filing a defective pleading during the statutory period or where the complainant was induced or tricked by the adversary's misconduct into allowing the filing deadline to pass. This case involved only a "garden variety claim of excusable neglect."

3. Concurrent Jurisdiction

In **Yellow Freight System, Inc., v. Donnelly, 494 U.S. 820 (1990)**, the United State Supreme Court held that because Title

VII contains no language that expressly confines jurisdiction to federal courts or ousts state courts of their jurisdiction, that is strong evidence that Congress did not intend to divest state courts of concurrent jurisdiction. As state courts have the inherent authority, and are competent, to adjudicate federal claims, the employee's timely filing in state court after receive of her "right to sue" letter from the EEOC was sufficient.

The **Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 626(c)(1) and 633(b)**, expressly grants concurrent jurisdiction to state courts.

4. Damage Awards and Taxation

In **United States v. Burke, ___ U.S. ___, 112 S.Ct. 867 (1992)**, the Supreme Court held that back pay awards in settlement of Title VII claims are not "damages received on account of person injuries" within the meaning of the Internal Revenue Code's statutory exclusion of such damages from gross income. The Court reasoned that nothing in Title VII as it was then written purports to compensate the employee for any of the traditional harms associated with personal injury, such as pain and suffering, emotional distress, harm to reputation, or other consequential damages. Because the Court found that Title VII's sole remedial focus is the award of backwages, it does not redress tort-like personal injury within the meaning of the statutory exclusion from gross income.

5. Retaliation/After-Acquired Evidence

a. Establishing a Prima Facie Case of Retaliation

1. Christopher v. Stouder Memorial Hospital, 936 F.2d 870 (6thCir. 1991).

The elements of a prima facie case of retaliation are that the plaintiff was engaged in activity protected by Title VII, that the exercise of the plaintiff's rights was known by the employer, that the employer thereafter engaged in an adverse employment action, and that a causal connection existed between the plaintiff's protected activity and the employer's adverse action.

2. EEOC v. Romeo Community Schools, 976 F.2d 985 (6thCir. 1992).

a. A female temporary custodian was denied a promotion to permanent status after she complained to her employer about a disparity in

pay between male and female temporary custodians. She told the employer she thought it was "breaking some sort of law" by that practice.

b. The Sixth Circuit held that the plaintiff had established a prima facie case of retaliation even though the refusal to promote occurred before she had instituted formal proceedings with the EEOC. The Court endorsed the principle that it is the assertion of statutory rights (e.g., nondiscrimination because of sex in compensation) that is the triggering factor for a claim of retaliation, not the filing of a formal complaint. Because the plaintiff alleged that the adverse employment actions occurred after her protest, she had put forth a prima facie case of retaliation.

b. **Effect of After-Acquired Evidence on Retaliation Claim**

1. **Background**

a. In **Price Waterhouse v. Hopkins, 490 U.S. 642 (1989)**, the United States Supreme Court held that when an employer's adverse employment decision rests on both permissible and impermissible factors ("mixed motive"), and the impermissible ground was a "substantial" factor in the employment decision, the plaintiff has made out a prima facie case of disparate treatment or intentional discrimination. Nonetheless, the employer could avoid liability by proving, by a preponderance of the evidence, that the legitimate reason, standing alone, would have induced it to make the same decision.

b. Section 107(a) of the 1991 Civil Rights Act, while preserving the burden-shifting rules of **Price Waterhouse**, makes significant changes in mixed-motive cases. Even though a permissible factor(s) motivated the employment decision, if the plaintiff demonstrates that race, color, religion, sex or national origin was a **motivating** (not "substantial") **factor** for the employment decision, employer liability is established. The court may award attorneys' fees and costs as well as injunctive and declaratory relief. The burden then shifts to the employer to demonstrate that the legitimate reason(s), standing alone, would have induced it to make the same decision. If the employer does not meet this burden, the employer is subject to all of

the relief available under Title VII including damages (compensatory and punitive) and equitable (e.g., back pay, reinstatement, hiring and promotion).

2. After-Acquired Evidence and Retaliatory Discharges.

a. Background.

1. In **McKennon v. Nashville Banner Publishing Company**, 9 F.3d 539 (1993), the Sixth Circuit Court held that the after-acquired evidence doctrine "mandates judgment as a matter of law for an employer charged with discrimination if evidence of the employee's misconduct surfaces at some time after the termination of the employee and the employer can prove it would have fired the employee on the basis of the misconduct if it had known of it." **Id. at 541.**

2. Similarly, in **Milligan-Jensen v. Michigan Technological University**, 975 F.2d 302 (1992), the Sixth Circuit ruled that an employee who failed to include a DUI conviction on her employment application was precluded from recovering on her Title VII action based on allegations of sex discrimination and retaliation for filing an EEOC charge. The Court found that the employee suffered no legal damage by being fired because falsification of the application, if discovered during the employee's employment, would have resulted in the employee's termination.

3. And, in **Johnson v. Honeywell Information Systems, Inc.**, 955 F.2d 409 (1992), an employee's misrepresentations as to her educational background on her employment application barred her recovery under the state's Title VII equivalent even if the employer discharged the employee for her opposition to violations of the law.

b. Effect of 1991 Civil Rights Act

Arguably, §107(a) allows the employee to recover, at a minimum, attorneys' fees and costs as well as to obtain injunctive and declaratory relief because the employee's discharge was "motivated" by impermissible reasons despite the presents of the misconduct that would have, if known by the employer, caused the employer to terminate the employee.

6. Attorney's Fees

a. Assessed Against Defendant

In **Lilley v. BTM Corporation, 958 F.2d 746 (1992)**, the Sixth Circuit Court of Appeals held that although the plaintiff was unsuccessful in pursuing an age discrimination claim, his success in proving a retaliatory discharge claim was sufficient to render him a "prevailing party" eligible to recover reasonable attorney's fees. Moreover, because the expenses the plaintiff incurred in pursuing the unsuccessful age discrimination claim were related to the retaliatory discharge claim on which he was successful, his expenses in pursuing the age discrimination claim were recoverable. See, generally, **Hensley v. Eckerhard, 461 U.S. 424 (1983)**.

b. Assessed Against Plaintiff

In **Noyes v. Channel Products, Inc., 935 F.2d 806 (1991)**, the Sixth Circuit Court of Appeals held that the district court's award of attorneys' fees against an unsuccessful plaintiff in a Title VII retaliatory discharge case was an abuse of discretion. The Court said that attorneys' fees should be awarded to defense counsel only in the most "egregious circumstances." **Id. at 810.**

III. THE KENTUCKY CIVIL RIGHTS ACT, K.R.S. CHAPTER 344.

A. Facial Discrimination

There are no new Kentucky cases to report.

B. Disparate Treatment or Intentional Discrimination

1. Burden of Proof

a. Kentucky's Civil Rights Act has been construed to be virtually identical to corresponding Title VII provisions. Consequently, the Kentucky courts have followed federal

case law when interpreting the Kentucky Civil Rights Act. See, **Kentucky Comm'n on Human Rights v. Kentucky**, 586 S.W.2d 270(Ky.App. 1979). For example, the **McDonnell Douglas** framework for proving intentional discrimination (as modified by **Burdine**) has been applied to cases alleging intentional employment discrimination under KRS §344.040. **Kentucky Center for the Arts v. Handley**, 827 S.W.2d 697 (Ky. 1991).

b. An unresolved question, however, is whether the U.S. Supreme Court decision in the **Hicks** case will also become part of the Kentucky courts' analysis of the Kentucky Civil Rights Act.

c. As the Kentucky Civil Rights Act goes beyond merely incorporating the antidiscrimination policies embodied in Title VII, see **Meyers v. Chapman Printing Company**, 840 S.W.2d 814, 817 (Ky. 1992), the **Hicks** decision need not be adopted as further gloss on how a plaintiff establishes a case of intentional discrimination.

2. **Mixed Motive Cases of Intentional Discrimination**

a. The Kentucky Civil Rights Act was not amended when Congress adopted the 1991 Civil Rights Act. Therefore, more differences now exist between the provisions of the state's law and the federal law than before. For example, in the **Chapman** case, the Kentucky Supreme Court adopted the **Price Waterhouse** rule than an employer can avoid liability in a mixed motive disparate treatment case by showing the legitimate reason, standing alone, would have induced it to make the same decision. However, the 1991 Civil Rights Act legislatively changed the **Price Waterhouse** the employer avoidance of liability rule.

b. The question then arose in **First Property Management Corporation v. Zarebidaki**, 867 S.W.2d 185 (Ky. 1993), what effect did the changes in federal law have on the rule for mixed motive cases brought under Kentucky state law. The Kentucky Supreme Court stated that the rules for federal cases tried in equity without a jury are different from the rules for cases under the Kentucky Civil Rights Act which are claims at law. However, it then went on to hold that an employer is not free from liability simply because it offers proof that it would have discharged the employee anyway, even absent the lawfully impermissible reason. If the jury believes the impermissible reason did in fact contribute to the

discharge as one of the substantial motivating factors, employer liability attaches.

3. **Hall v. Transit Authority of Lexington-Fayette Urban County Government**, ___ S.W.2d ___, WL 83226 (Ky.App. 1994); **Kirkwood v. Courier Journal**, 858 S.W.2d 194 (Ky. 1993); and **Meyers v. Chapman Printing Company**, 840 S.W.2d 814 (Ky. 1992).

These sexual harassment cases are reviewed in the material on "Harassment: Sexual and Otherwise" prepared Linda Scholle Cowan.

C. Disparate Impact Discrimination.

In **Leonard v. Corrections Cabinet**, 828 S.W.2d 668 (Ky.App. 1992), a black employee was disqualified from applying for promotion due to a prior felony conviction. The Court did not analyze the potential disparate impact such a facially neutral policy might have on a protected class. Instead, the Court summarily disposed of the potential disparate impact discrimination claim by stating that even if the employee could prove that black applicants were disqualified at a higher rate than whites, "we know of no established protected class involving persons with felony records, and we decline to create one." **Id. at 672.**

D. Other Issues.

1. Statute of Limitations and Continuing Violations.

a. In **Leonard v. Corrections Cabinet**, 828 S.W.2d 668, the Kentucky Court of Appeals held that state law governs the substantive limitation period for federal civil rights action (one year - **KRS 413.140(1)(a)**), federal law governs when the cause of action accrues and when the statute begins to run.

b. The cause of action for a discreet act such as discriminatory discharge of a person accrues and the limitation period begins to run at the time of the discharge. The cause of action for a continuing violation such as discriminatory pay arises each time the employee is paid less than her/his counterpart.

c. In **Leonard** the court found that even though the employee was told unequivocally that

he could never be promoted because of his felony conviction, each time he applied for promotion and was denied, a new, discrete act occurred and the statute of limitations began to run on that cause of action.

2. Removal

a. In **Gafford v. General Electric, 997 F.2d 150 (6th Cir. 1993)**, the Sixth Circuit was faced with a challenge to its subject matter jurisdiction over an employment discrimination lawsuit under Kentucky's Civil Rights Act.

b. The employee brought suit in Jefferson Circuit Court alleging the employer's failure to promote her was a violation of **KRS §344.040**. The employee sought unspecified amount of damages to compensate her for lost wages and retirement benefits, for mental and emotional anxiety and stress, and for court costs and attorney fees. The employer petitioned for removal in the U.S. District Court for the Western District of Kentucky based on diversity of citizenship and satisfaction of the \$50,000 amount in controversy requirement.

c. The court held that when a plaintiff seeks to recover some unspecified amount that is not self-evidently greater or less than the federal amount-in-controversy, the defendant can have removal if it proves that it is "more likely than not" that the plaintiff's claims meet the federal amount-in-controversy requirement. **Id. at 158.**

3. Waiver

a. In **Kirkwood v. Courier-Journal, 858 S.W.2d 194 (Ky.App. 1993)**, the court found that the employee's failure to use a mandatory grievance and arbitration procedure in her union's collective bargaining agreement did not preclude her from bringing race and sex discrimination charges under Kentucky's Civil Rights Statute.

b. Although an informed individual may waive a statutory civil right by agreeing to submit a claim against the employer to binding arbitration, **Gilmer v. Interstate/Johnson Lane Corp., ___ U.S. ___, 111 S.Ct. 1647 (1991)**, a waiver may not be accomplished prospectively on behalf of an

individual by that employee's union or collective bargaining unit.

4. Retaliation - A Prima Facie Case

a. In **Mountain Clay, Inc. v. Commonwealth of Kentucky, Commission on Human Rights, 830 S.W.2d 395 (Ky.App. 1992)**, the court found that the employee had established prima facie case of retaliation when the employer filed a lawsuit seeking to enjoin the Human Rights Commission from holding a hearing on the employee's complaint, seeking to hold the employee liable personally for the employer's costs of defending against the complaint, and seeking to require the employee to post bond in a sufficient amount to cover those employer expenses. The circuit court dismissed the employer's suit as premature.

b. The Commission found, and the court would not disturb the finding, that the employer filed the suit to expose the employee to fears of extreme financial hardship and to coerce her into dropping or foregoing her complaint.

c. The court also refused to recognize a per se violation of due process when the Commission hears a case in which it has been named an adverse party. The court pointed out that if it accepted such an argument, an employer who is a defendant in a civil rights action could file suit naming the Commission as an adverse party and then argue that the Commission could not hear the action because it was so named.

5. Attorney Fees

a. In **Meyers v. Chapman, 840 S.W.2d 814**, the Kentucky Supreme Court endorsed the trial court's determination of plaintiff's attorneys' fee award. The trial court arrived at the fee for prosecuting the plaintiff's two causes of action by determining the appropriate number of hours reasonably expended by each of the plaintiff's three attorneys. It multiplied that number by its finding of an appropriate hourly rate. The total sum was then reduced by 15% because of the "degree of success achieved" by plaintiff's attorneys. The jury had decided for the employee on her sexual harassment cause of action, but against her on her

gender-based discharge claim. The trial court arrived at the fee for the "attorney fee litigation" by calculating the appropriate number of hours, multiplying by a lesser rate than it approved for the principal litigation and then reduced the total by 75% because it found that only some of the hours spent on the attorneys' fee litigation were necessitated by the defendant's attack.

b. The court sustained the award of attorneys' fees even though they were substantially more than the plaintiff's total recovery. It found that if attorneys' fees were restricted to the size of the claim there might be no incentive to pursue worthwhile claims.

c. The court rejected the argument that compensation should have been enhanced because the plaintiff's attorneys represented her on a contingency fee basis.

IV. THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967, 29 U.S.C. 621 et seq. [hereinafter the ADEA].

A. Facial Discrimination.

1. Gregory v. Ashcroft, 501 U.S. 452 (1991).

The U.S. Supreme Court held that appointed state judges in Missouri who were subject to a state constitutional mandate compelling retirement at the age of 70 were not covered by the ADEA. They fell within the ADEA's exclusion for appointees "on a policymaking level."

2. Section 321 of the 1991 Civil Rights Act.

a. This section extends the protection of the ADEA against employment discrimination to certain previously unprotected state officials: (a) members of an elected official's personal staff; (b) those appointed to serve the elected official on a policy making level; and (c) those appointed to serve the elected official as an immediate advisor with respect to the exercise of the constitutional or legal powers of the office.

b. The newly covered state employees have no trial right. Disputes are to be resolved through an EEOC administrative action with review by a Court of Appeals.

c. Elimination of the state employee exemptions overrides the U.S. Supreme Court's decision in **Ashcroft**.

B. Disparate Treatment or Intentional Discrimination

1. Availability of Disparate Treatment Theory

In **Hazen Paper Company v. Biggins**, ___ U.S. ___, 113 S.Ct. 1701 (1993), the U.S. Supreme Court stated that disparate treatment theory is available to a employee under the ADEA.

2. Employer Liability Under Disparate Treatment Theory

a. Employer liability depends on whether age actually motivated the employer's decision. Whether the employer relied on a formal, facially discriminatory policy based on age or was motivated by the employee's age on an ad hoc, informal basis, age must actually have played a role in the employer's decision-making process and had a determinative influence on its outcome. **Id. at 1706**.

b. The **Hazen** Court held that an employee does not prove a violation of the ADEA merely by proving that the employee was discharged to prevent his pension benefits from vesting. The Court reasoned that age and years of service are "analytically distinct," so that an employer might take account of one while ignoring the other. Consequently, a decision based on years of service is not necessarily an impermissible age-based decision under the ADEA. [CAVEAT: The employer's action did violate the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §510.]

C. Disparate Impact Discrimination

1. In its **Hazen** decision, the U.S. Supreme Court expressly stated that it has never decided whether a disparate impact theory of liability is available under the ADEA and it would not do so in the context of the **Hazen** case. **Hazen Paper Company v. Biggins**, 113 S.Ct. at 1706.

2. In **Abbott v. Federal Forge, Inc.**, 912 F.2d 867 (6thCir. 1990) the Sixth Circuit recognized the availability of the theory of disparate impact discrimination under the ADEA. It said that to establish a prima facie case of age discrimination by showing disparate impact, the employee must identify a specific employment practice used by the employer and then establish its adverse effect by offering statistical evidence. Once an age discrimination plaintiff does that, the defendant must articulate a

legitimate, nondiscriminatory reason, such as business necessity or job-relatedness, for its practice. If the employer does so, then the plaintiff must show either that the employer's proffered reason was a pretext for discrimination or that an alternative employment practice exists that would serve the employer's legitimate interests without such a disparate impact.

D. Other Issues

1. Collateral Estoppel - Administrative

a. In **Astoria Federal Savings and Loan Association v. Solimino, 501 U.S. 104 (1991)**, the plaintiff filed a charge with the EEOC. The EEOC referred his claim to the state agency responsible for such claims under state law. That agency found no probable cause to believe that the plaintiff had been terminated because of his age. That decision was upheld on administrative review. Instead of appealing the administrative agency's decision to state court, the plaintiff filed an ADEA suit in federal district court grounded on the same factual allegations considered in the state proceedings.

b. The United States Supreme Court held that a judicially unreviewed state administrative finding has no preclusive effect on the age discrimination proceedings in federal court.

2. Jurisdiction

a. Sections 626(c)(1) and 633(b) of the ADEA expressly grant concurrent jurisdiction to state courts.

b. A federal employee complaining of age discrimination does not have to seek relief from the employee's employing agency or the EEOC at all. A federal employee can present the merits of her/his claim to a federal court in the first instance. **29 U.S.C. §633a(d)**. See, also **Stevens v. Department of the Treasury, 500 U.S. 1 (1991)**.

3. Damages

a. The § 7(b) of ADEA provides for liquidated damages in the case of a "willful" violation.

b. In **Hazen Paper Company v. Biggins, 113 S.Ct. at 1708 - 1709**, the U.S. Supreme Court affirmed that the definition of "willful" it articulated in **Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985)**, was applicable to

an informal disparate treatment case where age entered into the employment decision on an ad hoc, informal basis rather than because of a formal policy.

c. A "willful" violation of the ADEA occurs if the employer **knew** or **showed reckless disregard** for the matter of whether its conduct was prohibited by the ADEA. **Hazen Paper Company v. Biggens, 113 S.Ct. at 1708.**

4. Waiver

a. In **Gilmer v. Interstate/Johnson Lane Corporation, 500 U.S. 20 (1991)**, the United States Supreme Court held that an age discrimination claim was subject to compulsory arbitration pursuant to an arbitration agreement in a securities registration application the plaintiff, a securities representative, had to fill out in order to register with the NYSE.

b. The **Gilmer** court distinguished its earlier decision in **Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974)**. In **Gardner-Denver**, the issue was whether an employee whose grievance had been arbitrated in compliance with an arbitration clause in a collective-bargaining agreement was precluded from thereafter bringing a Title VII action based upon the same conduct. The Court held that the Title VII claim, an individual statutory claim, was not precluded by arbitration of the collective contract rights. **Gilmer**, in contrast, involved the issue of the enforceability of an agreement to arbitrate statutory claims. In **Gardner-Denver** the employee had not agreed to arbitrate the statutory claims whereas the employee had so agreed in **Gilmer**. And, the arbitration clause at issue in **Gilmer** was entered into "voluntarily" by the employee and not by his collective bargain representative. Finally, the Court found that the Federal Arbitration Act [FAA] was at issue in **Gilmer**, but not in **Gardner-Denver**. The FAA, according to the Court, reflects a "liberal federal policy favoring arbitration agreements."

V. EMPLOYMENT DISCRIMINATION AND SEXUAL ORIENTATION

A. Title VII and Homosexual, Sexual Harassment v. Discrimination or Harassment Based on Sexual Orientation.

1. Homosexual, Sexual Harassment

a. Demands by a homosexual supervisor or co-worker are actionable as impermissible sexual harassment under Title VII. The earliest case recognizing the possibility of

such a cause of action is **Barnes v. Costle**, 561 F.2d 983 (D.D.C. 1977). The **Barnes** court said in dicta that homosexual advances might give rise to a claim of sexual harassment under Title VII, but bisexual advances would not. See, also **Henson v. City of Dundee**, 682 F.2d 897 (11th Cir. 1982); and **Wright v. Methodist Youth Services**, 511 F.Supp. 307 (N.D.Ill. 1981).

b. However, there seems to be a presumption that the alleged perpetrator is heterosexual, see, e.g., **French v. Mead Corp.**, 33 F.E.P. Cases 635 (S.D. Ohio 1983), which can be overcome by showing that the alleged harasser has "homosexual proclivities," **Joyner v. AAA Cooper Transp.**, 597 F.Supp. 537 (M.D.Ala. 1983), *aff'd*, 749 F.2d 721 (11th Cir. 1984).

2. Discrimination or Harassment Because of Sexual Orientation

a. Title VII does not prohibit discrimination against homosexual employees, **Williamson v. A.G. Edwards & Sons, Inc.**, 876 F.2d 69 (8th Cir. 1989), *cert. denied*, 493 U.S. 1089 (1990); transsexual employees, **Ulane v. Eastern Airlines, Inc.**, 742 F.2d 1081 (7th Cir. 1984), *cert. denied*, 471 U.S. 1017 (1985) (plaintiff fired from her position as a pilot due to her change in sex from male to female); or employees perceived to be homosexual, **Smith v. Liberty Mutual Insurance Co.**, 569 F.2d 325 (5th Cir. 1978).

b. Title VII does not prohibit harassment, even of a sexual nature, of homosexual employees or those perceived to be homosexual employees, **Polly v. Houston Lighting & Power Co.**, 803 F.Supp. 1 (S.D.Tex. 1992).

B. State Statutes and Employment Discrimination Based on Sexual Orientation, See, Norris and Randon, "Sexual Orientation and the Workplace: Recent Developments in Discrimination and Harassment Law," 19 Employee Relations L.J. 233 (1993).

1. Prohibitions Against Discrimination Based on Sexual Orientation.

a. California, Connecticut, the District of Columbia, Hawaii, Massachusetts, Minnesota, New Jersey, Vermont, Washington, and Wisconsin specifically prohibit discrimination in employment based on sexual orientation.

b. All of the state statutes define sexual orientation to include heterosexuality, homosexuality, and bisexuality. [New York is considering a statute that would also prohibit discrimination because of asexuality.]

c. Perceived sexual orientation is protected in California, Connecticut, Hawaii, Massachusetts, New Jersey and Wisconsin.

d. California, Connecticut, and New Jersey have express provisions that state that affirmative action programs on the basis of sexual orientation are not required and none of the other states expressly requires the implementation of affirmative action plans.

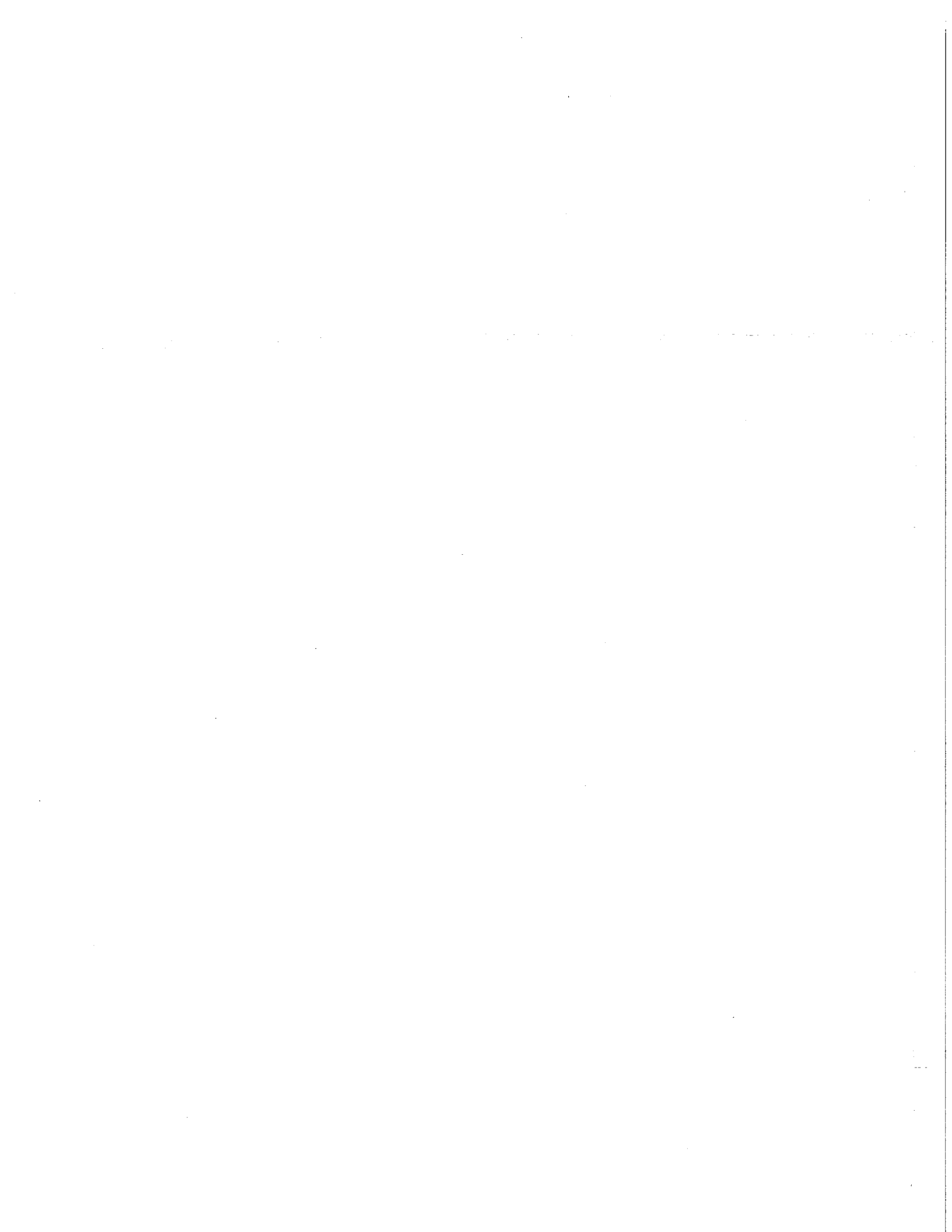
e. Except for New Jersey and Washington, there is a statutory exception for religious and charitable organizations.

f. Massachusetts explicitly states that its statute is not an endorsement or approval of homosexuality or bisexuality. The statute does not legitimize marriage between homosexuals and does not require health insurance or other employee benefits for "partners" of homosexual employees. In addition to such provisions, Connecticut's statute provides that its statute is not to be read to require the teaching of homosexuality or bisexuality in educational institutions.

g. California and Vermont have provisions that maintain the orthodox classification of "marital status" and the definitions of "family or dependent" in an employment benefit plan.

2. Prohibitions Against Prohibiting Discrimination Based on Sexual Orientation.

Colorado has a statute that specifically prohibits any protection on the basis of sexual orientation. Oregon considered such a statute, but rejected it.



ADMINISTRATIVE AGENCY PRACTICE

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SECTION J

ADMINISTRATIVE AGENCY PRACTICE

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SECTION J

ADMINISTRATIVE AGENCY PRACTICE

Richard C. Stephenson

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I. INTRODUCTION

- A. Dealing with state and federal administrative agencies occupies an increasingly larger percentage of the time of human resources professionals.
- B. The agencies most frequently encountered by such professionals are:
 - 1. Federal and state agencies enforcing civil rights statutes (e.g., Title VII, Age Discrimination in Employment Act, Americans with Disabilities Act, and KRS Chapter 344).
 - 2. Federal and state agencies enforcing the wage and hour laws (Fair Labor Standards Act and KRS Chapter 337).
 - 3. The Kentucky Division of Unemployment Insurance, Kentucky Cabinet for Human Resources, enforcing the unemployment insurance laws (KRS Chapter 341).
- C. Knowing the formal and informal procedures of the agencies involved gives the human resources professional an advantage in successfully dealing with these agencies.

II. CIVIL RIGHTS CLAIMS

- A. Responding to charges filed with the Equal Employment Opportunity Commission (EEOC).
 - 1. Title VII Charges.
 - a. Governing law: Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.)
 - b. How charges are filed.
 - (1) In writing and under oath or affirmation [42 U.S.C. § 2000e-5(b)].
 - (2) On a form provided by EEOC.
 - c. Time limit for filing charges - within 180 days of the alleged unlawful employment practice (except in "deferral" states such as Kentucky where one has 300 days to file the charge). 42 U.S.C. § 2000e-5(e).

d. State filing requirement - In states such as Kentucky which has "deferral" status, no charge may be filed with EEOC "before the expiration of sixty days after proceedings have been commenced under the state or local law, unless such proceedings have been earlier terminated. . . ." 42 U.S.C. § 2000e-5(c).

(1) Thus in order to timely file an EEOC charge in Kentucky, the Charging Party must have filed with an appropriate state or local agency within 240 days in order that the required 60 days for state proceedings may have run prior to filing with EEOC.

(2) Not necessary that the "filing" with the state or local agency be timely (180 days in Kentucky) in order to preserve the right to file with the EEOC.

e. The investigation.

(1) Normally by interrogatories, requests for documents, and sometimes on-site inspection of records and interviews of personnel.

(a) Responding to interrogatories and requests for production.

1 EEOC is entitled to information relevant to the charge but you should limit the information you provide to only that which is relevant.

a Restrict information provided to the narrowest department or entity at the level the unlawful action was taken (e.g., if personnel decisions for a plant are made at that plant, information relating to company-wide practices outside the plant are probably not relevant to the charge).

b Restrict document production to those documents

directly relevant to the claimed unlawful act - e.g., do not produce entire personnel files - instead make EEOC tell you what specific documents they want.

c Remember that everything you produce will be available to the Charging Party if he should later decide to bring a Title VII lawsuit.

(b) Interviews of personnel.

1 Whether to allow interview of non-management personnel on working time - no requirement that you do so but it gives you more control.

2 Right to have counsel or management representative present at interview of any management or supervisory employee.

3 You may be able to negotiate presence at interview of non-management employees.

4 Control the access of the investigator while he is on your premises.

(c) EEOC has subpoena power to coerce the production of information if necessary but it is reluctant to exercise that power.

(d) The right way and the wrong way to say "no" to the investigator's demands for information.

1 Be firm but polite.

2 Be prepared to compromise.

3 Appear reasonable.

4 Require EEOC to put all requests in writing and respond to all requests in writing.

f. The determination of probable cause.

- (1) A determination as to whether there is reasonable cause to believe the charge is true is supposed to be made after investigation. 42 U.S.C. § 2000e-5(b).
- (2) In theory, after 180 days from the filing of the charge, the EEOC is supposed to issue a right to sue notice to the Charging Party. 42 U.S.C. § 2000e-5(f)(1).
 - (a) In practice, this is never done unless the Charging Party requests it.
 - (b) In certain circumstances, the employer may want to consider requesting that the right to sue letter be issued prior to a determination being made.
- (3) If the EEOC determines that there is not reasonable cause to believe the charge is true, it will dismiss the charge and issue a notice of right to sue to the Charging Party. 42 U.S.C. § 2000e-5(b).
- (4) If the EEOC determines that there is probable cause to believe the charge is true, it will attempt conciliation.

g. Conciliation

- (1) 42 U.S.C. § 2000e-5(b) provides that "[i]f the Commission determines . . . that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion."
- (2) Since EEOC looks to a "make whole" remedy, conciliation is usually equated with capitulation.

(3) However, where the EEOC regards the charge as "weak", there is usually some opportunity for compromise.

(a) Neutral employment reference.

(b) Backpay without reinstatement.

(c) Reinstatement without backpay.

(4) If conciliation is successful, a conciliation agreement will be prepared and signed by the Charging Party, Employer and EEOC.

(a) Although EEOC will assert that all of its provisions are "boiler-plate" and mandatory, they are not.

(b) Make sure that the provisions of the agreement are clear and unambiguous.

(c) Consider provisions whereby:

1 Charging Party agrees to keep the terms of the agreement confidential.

2 Charging Party agrees not to ever apply for employment with the Company.

3 Charging Party releases the employer from any and all claims against the employer arising out of the employment relationship (a general release).

(d) Some EEOC District Directors will not approve general releases, confidentiality clauses, etc., as a part of the formal conciliation agreement but will not object to a separate agreement containing provisions between the Charging Party and the employer.

h. The Right to Sue Notice.

(1) Not issued if EEOC decides to file a suit on behalf of the Charging Party.

- (a) Several years ago, it was very unusual for the EEOC to file suit on behalf of the Charging Party unless there were pattern and practice or class implications to the charge.
 - (b) Currently, EEOC's policy is that there is a presumption in favor of such suits.
- (2) If EEOC does not file suit on behalf of the Charging Party, it will issue a Right to Sue Notice to the Charging Party even where it has found no probable cause.
- (3) The Charging Party has 90 days from receipt of the Notice of Right to Sue to file a Title VII suit in the U.S. District Court or state court.
 - (a) Receipt in the past could be proven by certified mail receipt form in the EEOC file.
 - (b) Current practice is not to send notices certified mail.
- i. Responding to EEOC Charges.
 - (1) No response, other than answers to the EEOC interrogatories, is required.
 - (2) Particularly if you have a strong defense, you will probably want to file with EEOC a position statement at some time prior to the probable cause determination being made.
 - (a) Frequently, EEOC will solicit a position statement as a part of the interrogatories to the employer.
 - (b) Position statement should address each and every allegation of the charge.
- j. Responding to a "cause" determination.
 - (1) While there is no statutory or regulatory provision for appealing from a cause determination, it should be considered.

- (a) It should be addressed to the District Director.
- (b) It should address both the facts and the law as to every basis cited for the probable cause determination.
- (c) Even if the appeal is denied or not even considered by the District Director, it will be the top document of the file which goes to EEOC's attorneys to determine if EEOC will file suit on behalf of the Charging Party.

2. Charges under the Age Discrimination in Employment Act (ADEA).

- a. Governing law: Age Discrimination in Employment Act of 1967 (29 U.S.C. § 621 et seq.).
- b. How charges are filed - same as Title VII.
- c. Time limit for filing charges - within 180 days of the alleged unlawful employment practice (except in "deferral" states such as Kentucky, where one has 300 days to file the charge). 29 U.S.C. § 626(d).
- d. Time limit for filing suit in state or federal court:
 - (1) Not before 60 days have elapsed since the filing of a charge with the EEOC (and in a deferral state, 60 days after a charge has been filed with the state agency). 29 U.S.C. § 626(d) and 29 U.S.C. § 633(b).
 - (2) Probably not later than ninety (90) days after the receipt of a notice by EEOC that it has dismissed a charge or has otherwise terminated its proceedings. 29 U.S.C. § 626(e).
 - (a) But note that at least one court has held that despite the fact that the Civil Rights Act of 1991 deleted references to the two and three year statutes of limitation and created a 90 day right to sue notice period,

the former limitations periods are still applicable. Simmons v. Al Smith Buick Co., 63 FEP 958 (E.D. N.C. 1993).

(b) Also note that at least one court has held that, unlike Title VII, a right to sue notice is not a prerequisite to suit. Adams v. Burlington Northern R.R. Co., 63 FEP 679 (D.C. Kansas 1993).

e. ADEA does not require any investigation or determination of probable cause - only conciliation.

(1) However, in practice the EEOC tends to process an ADEA charge the same as a Title VII charge.

(2) The EEOC may bring a civil action on behalf of the Charging Party if it chooses to do so.

f. Employers should respond in the same fashion as to a Title VII charge.

B. Responding to charges filed with the Kentucky Commission on Human Rights (KCHR) and the Lexington-Fayette Urban County Human Rights Commission (LFUCHRC).

1. Governing law:

a. KCHR - KRS Chapter 344 (Kentucky Civil Rights Act) and 104 KAR 1:020 et seq.

b. LFUCHRC - KRS Chapter 344, Ordinance No. 166-92, and the Rules of Practice and Procedure of the LFUCHRC.

2. How the Complaint (same as charge under Title VII) is filed.

a. Written sworn complaint KRS 344.200; 104 KAR 1:020, Section 1(2)(a) and (c).

(1) It is sufficient under Title VII that charge merely be signed by a Charging Party who "declares under penalty of perjury" that the charge is true.

- (2) But under state law, it is necessary that the signature be notarized.
3. Time limit for filing Complaint: Within 180 days of the alleged unlawful employment practice. KRS 344.200(1); Section 2.010 3. of the Rules of Practice and Procedures of the LFUCHRC.
4. Interrelationship of state and federal law.
 - a. It is the common practice of both the state deferral agencies (KCHR and LFUCHRC) and the EEOC to dual file all complaints/charges with each other.
 - b. If either of the state agencies elects to take jurisdiction and investigate a charge, the EEOC holds its investigation in abeyance until the conclusion of the state or local agency processing.
 - (1) Typically, the EEOC simply adopts the disposition of the charge made by the KCHR or LFUCHRC.
 - (2) Both the KCHR and LFUCHRC have work sharing agreements with EEOC under which the Kentucky agencies are reimbursed for investigating charges for the EEOC.
 - (3) Accordingly, you will much more frequently be involved with the Kentucky agencies than EEOC.
5. Procedure of the KCHR and LFUCHRC.
 - a. From the filing of the charge through investigation, probable cause determination, and conciliation, there are only these two significant differences between the processing by the Kentucky agencies and the EEOC.
 - (1) KRS 344.210(1) mandates that within 60 days of the filing of the complaint, unless it has been dismissed or conciliated, the matter must be set for a hearing.
 - (a) In the past, the mandate was ignored and waivers were obtained from the employer as to the setting of the matter for hearing.

(b) However, a recent case decided by the Kentucky Court of Appeals decided that KRS 344.210(1) was mandatory.

(c) Consequently, all cases are now being set for hearing within 60 days of the complaint being filed - however, cases are typically set for dates months in the future to give adequate time for investigation and conciliation.

(2) Once conciliation has failed, the major difference in procedures appears - unlike the EEOC which either files suit in court on behalf of the Charging Party or issues an authorization to the Charging Party to file suit, the KCHR and the LFUCHRC conduct formal hearings, determine whether a violation has occurred, and direct remedies for such violations.

b. Hearings before the KCHR and LFUCHRC.

(1) Conducted under their own procedural regulations.

(2) Conducted before hearing officers who may be Commissioners or outside persons (normally attorneys) hired to conduct the hearing.

(3) The case for the Charging Party is normally presented by an attorney for the Commission.

(4) At the conclusion of the hearing, parties are typically given the opportunity to present proposed findings of fact and conclusions of law to the hearing officers.

(5) The hearing officers normally present proposed findings of fact and conclusions of law to a full meeting of the Commission for adoption or modification and the issuance of an order.

(6) Very important to present all facts favorable to the employer at the hearing

as no further evidence will be taken on appeal.

(a) Either party may appeal the Commission's order to the Circuit Court of the county where the alleged unlawful employment practice occurred.

(b) On appeal, the Court's scope of review is extremely limited - "the findings of fact of the Commission shall be conclusive unless clearly erroneous in view of the probative and substantial evidence on the whole record." KRS 344.240(2).

c. Discovery by employers in preparation for hearings.

(1) KRS 344.260 and 344.200(7) appear to provide for discovery by either party before the KCHR.

(2) Neither Ordinance No. 166-92 nor the LFUCHRC's Rules of Practice and Procedure expressly provides for discovery by employers, but in practice employers have generally been allowed to take depositions.

(3) Employers may, at least after a determination of cause has been made, obtain access to the investigative files of the KCHR and LFUCHRC under the Kentucky Open Records Act and of the EEOC under the federal Freedom of Information Act.

C. General Observations.

1. Proceedings before the EEOC, KCHR and the LFUCHRC are adversary proceedings and should be approached from that standpoint.

a. Do not be misled into thinking that the EEOC, KCHR, or the LFUCHRC or their staffs are simply objective fact-finders.

b. Where there is any doubt at all, the staffs of those agencies will favor the Charging Party.

- c. Accordingly, it is imperative that you present the employer's side in its most favorable light - do not expect the agency staffs to solicit or present evidence favorable to the employer.
- 2. The quality of due process that the employer will receive at hearings before the KCHR and the LFUCHRC is not high, and to the extent that the employer can steer the proceedings to the EEOC and thus ultimately to the federal courts rather than to hearings before the KCHR and the LFUCHRC, it will normally want to do so.
 - 3. Nothing is gained by alienating the staffs of the agencies.
 - a. Be firm when you believe you are right, but -
 - b. Be courteous and polite to the staff members.
 - c. Establish a personal rapport with them.

III. WAGE AND HOUR CLAIMS

A. The Agencies.

- 1. Federal - Wage and Hour Division of the Employment Standards Administration of the U.S. Department of Labor.
- 2. Kentucky - Division of Employment Standards & Mediation of the Kentucky Labor Cabinet.

B. Governing Law.

- 1. Federal - Fair Labor Standards Act (FLSA) (29 U.S.C. Section 201 et seq.).
- 2. State - KRS Chapter 337.

C. The administrative process.

- 1. The investigation.
 - a. Nearly always the result of an employee complaint.
 - b. Request for payroll records.

(1) Even though Kentucky employers are only required to keep wage and hour records

for one year (KRS 337.320), if they are retained, the Kentucky Labor Cabinet has the right to inspect them. Cabe v. Kitchen, Ky., 415 S.W.2d 96 (1967).

- (a) The Kentucky Division of Employment Standards & Mediation has taken the position it can inspect records five years old if it chooses.
 - (b) Frequently Kentucky investigators are satisfied with auditing one or two years of records - this is an area where there is room for negotiation with the investigator.
- (2) The Federal Fair Labor Standards Act requires the retention of most wage and hour records for three years and federal investigators typically audit three years.
 - (3) If an employer can in good faith assert that records beyond one year are in permanent storage and can be retrieved only with some difficulty, frequently the investigator will only ask for those records readily available.
 - (4) To the extent that the employer can reduce the number of years audited, it has substantially reduced its potential liability.
- c. Come into compliance immediately - the limitations periods run from the date a lawsuit is filed against the employer - not from the date the investigation commenced.
- 2. Assessment against the employer if a violation is found.
 - a. Request that the assessment be made in writing detailing the amounts due to each employee for specific time periods.
 - b. Explore the possibilities of settlement.
 - (1) Most wage & hour claims are settled.
 - (2) Immediately after the assessment is the most opportune time to settle.

(3) Pressures on the agency to settle:

(a) Litigation is time-consuming - by the time the agency is prepared to file suit, much of the back wages may be cut off by the statutes of limitations.

(b) The agency loses control of the process once it is recommended for litigation or hearing.

(4) Pressures on the employer:

(a) Liquidated damages if case goes to trial and employer loses.

(b) Expense of litigation.

c. Possible settlement strategies:

(1) Agree to pay the complaining employee all back wages but no one else.

(2) Agree to pay current employees all or a portion of back wages due but not former employees (who the agency knows will be difficult to locate anyway).

(3) Agree to pay former employees only if they individually petition the agency for relief.

3. If case cannot be settled at the time the assessment is made:

a. Federal - the case will be submitted to the Solicitors of the U.S. Department of Labor by the Area Director with a recommendation for litigation.

(1) Employer may then try to convince the solicitors that its legal or factual position is correct or

(2) Settle it with the solicitors prior to a suit being filed.

b. State -

- (1) The Commissioner of Workplace Standards makes findings of fact which become a final order in fifteen days.
- (2) Either party suffering from these findings may petition for a fact-finding hearing to be conducted by the Commissioner or his authorized agent.
- (3) An appeal may be taken to the circuit court from the determination of the Commissioner but no new evidence may be taken and the scope of the court's review is very limited.
- (4) Accordingly, there is not much room for maneuver under the state proceedings once the matter passes the point of assessment.

IV. UNEMPLOYMENT INSURANCE CLAIMS

- A. The Agency - Division for Unemployment Insurance, Department for Employment Services, Kentucky Cabinet for Human Resources.
- B. Governing law - KRS Chapter 341 and 903 KAR 5:010 et seq.
- C. The administrative process.
 1. Claim by former employee is made at an unemployment insurance office.
 2. Notice of Claim is sent to former employer (Initial Claim for Unemployment Insurance Benefits - Form UI - 401).
 - a. Form contains information provided by employee and elicits information from employer with regard to the circumstances of the termination of employment.
 - b. If an employer receives this form, it means that the employer is believed to be the most recent employer of the claimant for whom the claimant has worked in each of ten weeks (whether or not consecutive) and that the employer will therefore be the one whose account will be charged with any benefits.
 - c. If the employer has indicated he was separated for any reason other than lack of work, there

will be a fact-finding interview date and time on the form.

d. Employer should complete the reverse side of the form, giving reason for discharge and indicating whether it will attend the fact-finding interview.

(1) If you intend to contest the payment of benefits, you should attend the fact-finding interview if possible.

(2) If you cannot attend the interview, you must ensure that the "Employer's Statement" on the form is completed in detail describing the reason for the discharge.

3. Fact-Finding Interview.

a. Not conducted under oath.

b. Interviewer will ask claimant and employer to state their positions as to reasons for discharge.

c. Not normally necessary to be represented by counsel at this stage.

4. Notice of Determination.

a. Form is mailed to both parties.

b. Provides the initial determination as to eligibility for benefits.

c. Appeal from Determination.

(1) Either party may appeal the Determination by sending a letter to the Division's local office (address shown on the Determination) postmarked no later than 15 days after the date of the Determination.

(2) If such an appeal is filed, a hearing before a Referee will be scheduled.

5. Referee Hearing.

a. Both parties will receive a notice of the date, time, and place of hearing.

- b. Telephone hearings.
 - (1) Sometimes the Appeals Branch of the Division sets Referee Hearings by telephone.
 - (2) You need not, and usually should not, accept a telephone hearing.
- c. Subpoenas will be issued by the Division on behalf of either party to compel attendance of witnesses.
- d. Conduct of hearing.
 - (1) In theory, the party having the burden of proof puts on its case first.
 - (a) In practice, the employer always has to put on its case first.
 - (b) In misconduct cases, the employer clearly has the burden of proof and the obligation of putting its case on first and being cross-examined by the claimant or his representative.
 - (2) Following the employer's proof, the claimant will put on his proof followed by cross-examination by the employer or his representative:
 - (3) If either side is unrepresented by counsel and incapable of putting on its proof, the Referee will elicit proof that appears appropriate.
 - (4) Normally, at the close of proof, the Referee will allow each party to make a closing statement.
 - (a) Employer should make a closing statement stating concisely why benefits should be denied the claimant.
 - (b) The appropriate sections of the statutes and a short summary of the proof that was developed should be cited showing why the employer's position is correct.

- (5) It is important to remember that this hearing is your only opportunity to put on evidence and you must therefore give it your best effort.
 - (a) Have witnesses present with first-hand knowledge of the facts - although Referees are not precluded from accepting hearsay evidence at hearings, it will not prevail against non-hearsay evidence introduced by the other side.
 - (b) If witnesses are not going to be available on the hearing date, make a timely request for a change of hearing date.
 - (c) Referee Hearings are tape-recorded.
- e. Subsequent to the hearing, the Referee will issue a Referee Decision
6. Appeal of the Referee Decision to the Kentucky Unemployment Insurance Commission.
 - a. Either party may appeal the Referee Decision to the Kentucky Unemployment Insurance Commission by sending a letter to the Commission, which letter must be filed with the Commission within fifteen days of the mailing date of the Referee Decision.
 - b. The Commission will notify the parties of a date for the filing of written arguments by the parties (normally 10 days for the appellant and 7 days thereafter for the appellee).
 - c. It may, but seldom does, schedule oral arguments before it by the parties.
 - d. The parties may request a copy of the tape-recording of the Referee Hearing for their use in preparing their arguments.
 - e. After reviewing the written and/or oral arguments of the parties, the Commission will issue its decision to the parties.
7. Appeal of the decision of the Kentucky Unemployment Insurance Commission to the Circuit Court.

- a. Either party may appeal the decision of the Commission to the Circuit Court of the county where the claimant was last employed.
 - b. Such appeals are heard by the Circuit Court on the record in a summary fashion.
 - c. Circuit Court will not reverse a decision of the Commission if it is supported by substantial evidence.
- D. Whether to be represented by legal counsel in Unemployment Insurance proceedings.
1. Prior to an amendment to KRS 341.470, corporate or partnership employers could not be represented in such proceedings by a non-attorney.
 2. However, KRS 341.470(3)(b) provides that corporate and partnership employers may be represented by an officer or manager of the corporation or partnership.
 3. Employers should carefully consider the use of legal counsel to represent them in such proceedings particularly where it appears that the claimant may file other claims, charges or lawsuits against the employer.
 - a. The outcome of the unemployment insurance proceedings will not have res judicata or collateral estoppel effect in subsequent proceedings in other forums. KRS 341.420(5).
 - b. Even though the proceedings do not have a res judicata effect, the psychological effect of defeating the employer in the unemployment insurance proceedings may encourage the employee to file other claims, charges or lawsuits against the employer.
 - c. Also note that statements made under oath in unemployment insurance proceedings may be used for impeachment of witnesses in subsequent proceedings.
- E. General Considerations.
1. Always request a copy of the tape of Referee Hearings whether they are appealed or not.

- a. It contains testimony under oath which may well be inconsistent with the testimony of the former employee in subsequent proceedings before other agencies or courts.
 - b. The tapes are destroyed in approximately 60 days if no appeal has been taken.
2. The Kentucky Unemployment Insurance Commission prepares for sale at cost the Kentucky Unemployment Insurance Digest, a syllabus of Unemployment Insurance Appeal Decisions, the latest having been prepared in 1991.
 3. Definition of "misconduct".
 - a. The general definition is provided by the case of Boynton Cab Company v. Neubeck, Wis., 296 N.W. 636 which has been adopted by the Kentucky courts:

Conduct evincing such willful or wanton disregard of an employer's interests as found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of the employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional disregard of the employer's interests or of the employee's duties and obligations to his employer.

- b. The Kentucky legislature has further defined "misconduct" by non-exclusive example to include:

Falsification of an employment application to obtain employment through subterfuge; knowing violation of a reasonable and uniformly enforced rule of an employer; unsatisfactory attendance, if the worker cannot show good cause for absence or tardiness; damaging the employer's property through gross negligence; refusing to obey reasonable instructions; reporting to work under the influence of

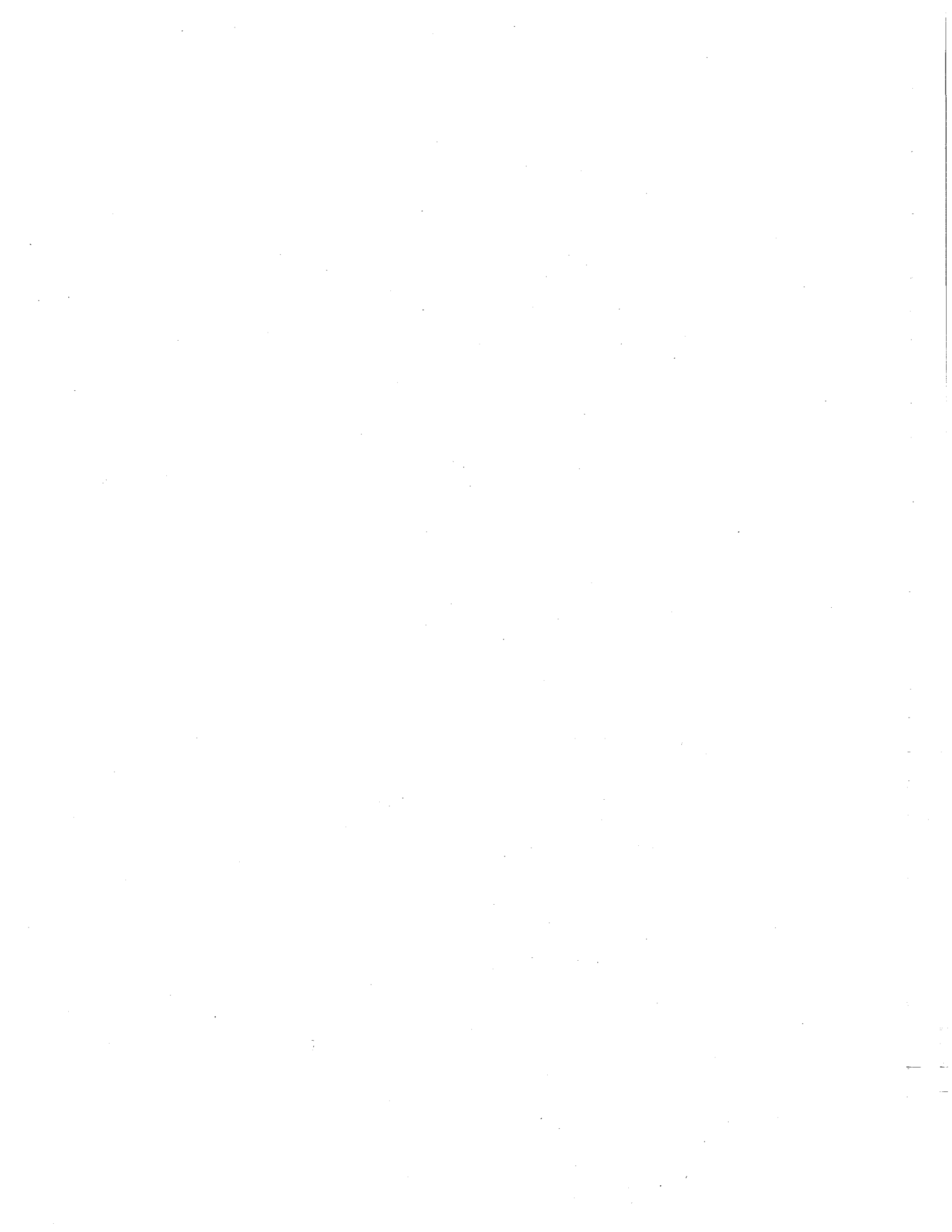
alcohol or drugs or consuming alcohol or drugs on employer's premises during working hours; conduct endangering safety of self or co-workers; and incarceration in jail following conviction of a misdemeanor or felony by a court of competent jurisdiction, which results in missing at least five (5) days work.

KRS 341.370(6).

**HIV POSITIVE PERSONS AND
COMMUNICABLE DISEASES**

Employment and Workplace Considerations

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HIV POSITIVE PERSONS AND COMMUNICABLE DISEASES

Employment and Workplace Considerations

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HIV POSITIVE PERSONS AND COMMUNICABLE DISEASES:
Employment and Workplace Considerations

I. Introduction

Throughout history, persons with certain communicable diseases have been discriminated against by the larger society. The Bible tells of the ostracism of lepers, and during more modern times, victims of tuberculosis and other contagious diseases were shunned and feared. In recent years, the discovery of the human immunodeficiency virus, which causes acquired immune deficiency syndrome (AIDS), has provoked a new wave of fear. Since the AIDS virus was first discovered in the United States in 1981, the public has become increasingly concerned with the spread of this deadly disease. Statistics show that in 1981, 164 people in the U.S. had died from AIDS; in 1993 the death-toll is estimated to be between 53,000 and 76,000.¹

In addition, although once believed to be a disease limited to male homosexuals, AIDS now infects an ever-increasing number of heterosexuals of both sexes. As of March, 1992, an estimated 12,881 individuals (or approximately 25% of the total number infected) had acquired the virus through heterosexual contact.²

Because the disease is terminal and communicable, a fearful public has sometimes attempted to isolate the infected individual from society at large or to otherwise discriminate against AIDS sufferers. This outline will address legal issues as they relate to employment of persons infected with the HIV virus that causes AIDS and persons with other communicable diseases.

¹Krugel, Charles A. AIDS and the ADA: Maneuvering Through a Legal Minefield, July 1993 Labor Law Journal 408.

²Id. at 409.

II. AIDS and HIV

The cause of AIDS is the human T cell lymphotropic virus type III (often referred to as HIV or HTLV-III). A person infected with HIV but who is otherwise asymptomatic is sometimes referred to as being HIV-positive. Medical researchers believe that many persons are infected with HIV but develop antibodies and do not develop further complications. A minority of HIV-positive individuals (perhaps as few as 30%) develop AIDS-related complex (ARC), and a smaller number (estimated as low as 10%) develop AIDS. Persons with AIDS have a severely impaired immune system and are thus susceptible to a variety of other illnesses. There is presently no known cure for AIDS, although several treatments have had limited success in prolonging life and in delaying the onset of more serious complications. AIDS sufferers typically die within five years of diagnosis, not of AIDS itself, but of one or more of the many diseases which the victim's impaired immune system cannot overcome. The diseases that can result from AIDS include pneumonia, cancer and brain degeneration resulting in dementia.

The AIDS virus is found in bodily fluids of infected individuals, including in blood, semen, feces, tears, saliva, human milk and urine. The principal means by which the virus is transmitted between individuals are: (1) sexual contact (2) sharing of contaminated needles (3) transfusions of infected blood or blood products (a cause now virtually eliminated in the United States through improved methods of testing the supply of blood or blood products) and (4) perinatal transmission from an infected mother to infant, either in utero or through breast feeding.

Most medical experts, including the U.S. Centers for Disease Control (CDC), conclude that the disease cannot be transmitted casually, such as by shaking hands, sharing toilets or through food, and there is also believed to be a very low risk of transmission even where there is limited contact with bodily fluids of an infected individual, such as through mouth-to-mouth resuscitation or human bites. Despite these findings, however, the recent highly publicized case of an infected dentist who apparently

transmitted the disease to several patients through dental treatment, has raised new questions and fears regarding transmission.

Blood tests can determine the presence of HIV in an infected individual. Typically, two types of tests are used. First, an inexpensive screening test determines whether blood infection is present. A more expensive, confirmatory test may then be used to verify the positive screening test result. A positive result indicates only that the individual has been exposed to the virus, and not that the individual will develop either ARC or AIDS. Moreover, the antibodies that cause a positive result on blood tests do not develop immediately upon exposure to the virus. An infected person may test negative for several months after exposure.

III. Statutory Framework

A. Federal law. At least five federal statutes have some degree of application to the issues posed by communicable diseases in the workplace. Two of them, the Rehabilitation Act of 1973 (29 U.S.C. 701 et. seq.) and the Americans With Disabilities Act (42 U.S.C. 12101 et. seq.) (ADA) apply directly to employment discrimination against individuals with a communicable disease. Although both of these statutes are designed to prevent discrimination in the workplace, they differ somewhat in their substantive provisions, and significantly in the scope of their applicability and available remedies.

1. The Rehabilitation Act of 1973. This statute provides that "[n]o otherwise qualified individual with a disability... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal Financial Assistance...."

The scope of this Act limits its applicability to employers receiving federal monies. Under Section 504 of the Rehabilitation

Act, an individual may bring a private right of action, and remedies include back pay and attorneys' fees.

2. The Americans With Disabilities Act of 1990. This statute was specifically designed to prevent employment discrimination against a "qualified individual with a disability". A qualified individual is one "with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."

The ADA defines disability as one of the following (a) a physical or mental impairment that substantially limits one or more of the major life activities of the individual; (b) having a record of such an impairment; or (c) being regarded as having such an impairment. The Act expressly states that an employer may not discriminate against an individual with a contagious disease unless the disease poses a "direct threat" to others. It is generally agreed (and at least one court has observed in dicta) that positive HIV status and AIDS-related conditions would be encompassed by the Act's definition of a contagious diseases. See Robbins v. Clark, 946 F. 2d 1331, 1335 (8th Cir. 1991).

Discrimination may exist when "reasonable accommodation" is not made. This includes: "(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (B) job restructuring, part-time or modified work schedules...and other similar accommodations for individuals with disabilities." Employers need not make reasonable accommodation if to do so would present an undue hardship to the employer, which is defined as requiring significant difficulty or expense, when considered in light of the size and financial condition of the employer, as well as other factors, and also takes into account whether the accommodation would disrupt the employer's business.

Medical examinations are permitted under ADA only if they are administered to all employees, if they are required only after an employment offer has been made and before commencement of the employee's duties, and where the reasons for the examination are

job-related and consistent with business necessity. If exams are undertaken, the results must be kept in a separate confidential file.

Because of lobbying efforts by the restaurant and hospitality industry, the ADA permits discriminatory treatment of food handlers suffering from contagious diseases, provided the disease appears on a list to be compiled by the Department of Health and Human Services (DHHS) of infectious and communicable diseases that are transmitted through the handling of food. Despite the exemption, the employer is to determine whether there is a reasonable accommodation that will eliminate the risk of transmission of the disease through food handling. If such an accommodation exists that will not pose an undue hardship on the employer, the employer must provide the accommodation. If no reasonable accommodation without undue hardship is possible, the employer may refuse to assign the person to a food handling job. Although this exemption was intended to afford some comfort to food service employers, it is unlikely that AIDS or HIV positive infection will appear on the list to be maintained by DHHS, in light of the generally accepted fact that these diseases are not transmitted through food.

In contrast with the Rehabilitation Act, the scope of ADA is extremely broad. Any employer with 25 or more employees is covered; after July 26, 1994, any employer with 15 or more employees will be covered. The ADA provides for recovery of attorneys' fees, as well as for compensatory and punitive damages.

3. The Employment Retirement Income Security Act of 1971, 29 U.S.C. 1001-1461 (ERISA). Although a comprehensive discussion of ERISA is beyond the scope of this outline, this statute includes prohibitions against discharging or otherwise discriminating against employees for the purpose of interfering with their right to claim benefits under an employee benefit plan. In a recent case, Folz v. Marriott Corp., 594 F. Supp. 1007 (W.D.Mo. 1984), a U.S. District Court awarded damages to an

employee who was discharged by the employer to avoid the economic consequences of the employee's medical condition (multiple sclerosis) to the employer's self-funded medical plan. AIDS is also an expensive medical condition, and cases have raised the issue of the rights of employers to limit benefits payable for AIDS-related expenses under medical benefit plans. These issues are discussed separately in Section VIII of this outline.

4. Occupational Safety and Health Act, 29 U.S.C. 651 et. seq. (OSHA). Although no reported decisions have as yet involved issues posed by AIDS as they relate to the protections afforded by OSHA, this statute could be used as the basis of a claim by uninfected persons whose assigned tasks place them in contact with infected co-workers or other individuals. As an employer considers whether a contagious employee poses a "direct threat" to others (as contemplated by ADA) it must also determine whether requiring the other employees to work with infected individuals is consistent with its duty to furnish a hazard-free workplace. OSHA also precludes employers from retaliation against employees who refuse to perform assigned tasks that the employees reasonably believe pose a danger.

OSHA has also promulgated guidelines for reducing the risk to health care workers of exposure to blood-borne illnesses. These guidelines are discussed separately in Section VII B of this outline.

5. Family and Medical Leave Act 29 U.S.C. 2601 et. seq. (FMLA). This statute requires that employees receive up to 12 weeks of unpaid leave, either continuous or intermittent, under certain circumstances, including a serious health condition. The EEOC has not yet addressed the issue of whether reasonable accommodation under the ADA could require medical leave in excess of the maximum prescribed by the FMLA. Because of the serious nature of AIDS-related illnesses, however, it is possible that in the absence of

a showing by the employer of undue hardship, leave beyond that mandated by FMLA could be required.

B. State statutes.

1. Handicap discrimination laws. Most states have statutes which prohibit discrimination against handicapped individuals. The definition of handicap and the level of protection afforded varies from state to state, and has resulted in disparate results when AIDS-based discrimination cases are decided. Some statutes specifically exempt discrimination against individuals with contagious diseases from the prohibited conduct.

2. AIDS-specific statutes. Some states, including Kentucky, have enacted statutes which specifically prohibit discrimination against persons infected with AIDS. The Kentucky law prohibiting AIDS-based discrimination is included in the Equal Opportunities Act (K.R.S. 207.130 et. seq.) which, among other things, generally prohibits discrimination in employment because of a handicap.

Under the Act, an employer may not "fail or refuse to hire, discharge or discriminate against any handicapped individual with respect to wages, rates of pay, hours, or other terms and conditions of employment ... on the basis of the results of a human immunodeficiency virus-related test, unless the absence of human immunodeficiency virus infection is a bona fide occupational qualification of the job in question; nor shall any employer limit, segregate or classify handicapped individuals in any way which would deprive or tend to deprive any handicapped individual of employment opportunities or otherwise affect employee status...on the basis of the results of a human immunodeficiency virus related test, unless the handicap or absence of human immunodeficiency virus infection, constitutes a bona fide and necessary reason for the limitation, segregation or classification." K.R.S. 207.150.

In addition, K.R.S. 207.135 specifically grants the protections of the anti-handicap discrimination statute (K.R.S. 207.130 to 207.240) to persons with AIDS, AIDS-related complex (ARC), or human immunodeficiency virus. This section of the law prohibits any person from requiring an AIDS test as a condition of employment or continued employment unless the absence of the virus is a bona fide occupational qualification (BFOQ) for the job in question. The burden of proof as to the BFOQ is on the employer, who is required (i) to ascertain whether the employee is currently able to perform the duties of the job in a reasonable manner or whether the employee will pose a "significant risk" of transmitting the virus to others in the course of normal work activities and (ii) to establish that there is no means of reasonably accommodating the employee's AIDS status short of requiring the test. K.R.S. 207.135(2)(b).

The statute further provides that if an employer asserts that an AIDS-infected individual is not otherwise qualified for the job, the employer has the burden of proving that no reasonable accommodation can be made to prevent the likelihood of exposure of others to a significant possibility of becoming infected. K.R.S. 207.135(3)(c). Finally, the statute prohibits discrimination against licensed health care professionals on the basis that they treat or provide care to AIDS-infected individuals. K.R.S. 207.135(d).

IV. Federal Case Law

The United States Supreme Court has not yet addressed the subject of AIDS and employment discrimination. Moreover, much of the case law pertaining to communicable diseases in employment developed prior to passage of the ADA, either under the Rehabilitation Act or various state anti-discrimination statutes. In light of the comprehensive scope of ADA, however, practitioners should expect courts to grant at least as much protection to employees with communicable diseases in cases brought under ADA as has been afforded under these older statutes.

A. School Board of Nassau County v. Arline. The leading case dealing with contagious disease in the workplace was decided under the Rehabilitation Act. In that case, School Board of Nassau County v. Arline, 480 U.S. 273 (1987), reh'g. den. 481 U.S. 1024 (1987), the United States Supreme Court was presented with the case of an elementary school teacher who had been discharged after suffering a relapse of tuberculosis. The Court's determination centered on whether the teacher's continued presence in the workplace constituted a significant risk of passing the disease to others. The Court outlined four factors to be considered in such a determination. They are: (1) the nature of the risk (i.e., how the disease is transmitted); (2) the duration of the risk (how long the carrier is infectious); (3) the severity of the risk (the potential harm to others); and (4) the probabilities that the disease will be transmitted and will cause varying degrees of harm.

B. AIDS-Based Discrimination. Most of the reported decisions have found that it is illegal to discriminate against an employee on the basis of AIDS or HIV-positive status. An early federal case, Chalk v. United States District Court of Central California, 840 F. 2d 701 (9th Cir. 1988) is typical. In that case, Chalk, a certified teacher of hearing-impaired students, was removed from his teaching assignment and offered an administrative position after having been diagnosed as having AIDS. In reversing the district court's finding in favor of the school board, the Ninth Circuit, basing its decision largely on Arline, issued an injunction allowing Chalk to return to the classroom. In its holding, the court observed that since the disease cannot be casually transmitted, the risk to the students was minimal.

Similarly, in the now well-known case of Cain v. Hyatt, 734 F. Supp. 671 (E.D. Pa. 1990), a federal district court found that Hyatt Legal Services had illegally discriminated against one of its regional partners by relieving him of his duties within a week of his being diagnosed with AIDS. The court, interpreting the Pennsylvania Human Relations Act, found that there was no actual

risk of infection to others in the workplace. The plaintiff was awarded damages for mental anguish and humiliation, backpay, and punitive damages.

C. No Discrimination Found. In a minority of decisions, courts have declined to find that AIDS was a handicap or that the employer's conduct was discriminatory. In Hilton v. Southwestern Bell Telephone Co., 936 F. 2d 823 (5th Cir. 1991), the plaintiff's employer refused to return him to his position after ARC-related illness forced absence from his job. He sued under the Texas Human Rights Act alleging discrimination. The Fifth Circuit found that the plaintiff was not a handicapped person under the Texas Act. In so doing, the court strictly construed the statute, noting that the physical conditions in the statute referred to physiological not pathological conditions. The court determined that AIDS was an "invisible, pathological" condition. The court also noted that the plaintiff's illness made him unable to perform the duties of his job. This last ground for the decision appears to be a sound one, and could alone have supported the decision. In light of ADA and the majority of cases which find that AIDS does constitute a disability, employers should likely not rely on the highly technical distinction as to physical condition drawn by the Hilton court.

HIV testing was involved in another case where no discrimination was found. In Leckelt v. Board of Commissioners of Hospital District No. 1, 909 F. 2d 820 (5th Cir. 1990), interpreting Section 504 of the Rehabilitation Act, the defendant hospital fired the plaintiff for refusing to disclose the positive result of a private HIV test he had taken. The hospital successfully argued that it needed the results in order to undertake reasonable accommodation of the employee's condition. The court further determined that the plaintiff-employee's actions rendered him otherwise not qualified to perform his duties. This case is significant in that it involves an infected health care

worker and thus, presumably, a higher risk of transmitting the infection to others.

V. State Case Law. Most litigation related to AIDS- and communicable disease-based discrimination in the workplace has occurred at the state level. Many of those cases hold that employees with AIDS are handicapped persons for purposes of state anti-discrimination laws.

A. AIDS-Based Discrimination. A typical state case is Raytheon Co. v. Fair Employment & Housing Commission, 261 Ca. Rptr. 197 (Cal. App. 1989). In that case, the plaintiff, a three-year employee of Raytheon, was diagnosed as having AIDS and was hospitalized for several weeks. After receiving permission from his doctor to return to work, he sought to do so, but was required to submit to a physical examination. Through the examination, the employer's medical advisor became aware of his condition and, after a thorough review of medical literature about the disease and its transmission, cleared the employee to return to work. Despite the medical findings, the employer delayed his return to his duties; eventually, the plaintiff developed Kaposi's sarcoma, a cancer associated with AIDS. At that point, the employer refused reinstatement, citing as its reason the fact that he had AIDS and that co-workers would be exposed to the risk of contracting the disease from him.

The employee filed complaints alleging discrimination based on physical handicap. The state administrative agency found that he had been discriminated against on this basis, and the employer appealed. The California Court of Appeals for the Second District found in the employee's favor, indicating that an employee with AIDS was suffering from a physical handicap and that the risk of transmission to co-workers had been exaggerated by the employer.

B. Positive HIV Status. Additional questions are presented when the employee does not have AIDS or, in fact, any symptoms, but

has merely tested positively for the HIV virus. Several state court opinions have discussed this issue, and reached differing conclusions. In Benjamin R. v. Orkin Exterminating Co., 390 S.E. 2d 814 (W.Va. 1990), an employee who advised his supervisor of HIV-positive test results was subsequently discharged and filed a discrimination claim against the employer. The federal court receiving the complaint certified the question to the West Virginia Supreme Court as to whether an HIV-positive person was handicapped within the West Virginia anti-discrimination statute. The state court found that HIV-positive status was a protected handicap under the statute even in the absence of symptoms. The court emphasized that the medical condition would have a strong negative impact on "socialization", which the court found to be a "major life function".

An opposite result was reached in Burgess v. Your House of Raleigh, Inc., 388 S.E. 2d 134 (N.C. 1990). There, the North Carolina Supreme Court upheld the discharge of a restaurant cook who had tested positive for the HIV virus. The court in Burgess found that the language of the state statute was not intended to protect persons with HIV. It is important to note also that the North Carolina statute contained a communicable disease exemption, i.e., a provision that permitted discrimination against persons with communicable diseases. Also, the court noted that the legislature had made subsequent modifications to the statute without adding a provision protecting HIV-positive individuals. (In 1989, however, North Carolina enacted the Communicable Disease Law, N.C. Gen. Stat. Sec. 130-A-148, which now protects HIV-positive individuals.)

Also of note is the fact that following the Court's decision in Arline, the Department of Justice reversed an earlier analysis of the issue of whether an employee is disabled if the discrimination suffered was the result of fear of contagion. The department's more recent opinion indicates that the federal definition of "handicapped" would encompass asymptomatic carriers of HIV as well as sufferers of AIDS. See Application of

Rehabilitation Act's Section 504 to HIV-Infected Individuals, Memorandum of the U.S. Department of Justice, Daily Lab. Rep. (BNA) No. 195, at D-1 (Oct. 7, 1988).

C. False Perception of HIV Infection. Yet another category of cases involves employees who have neither AIDS nor HIV, but who are falsely rumored or perceived to have AIDS or HIV. Courts are divided as to whether these individuals should be afforded the protection of state handicap anti-discrimination laws. In a typical case, Sanchez v. Lagoudakis, 486 N.W. 2d 657 (Mich. 1992), an employer fired a waitress who was rumored to have AIDS. The employer first required her to submit medical evidence indicating she did not have the disease. She did so, but refused to return to work due to the humiliation she claimed to have suffered, and then filed a complaint of discrimination. The court found for the employee, finding first that AIDS was a handicap under Michigan law, and then finding that it is the employer's conduct, "the employer's belief or intent - and not the employee's condition" that must be examined. Id. at 660.

In contrast to Sanchez, the case of Rose City Oil v. Missouri Commission on Human Rights, 832 S.W. 2d 314 (Mo. Ct. App. 1992) holds that employer conduct based on false perception of AIDS is not discriminatory. In that case the court found that the plaintiff had no condition that would be protected under the statute.

No Kentucky cases have been reported in which the issue has been addressed. It is important to note that the Kentucky statute does not expressly address the issue of perceived, rather than actual, disabilities. HIV positive persons are specifically protected, however, even in the absence of symptoms. Moreover, under the ADA an individual is regarded as disabled even if he or she is only perceived to have an impairment, which is defined by regulation as an inability to perform a major life activity that the average person in the general population can perform, or can only perform with significant restrictions. See Regulations to

Implement the Equal Employment Provisions of the Americans With Disabilities Act, 29 C.F.R. part 1630 (1992) (hereinafter cited as "ADA Regulations").

VI. Employer Defenses to Discrimination Claims. In addition to asserting that the AIDS-related or other communicable disease is not a disability or handicap under applicable law, employers may defend against claims by asserting that reasonable accommodation cannot be made due to undue hardship, or that despite reasonable accommodation, the infected person poses a direct threat to others.

A. Direct threat. The employer may discriminate against an individual with a communicable disease if that individual would pose a direct threat to others in the workplace. This has been defined to mean a significant risk of substantial harm to the health or safety of the individual or others that cannot be reduced to an acceptable level or eliminated by reasonable accommodation.

The fear of workplace transmission of AIDS is simply not supported by experience. Through August of 1991, the CDC had confirmed only 28 cases of AIDS through occupational transmission. This represents a total of less than 0.003% of all reported cases of AIDS. Moreover, there are no known cases of casual transmission of the disease in the workplace. Despite the relatively small risk of transmission, however, the nature of tasks performed by health care workers involving contact with bodily fluids and tissues makes the fear of infection a reasonable one. For this reason, many of the cases interpreting whether a "direct threat" exists involve health care employment.

The "direct threat" defense requires an employer to engage in a risk analysis. The EEOC has stated that the employer should consider the duration of the risk, the nature and severity of the harm, the likelihood that the harm will occur, and the imminence of the potential harm. 29 C.F.R. Sec. 1630.2(r) (1992). This analysis is a departure from pre-ADA cases, in which employers were permitted to restrict a health care worker's activities when faced

with virtually any possibility of infection to others. In Estate of Behringer v. Medical Center at Princeton, 592 A. 2d 1251 (N.J. Super. Ct. Law Div. 1991), for example, a "no risk" standard was applied to permit the employer-hospital to ban a surgeon with AIDS from performing invasive procedures. This case could well have had a different outcome under the ADA, since the CDC has issued guidelines which suggest case-by-case study by a medical review board and the consistent use of certain prescribed safeguards by all health care workers. See generally, Prewitt, R.B., "The Direct Threat Approach to the HIV-Positive Health Care Employee Under the ADA," 62 Miss. L.J. 719 (Spr. 1993).

In general, the CDC guidelines attempt a determination of whether a given health care task renders others "exposure prone to transmission of infection by the health care worker." The guidelines, coupled with increasing knowledge about AIDS and the methods by which it is transmitted, have resulted in decisions more favorable to the employee than that rendered in Behringer. For example, in In re Westchester County Medical Center, No. 91-504-2 (Dep't. HHS App. Bd. April 20, 1992), an administrative proceeding, an HIV-positive pharmacist was permitted to continue his regular duties- including preparation of intravenous materials - when the judge determined there was no significant risk of transmission of the disease.

B. Reasonable accommodation. Once a significant risk of transmission is determined to exist, the employer must examine whether the risk of infection to others can be negated by reasonable accommodation. Reasonable accommodation initially involves analyzing the job's functions to determine which are considered essential and which are marginal. Reasonable accommodation may include restructuring the job, i.e., reallocating or redistributing nonessential job functions of the infected worker. It may also involve altering when or how essential functions of the job are performed, but does not require

elimination of essential job functions. 29 C.F.R. app. Sec. 1630.2(o) (1992).

If the infected employee cannot be reasonably accommodated in his original position, the ADA appears to require that he or she be reassigned to another vacant position if no undue hardship to the employer would result. However, reassignment will not substitute for a less drastic form of accommodation. See Chalk v. United States, 840 F.2d 701 (9th Cir. 1988), in which the reassignment of a teacher with AIDS constituted illegal discrimination since the classroom position posed no significant risk of infection to others. A similar result was reached in the Westchester case discussed above.

C. Undue hardship. An employer is not required to make accommodation if to do so would result in an undue hardship to it. In interpreting this part of the statute, courts are to look not only to the type of accommodation being sought, but also to the effect of the accommodation on the employer, the ability of other employees to perform their duties, and the impact on the employer's ability to conduct its business. ADA Regulations Sec. 1630.2(p) (2) (v). The analysis requires the court to determine first whether the disabled employee can perform the required job duties with an accommodation, and then whether the accommodation imposes an undue hardship on the employer.

In Dexler v. Tisch, 660 F. Supp. 1418 (D. Conn. 1987), a case decided under the Rehabilitation Act, the court evaluated the means of accommodation proposed by the applicant, and then determined that those alternatives would be costly, potentially unsafe, and would often leave the individual without sufficient work to do. The court found the proposed accommodation to be an undue burden on the employer, and accommodation was therefore not required. Similarly, in Davis v. United States Postal Service, 675 F. Supp. 225 (M.D. Pa. 1987), the court stated that the employer was not required to violate existing contracts in order to reassign a disabled employee who was otherwise unqualified for reassignment.

The amount of additional expense necessary to establish an undue hardship will be a function of the size and assets of the employer. Moreover, if additional funds to pay for the accommodation are available from another source (such as a government program, tax credits or from the employee seeking accommodation), those resources will be taken into account in determining the employer's actual cost of the proposed accommodation. 29 C.F.R. 1630.2(p).

Although, as in Dexler, the actual cost of accommodation will be considered in determining whether an undue hardship exists, an employer's concern over anticipated or future costs-including higher insurance costs- has not been recognized by courts. In State Div. of Human Rights ex rel. McDermott v. Xerox Corp., 480 N.E. 2d 695 (N.Y. 1985), another pre-ADA case, an employer claimed that an obese employee would cost the employer more in future health care costs, citing studies that connected obesity with greater risk of health problems. The court rejected this argument, stating that employment can be refused only when the condition is related to performing the job duties. Judicial guidance is not yet available on the issue of when an employer may find that the employee's anticipated absence from work constitutes an undue hardship, but in light of the McDermott decision and ADA regulations, the employer seeking to avoid litigation should base its actions on current attendance patterns, rather than anticipated absences.

A significant issue that has not yet been judicially determined is the right of an employer to take what might otherwise be discriminatory action against an employee with a communicable disease due to adverse public reaction to the presence of the employee in the workplace. This issue could arise in the context of retail (especially food service) businesses as well as in the health care area. Despite the medical evidence that AIDS is not transmitted casually or through food, customers may choose not to patronize establishments where an infected worker may handle their food or deliver their health care. Congress attempted to address this issue for restaurants by including the narrow food-handlers'

exemption in the ADA; however, this portion of the statute will be of limited use to employers unless AIDS and related diseases are found to be transmittable through food - a finding that appears highly unlikely in light of currently available data.

Can an employer suffering substantially reduced revenues claim that to continue to employ an infected individual in a customer-contact or food-handling position is an undue hardship? Regulations have already established that the irrational fears and prejudices of co-workers and resulting disruption of business will not constitute undue hardship. 29 C.F.R. 1630.15(d). In light of this regulation, claiming undue hardship based on an unfounded public perception seems risky. A better course of action would be support for public education as to the methods by which these diseases are, and are not, transmitted.

VII. Other Employment Issues

A. HIV testing. An issue frequently raised in the area of health care employment is when, if ever, it is permissible to test employees for the presence of HIV. Calls for mandatory testing intensified recently when the infection of several dental patients by Dr. David Acer became front-page news. One of those patients, Kimberly Bergalis, is believed to be the first patient to have become infected with AIDS from a dentist.

Following this publicity, several pieces of federal legislation were proposed to require that health care workers be tested for the presence of the virus, and that the public be advised as to the test results. No mandatory testing or disclosure laws were enacted; however, an amendment by Senators Robert Dole and Orrin Hatch was passed by both houses and requires each state, as a condition to receiving federal public-health funds, to adopt CDC guidelines or a substitute measure, in its health care licensing laws.

Virtually all professional medical associations and the CDC oppose mandatory testing, but support voluntary testing. The

primary opposition to mandatory testing is the extremely low incidence of transmission of HIV from health care worker to patient and the fact that adherence to the guidelines described above is believed to further reduce the risk.

Employers who are contemplating a mandatory testing requirement will need to consider several key issues, including (for public employers) Fourth Amendment rights, the right to privacy, and state and federal discrimination policies. As a preliminary inquiry, the employer must establish a need for the testing, i.e., that the job for which testing is a requirement interacts with others in such a way as to present a risk of transmission of blood-borne disease.

If the employer can establish that such a risk exists, a court will likely require that it further establish that the risk cannot be eliminated or reduced to acceptable levels through adherence to established safety guidelines. This should be easier to establish for positions in the health care industry where the risk of exposure to blood and bodily fluids of others is high.

1. Preventive Care Guidelines. Both the CDC and OSHA have issued guidelines intended to minimize the risk of transmission of blood-borne illnesses in the workplace. (It is interesting to note that although the threat of HIV has received wide publicity, the hepatitis B virus (HBV) is more readily transmittable in the health care arena than is HIV). For a description of these guidelines, see generally Huebner, "Mandatory Testing of Health Care Workers for AIDS: When Positive Results Lead to Negative Consequences", 37 N.Y.L. Sch. L. Rev. 339 (1992). These detailed recommendations are intended to be applied universally by health care workers and would reduce both the risk of transmission of infection from worker to patient and the risk of transmission from patient to worker. These guidelines can be especially helpful to health care employers who are faced with the issue of whether reasonable accommodation for HIV infection can be accomplished without undue risk of

transmission to others, and whether to undertake testing of employees in high risk areas.

2. Privacy Rights. In determining whether mandatory testing is appropriate, courts seem likely to apply a balancing test, weighing the employee's right to privacy and Fourth Amendment rights (if applicable) against the public safety issues presented. The right to privacy applies not only to the employer's right to require testing, but also to the subsequent disclosure of test results.

In most cases where the court was presented with a challenge to mandatory testing based on the right of privacy, the right to test was upheld. In Plowman v. United States Department of Army, 698 F. Supp. 627 (E.D.Va.1988), the Army tested a civilian employee without his consent and advised his supervisors of the result. The court found no violation of privacy rights. Similarly, in Local 1812, American Federation of Government Employees v. Department of State, 662 F. Supp. 50 (D.D.C. 1987), no violation of a privacy right was found where the Department of State required HIV testing as part of a medical fitness program. In that case, the court also noted that although an individual may experience psychological difficulties as a result of receiving adverse test results, those concerns do not raise constitutional privacy issues.

Other courts have recognized a privacy right, but have found it outweighed by the compelling state interest in protection of uninfected persons. See, e.g., Harris v. Thiipen, 727 F. Supp. 1564 (M.D. Ala. 1990), regarding testing of prisoners, and Johnetta J. v. Municipal Court, 267 Cal. Rptr. 666 (Ct. App. 1990).

Courts appear more willing to find violation of a right of privacy when the issue is raised in the context of disseminating test results, rather than the employer's right to test at all. In Woods v. White, 689 F. Supp. 874 (W.D. Wis. 1988), the court found that a prisoner had a right to privacy that precluded discussion of his test results with other prisoners and non-medical personnel. See also Doe v. Borough of Barrington, 729 F. Supp. 376 (D.N.J.

1990); but see In re Milton S. Hershey Medical Center, 595 A. 2d. 1290 (Pa. Super Ct. 1991), where strictly controlled disclosure on a need-to-know basis did not violate privacy rights of an HIV-positive physician.

3. Fourth Amendment Considerations. Fourth amendment protection against unreasonable search and seizure can also be a challenge to mandatory testing in the context of public employment. Blood testing has been found by the U.S. Supreme Court to be a personal search subject to Fourteenth Amendment protections. Schmerber v. California, 384 U.S. 757 (1966). In at least one case, these constitutional protections have been found to outweigh the need for mandatory HIV testing of employees, in light of the low risk of transmission of disease in the workplace context presented. Glover v. Eastern Nebraska Community Office of Retardation, 686 F. Supp. 243 (D. Neb. 1988).

B. Protection of Workers. OSHA requires that employers provide employees with a workplace free of hazards that pose a risk of death or serious harm. While most AIDS litigation has focused on the infected employee and his or her rights to remain employed, OSHA's provisions require employers to take appropriate precautions to assure the safety of all employees in the workplace. In the case of uninfected employees, this means adopting procedures that minimize the risk of infection by co-workers or others, such as patients in a health care setting.

OSHA has promulgated guidelines to reduce the risk of transmission of AIDS and other blood-borne diseases. 29 C.F.R. Sec. 1910.1030(d)(3). Under these guidelines, health care employers are required to implement a plan to control exposure to these diseases. The plan would include providing employees with protective equipment, sterilizing and disinfecting the workplace at appropriate intervals, providing designated areas for disposal of potentially contaminated wastes, training workers in proper safety procedures and providing HBV vaccinations to employees free of

charge. Compliance with these guidelines will be monitored by OSHA through its inspection process and penalties for noncompliance may be assessed. 29 U.S.C. Secs. 657, 666 (1988 & Supp. 1990).

VIII. Limitation of Health Care Benefits of Infected Persons

The rapidly increasing number of infected individuals and the relatively high cost of AIDS treatment (estimated at upwards of \$85,000 in lifetime costs per victim) have led insurance companies to attempt to reduce their exposure to AIDS-related claims. Many private insurers now employ underwriting criteria such as blood tests or questionnaires intended to screen out persons who may develop AIDS or related diseases.

Unlike private insurance companies, employers who provide or sponsor group health benefits to employees generally base their decision to insure an employee on his or her employment status with the employer, not on the likelihood that he or she will develop HIV infection. As employers have become increasingly concerned about the high cost of AIDS-related claims (especially since they have a lesser ability than insurance companies to keep the potential AIDS-claimant out of the insured pool), some have sought to control or limit these costs through reducing or limiting benefits for these claims. In several instances, litigation has resulted over the issues of whether, and to what extent, health care benefits for AIDS can be limited.

In many instances workplace-based health benefits are funded by the employer, plan participants, or some combination of the two, with little or no third party insurance protection. These self-funded plans are governed not by insurance law but by the employee benefits regulatory framework of ERISA.

In McGann v. H & H Music Co., 946 F. 2d 401 (5th Cir. 1991), cert. den. sub. nom. Greenburg v. H & H Music Co., 113 S. Ct. 482 (1992), a five-year employee was diagnosed with AIDS. At the time of diagnosis his employer maintained a health benefit plan that was provided through group health insurance purchased from an insurance company. The coverage had maximum lifetime benefit limits of \$1

million. Seven months after the AIDS diagnosis, the employer replaced the insurance plan with a self-funded plan, which contained a lifetime benefits cap for AIDS of \$5,000. No other benefit limitation for a specific disease or condition was implemented. The plaintiff brought suit under an anti-discrimination provision contained in Section 510 of ERISA. Summary judgment was granted for the employer, who argued that it had imposed the cap for cost containment, and the decision was affirmed by the Fifth Circuit.

Similarly, in Owens v. Storehouse, Inc., 984 F. 2d 394 (11th Cir. 1993), the court upheld an employer's right to cap its AIDS-related coverage under a self-funded health benefit plan. The cap was imposed after five employees had been diagnosed with AIDS. In that case, the court specifically rejected that the employer's fiduciary duty under ERISA precluded establishment of the benefits cap, and also found that ERISA pre-empted state law that might have afforded the plaintiffs additional protection.

It is important to note that both Greenburg and Owens were decided before the effectiveness of the ADA. Although early indications based on legislative history led commentators to suggest that benefit caps such as those upheld in Greenburg and Owen would still be permissible under ADA, EEOC regulations now prevent exclusions and limitations on benefits that are a subterfuge for disability-based discrimination. EEOC Regulations to Implement the Equal Employment Provisions of the ADA, 29 C.F.R. 1630.16(f) (1993).

Several cases resulting in reinstatement of higher benefit limits have been settled since the adoption of these regulations. See, e.g., EEOC v. Connecticut Refining Co., EEOC Chg. Nos. 161-93-0253, 0254 (3/9/94) and Estate of Kedinger v. IBEW Local 110, 63 Emp. Prac. Dec. (CCH) Par. 42,783 (D.Minn. 1993). In light of the regulations and these settlements, employers who wish to justify benefit caps for AIDS should seek to maintain parity with benefits offered for other catastrophic diseases.

IX. Summary

How can an employer meet its fair employment obligations when faced with the possibility of an applicant or employee with a serious communicable disease? First, employers should adopt a policy for the handling of applicants and employees with infectious diseases that complies with applicable laws and is consistent with the approach the employer wishes to take on this issue. Also a written job description should be developed for each position, clearly setting forth the necessary qualifications, including any that could be affected by an individual's infectious status. Essential and non-essential job functions should be clearly distinguished.

During the recruitment process, it is not advisable to ask applicants generally whether they have a disability; however, the employer could provide the applicant with the job description and advise him or her that the employer wishes to make reasonable accommodation for disabled applicants and employees as required by law. The application should ask whether the applicant has any disabilities that would require accommodation in order to perform the job's required duties. Based on the applicant's response, the employer should evaluate whether reasonable accommodation is possible, or whether it would pose an undue hardship.

Applicants who will be otherwise qualified with or without reasonable accommodation must be evaluated on the same basis as non-disabled individuals throughout the remainder of the hiring process. If an applicant has been offered employment, a medical exam may be required, but only if it is job-related and serves a business necessity. Results must be kept confidential and in a separate file.

Health care employers have a special responsibility to also evaluate whether the nature of the job's duties will pose an undue risk to others of transmitting a serious communicable disease. Those employers should determine the extent to which they believe that testing for the presence of infection is necessary to assure that no undue risk exists. If testing is undertaken, the

results should be kept confidential and disclosed only on a need-to-know basis consistent with the employer's responsibility to others, such as patients or co-workers. Employers whose work involves food handling will want to determine whether the communicable disease exemption from the ADA's provisions will apply to the disability presented.

Once an employee is on the job, if his or her disability status changes, or medical condition worsens, the employer must evaluate anew whether reasonable accommodation can be made. In some instances, this could involve decreased responsibilities and reassignment to a completely different job.

In light of recent regulation and until additional judicial guidance is available, health benefit plans should be evaluated to determine whether the benefits offered are non-discriminatory. At a minimum, employers should avoid singling out one disease or disability for coverage limits that differ substantially from other types of illnesses.

Finally, because in the case of contagious diseases such as AIDS any discriminatory treatment for the disabled employee must be based on the nature of the disability itself, not on co-workers fears or perceptions, the employer may want to consider ongoing, pro-active educational programs for its workforce, including explanation of the ways that these diseases are, and are not, transmitted.

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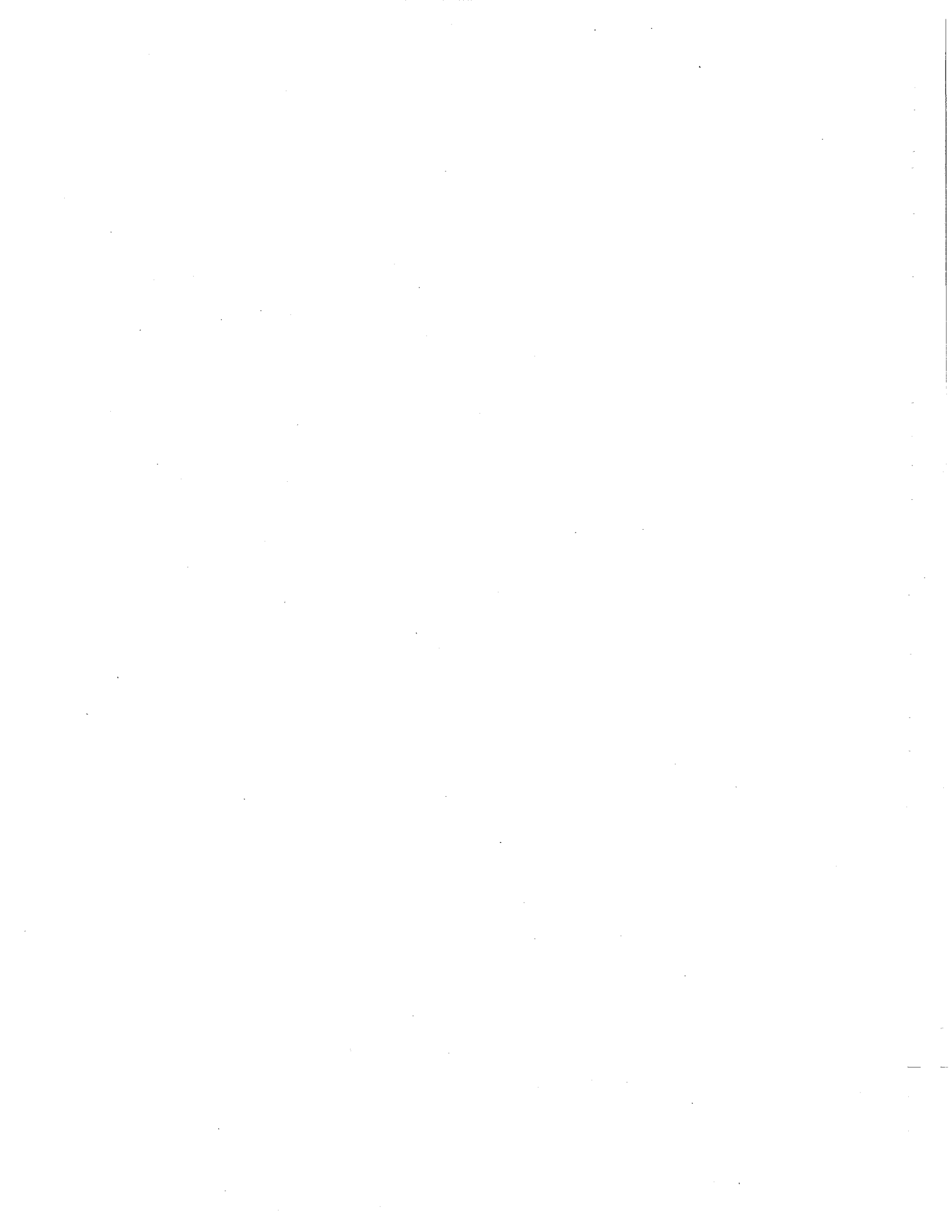
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VIOLENCE IN THE WORKPLACE

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VIOLENCE IN THE WORKPLACE

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I. INTRODUCTION¹

A. The Need For Action

Prior to 1980, the thought of developing strategies, utilizing resources, or attending seminars in preparation for violence in the American workplace, would probably have seemed a waste of time and effort. Our presence here today is a reflection of the fact that the nature of what was once thought of as sacrosanct -- the American workplace -- has undergone a dramatic transformation over the last decade.

Employers' concern and awareness of this issue is growing across the country. Some, however, even in view of the escalating violence seen regularly on the evening news, still harbor an "it couldn't happen in our organization" attitude. In an effort to create a sense of reality for anyone who consciously or unconsciously shares this minority view, let's begin with some troubling statistics.

Not a month goes by without a violent incident in the American workplace. The National Institute of Occupational Safety and Health reports that homicides are the key job safety issue to be dealt with in the 1990's, with a current average rate of 15 workplace murders each week in the United States. Violence is the leading cause of occupational fatalities among all workers and the leading cause of death for women. The Institute reports that homicides account for 12% of the workplace deaths, and that about 41% of the women killed on the job in the last decade were homicide victims.

Today, more than 1000 Americans are murdered on the job each year. This is 32% more than the annual average in 1980. More than 2 million employees suffer physical attacks on the job each year and more than 6 million are harassed or threatened in some way.

The human devastation represented by these statistics are shared with us regularly by the media. For example:

- * An unemployed man with a shot gun and pistol opened fire killing four and wounding four in a California unemployment office.
- * An employee of a marketing company shot himself and a co-worker in a suburb of Maryland.
- * A custodian doused a company bookkeeper and set her on fire because his paycheck was late.

¹The author acknowledges the contributions of Lisa May Evans, Law Clerk, Dinsmore & Shohl, who assisted in the preparation of this outline.

- * A Federal Express pilot attacked three co-workers in flight in the cockpit of a DC-10.
- * A purchasing manager in Chicago stabbed his boss to death over a disagreement about how paperwork should be handled.
- * A disgruntled technician who had quit his job came back to the lab where he worked with a 9mm Glock semi-automatic pistol. By the time he had finished shooting, two were dead and two were injured.

Workplace violence is a non-discriminating phenomenon. The potential for violence exists in any type of organization from a high-tech fiber optics laboratory to a Chuck E. Cheese restaurant. In a survey conducted by the Society for Human Resource Management, of the 479 American companies polled, 67% reported that there had been incidents of violence in their workplace. The following is a list of other interesting statistics from the study:

TYPE OF INCIDENT

- 75% Fist fights, altercations
- 17% Shootings
- 8% Stabbings
- 6% Sexual Assaults

TARGET OF ATTACK

- 54% Employees by employees
- 13% Supervisors by employees
- 7% Employees by customers

REASON FOR ATTACK

- 38% Personality conflicts
- 15% Family problems
- 10% Drug or alcohol abuse
- 8% Non specific stress
- 7% Firing/layoffs

2% Violent criminal history

Source: The Society for Human Resource Management, Alexandria, VA

B. Factors Influencing the Increase of Workplace Violence.

A TIME/CNN poll in April of this year reported that 30% of Americans see workplace violence as a growing problem, 18% have witnessed violence at work, and another 18% are worried about becoming victims themselves. The effect of these real fears on productivity and other areas can not be overstated.

Experts state that various factors are influencing the increase in workplace violence in America. Many of today's workers feel powerless, demoralized, and under-valued, and as a result, become very violent and angry when confronted with increasingly stressful situations. According to James Fox, the Dean of the College of Criminal Justice of Northeastern University, ". . . more and more ex-employees are angry and are taking out their anger in a violent way."

While the obvious influence of increasing violence in society as a whole is yet another factor, experts also blame the fact that work environments have become harsher, the rate of layoffs has increased, and workers often feel that they are not valued and have an ongoing sense of insecurity in relation to their jobs. Experts state that because many workers gain their self-esteem through work, they naturally feel threatened when their jobs are in jeopardy. Employers need to understand that, in this situation, employees feel cornered and much like frightened animals. As a result, they may feel that the only alternative is to lash out at the tormentor.

A recent article in the Occupational Safety and Health Reporter stated that, "[e]mployees are about twice as likely to be attacked in the workplace by customers as by co-workers, with nearly 68% of such violence attributed to clients, patients, and other strangers." The article contained the results of a report issued by the Northwest National Life Insurance Company.

Several surveys also suggest that the increased use of drugs and alcohol are viewed as contributing factors in the rise of workplace violence. The availability of guns and pervasiveness of violence in the media have also been considered to be factors, though to a lesser degree than drugs and alcohol.

The real point is that no one knows who is or will become, under varying circumstances, the volatile employee. A naive belief that it cannot or will not happen at your place of business only serves to create a false sense of security which will potentially

jeopardize your safety and the safety of others on your premises. The issue remains that the time to plan for the violent event is now, before confronted by a volatile employee.

In an effort to combat the problem of increasing workplace violence, a report from the National Safe Workplace Institute (a non-profit research, education and service organization located in Chicago, Illinois), recommended that employers implement "responsive" policies and procedures. The report also stated that most employers wait for a violent event before seriously addressing the problem of workplace violence; and most have been slow to view workplace violence as a separate issue, and instead, lump it with other human resource or security matters.

In businesses and organizations all across America, private as well as state and federal government agencies have begun to take action to address this issue. While no one has all of the answers, experts have been busy designing comprehensive plans and strategies to reduce employer exposure from potential violence and potential law suits. The United States Surgeon General, Dr. M. Joycelyn Elders, has outlined steps employers can take to create work environments that foster more harmonious relationships between employees. This is in the wake of state court decisions holding employers liable, in tort, for failure to protect their employees, customers, clients, and others lawfully on their premises from known dangers.

While the threat to human life and safety is the paramount concern to be addressed in any plan to reduce workplace violence, other costs, in the form of lost productivity, health care costs, lawsuits, higher worker's compensation premiums and other expenses can also be substantial. The National Safe Workplace Institute estimates that workplace violence cost employers 4.2 billion in 1992. Therefore, employers are being directed to plan for workplace violence in the same way they plan for changes in the market or future growth. The overall plan should be a forward looking, calculated and thorough analysis of the individual workplace and the organizational culture, as well as the characteristics of the individuals routinely on the premises.

C. Presentation Objectives

While no plan of action can be developed to eliminate workplace violence, the first step in any plan must include an understanding of the risks, responsibilities and liabilities. The objectives of this presentation will be to:

- * Discuss the state of the law regarding employer liability for workplace violence. This will include a discussion of the limited case law and statutory law in this region and trends which are developing nationwide to expand

employer liability for injuries arising out of violent incidents in the workplace.

- * Summarize the information available to help employers identify potentially violent employees and potentially dangerous environments.
- * Present an overview of strategies employers can use to reduce the risk of workplace violence.
- * Discuss ways to develop a response plan for handling crisis situations.

II. LEGAL ISSUES RELATED TO REDUCING THE RISK OF WORKPLACE VIOLENCE

Because crime is becoming more foreseeable, the duty to protect against it is being placed on employers more and more often as laws continue to expand in favor of employees across the country. Just as the sexual harassment laws have emerged to place a greater responsibility on employers for the acts of employees, courts are beginning to erode generally accepted principles which had, in the past, served to limit employer liability.

While in general, the legal impetus for this change is beginning in the courts, many state statutes are also being used to place additional duties upon employers. For instance, in 1991, California adopted a law which requires employers to respond to known dangers in the workplace. While the law was not necessarily intended to apply to workplace violence, it is hard to avoid the possibility of it being used by a plaintiff, where there is evidence that the employer knew of a risk and failed to take action.

As it stands, employers must consider a wide range of legal consequences in making hiring, disciplinary and termination decisions. In developing programs to deal with workplace violence, employers often find themselves in a "Catch-22" position. They face potential lawsuits under the Americans with Disabilities Act, Title VII or other anti-discrimination legislation, based on whom they do not hire, and they face potential liability for negligent hiring, retention or supervision or other laws if the person they do hire subsequently becomes involved in a violent incident.

The issue often boils down to the question of "which way to you want to be sued?" The fact of the matter is that the tension between anti-discrimination laws, privacy laws, and the employer's obligation to provide a safe work environment must be carefully balanced. In the end, the safety of an employer's workers,

customers, and others lawfully on the premises must be the primary concern, above and beyond any other laws.

A. The Americans With Disabilities Act and Other Anti-Discrimination Legislation.

The Americans with Disabilities Act (the "ADA"), which was enacted in 1990 and took effect in 1992, limits the degree to which an employer can refuse to hire, discipline or terminate a potentially threatening employee. Under the ADA, an individual with a disability is one who has a mental or physical impairment that substantially limits one or more major life activities, has a record of such impairment, or is regarded as having such an impairment. A mental impairment is defined as "[a]ny mental or psychological disorder".

The EEOC issued a Technical Assistance Manual to assist employers in determining their rights and responsibilities under the ADA. According to the Manual, ". . . personality traits, such as poor judgment, quick temper, or irresponsible behavior, are not themselves impairments." The Manual further states that,

"[s]tress" and "depression" are conditions that may or may not be considered impairments, depending on whether these conditions result from a documented physiological or mental disorder.

* * *

For example: A person suffering from general "stress" because of job or personal life pressures would not be considered to have an impairment. However, if this person is diagnosed by a psychiatrist as having an identifiable stress disorder s/he would have an impairment that may be a disability.

While formal diagnosis of a mental disorder usually triggers ADA protection, such protection can also be available where there is a perception that a person has a mental disability, absent any diagnosis. For example, if an employer regards an employee as being unstable or paranoid, or in some way limits the person based on unsubstantiated fears, the employer may be liable for discrimination under the ADA. Again, making appropriate decisions, in light of this piece of legislation, creates quite a "Catch-22" for employers, since any violations of the Act, even for alleged safety reasons, subjects employers to significant liability, including punitive damages.

There are key issues to understand in order to be able to make an accurate assessment of what is allowed under the ADA and the rights that employers have as they make key employment decisions. First, in spite of having a qualifying mental disorder, an employee has to be otherwise qualified for the job. An employer is not

required to hire or retain an individual who is not qualified to perform the job. In establishing qualifications, the individual has to be able to perform all of the non-discriminatory standards and requirements of the job. An employer's standards that require all applicants to be able to tolerate normal stress, come to work on time, obey supervisors' orders, and get along with people, for example, are acceptable as non-discriminatory standards under the ADA.

Secondly, the employer has to be able to make a reasonable accommodation for the disability, without having to suffer undue hardship, substantial cost or undue disruption of the workplace. Generally, it is the duty of the individual with the disability to request a reasonable accommodation. However, it is not the employer's obligation to implement the accommodation requested. A recent federal decision held that the Act does not require an employer to implement the best possible accommodation. The Act only requires that any accommodation made be reasonable and effective in light of the circumstances.

Reasonable accommodations have to be able to be made without undue hardship, excessive cost, or undue disruption of the workplace. An undue hardship is an action that requires "significant difficulty or expense" in relation to the size of the employer, the resources available and the nature of the operation.

The ADA has another provision, the direct threat provision, which can be used where an employer has reliable medical data upon which to believe that the employee's presence in the workplace creates a risk of substantial harm to others. However, even under these circumstances, the employer must first determine whether a reasonable accommodation can be made to reduce the risk. If so, the employer has a duty to make such an accommodation. If no reasonable accommodation can be made, the employer has no duty to hire or retain the employee.

To date, there have been no reported ADA challenges to employment decisions involving potentially violent employees. However, as more and more employers begin to understand their duty to carefully screen and monitor workplace behavior to protect themselves from liability, this area will probably become more litigated in the future.

In addition to ADA prohibitions, other anti-discrimination legislation on both the state and federal levels also restrict what information may be sought and used for employment decisions. Particularly, many states limit access to criminal records. Some states only allow the use of criminal convictions where there is a direct relationship between the crime committed and the employment position being sought.

B. Privacy Considerations

In order to make informed decisions about a prospective employee, employers need access to as much information as possible about the personal, professional and medical history of the individual. An employer's ability to obtain information about applicants has become hindered by prior employers' hesitancy to provide information other than their rank and file due to fear of defamation or invasion of privacy law suits.

Since legal liability is beginning to flow from hiring decisions, obtaining information is a key part of the process employers must undergo to learn as much about prospective employees as reasonably possible. Employers, however, need to be mindful of their legal limitations in this area.

In regard to medical records, the U.S. Supreme Court has held that there is a "limited privacy interest" in the confidentiality of a patient's medical records. Whalen v. Roe, 429 U.S. 589 (1977). Neither Ohio nor Kentucky laws clearly define the extent of this right. In both states, statutory law limits the extent to which physicians may disclose information to third parties.

Ohio law has gone as far as to allow third parties who induce the disclosure of confidential medical information to be liable in damages. Hammonds v. Aetna Casualty and Surety Co., 243 F. Supp. 793 (N.D. Ohio 1965). More recently, a Magistrate Judge with the United States District Court for the Southern District of Ohio held that the confidentiality of medical records was protected by the doctor-patient privilege and the United States Constitution. The Magistrate Judge sanctioned the defense attorneys in the case who obtained the plaintiff's medical record for the hospital it represented. The decision also held that a health-care provider can not reveal medical information absent a patient's authorization.

There are, however, some limited circumstances under which an employer can gain access to medical records. First, after an offer of employment is made, an employer can require an employee to submit to a medical examination if there is a question as to whether the employee is "fit for duty" (if such examinations are required of all applicants). Such examinations can also be required after employment, where the employee's performance is perceived as creating a threat to his or her safety, or the safety of others. (Keeping in mind that reasonable accommodation may have to be made for any disability which qualifies under the ADA.) The examining physician in this situation, in most states, cannot disclose any information beyond whether the employee is fit for duty.

Most states also have an exception to the general right of privacy in medical records which allows a physician to disclose

privileged information when it is necessary to protect the individual or public welfare. For instance, where a physician knows that a public transportation employee is currently using drugs or alcohol, he or she has a duty to report such information.

III. LEGAL ISSUES RESULTING FROM VIOLENCE IN THE WORKPLACE.

A. Negligence Theories

A wide range of theories are evolving to hold employers liable for injuries resulting from violent workplace incidents across the country. While Ohio and Kentucky laws have not gone as far in expanding employer liability for workplace violence as other states, a discussion of recent trends from these other states will help give an indication of potential future liability.

Under the negligent hiring, supervision and retention theories, an employer may be found vicariously liable for injuries caused by violent or criminal conduct of its employees, both within and outside of the scope of employment, where the employer knows or should know that the employee poses a risk of harm to others. Generally, employers have a common law duty to exercise reasonable care, in view of the circumstances, in relation to employees or prospective employees who may present a threat of injury. If successful under these theories, victims can hold employers liable for substantial compensation and punitive damages, including lost earnings, lost benefits, reimbursement for medical expenses, etc. Across the country, jury awards and settlements have been substantial, with one District of Columbia company settling for 16 million, and a 3.5 and 2.5 million dollar jury award in two New York cases. Red v. Product Dev. Corp., No. 89-1119 (D.C. Super. Ct. 1990) (unpublished opinion); Smith v. Nat'l R.R. Passen. Corp., 856 F.2d 467 (2d Cir. 1988); Haddock v. City of New York, 75 N.Y.2d 478 (1990).

Interestingly enough, Kentucky courts were among the first to recognize a cause of action for negligent hiring. Ballard's Administratrix v. Louisville & Nashville R.R. Co., 128 Ky. 826, 110 S.W. 296 (1908). Under the theory of negligent hiring, the employer is held liable for the conduct of his or her employees, even when they may be acting outside the scope of their authority. For example, where the employer is found in breach of a duty to the injured party by hiring an individual who later becomes violent, where the employer knew or could have determined by reasonable investigation that the individual posed a threat of harm, most courts will award damages to the injured party.

More and more courts are beginning to allow individuals to bring actions under this theory, even in cases where the worker's

compensation laws should apply. For example, a Kentucky court has held that an employer could be liable for negligent hiring where a worker injured a co-worker. Ballard's Admix., 128 Ky. 826, 110 S.W. 296.

Similarly, while not discussing the issue within the context of workplace violence, the Ohio Supreme Court has hinted at the possibility of extending liability for acts outside the scope of employment, where the employer knew of the potential threat to third parties. In the Kerans v. Porter Paint Co., 61 Ohio St. 3d 486 (1991), the court stated that:

An employer has a duty to provide its employees with a safe work environment and, thus, may be independently liable for failing to take corrective action against an employee who poses a threat of harm to fellow employees, even where the employee's actions do not serve or advance the employer's business goals.

The court's statement in this case represents a significant change from past Ohio law which held that in order for an employer to be liable for the acts of an employee, the employee had to be acting within the scope of employment and in furtherance of the employer's business. While the Ohio court's decision involved sexual harassment, there is no logical reason why the same rationale could not be made applicable in a case of workplace violence.

When it comes to protecting employees from injury by third parties, there is authority in Kentucky that indicates that a court could hold an employer liable under extraordinary circumstances. In Thoni Oil Benzol Gas Stations, Inc. v Johnson, 488 S.W.2d 355 (Ct. App. Ky. 1972), the Kentucky Court of Appeals stated that while,

"[a]bsent extraordinary circumstances an employer has no duty to anticipate injury to an employee through the criminal acts of third persons . . . [w]hen the conditions of employment are such that they invite attack upon employees by creating highly unusual and unreasonable exposure to danger without the employment of reasonable protective measures, there is justification for imposing liability upon the employer when injury results."

Finally, in a recent Minnesota case, a female employee informed her supervisor that she had been threatened by a male co-worker. The company delayed firing the co-worker, even though management knew that he had been convicted of a violent crime before. The man eventually killed the female worker and her estate was allowed to sue under the theory of negligent hiring.

Negligent retention is where an employer retains an employee whom the employer knows is unfit and fails to take any corrective or protective action. A classic example of the potential for exposure under this theory was presented in a recent case involving a Cincinnati Metro Bus driver. The driver had several arrests for DUI while driving his personal car. Cincinnati Metro initially stated it could not terminate him for offenses incurred while driving his personal vehicle. Later, perhaps after a conference with their attorney, they changed their position. Potentially, Cincinnati Metro could have been liable under the theory of negligent retention if the driver injured third parties while operating a bus under the influence of alcohol.

Negligent supervision is harder to define since the need for supervision arises because of past incidents known either at the time of hire or after employment. It is usually added to a claim of negligent hiring and/or negligent retention to increase damages. Under this theory, employers are held liable for negligently supervising unsafe or dangerous employees, where they have failed to respond to complaints about an employee's behavior, or have assigned employees with known or suspected tendencies to certain jobs.

For instance, in one recent Ohio case, a construction worker raped a nine-year old girl. The plaintiffs, in addition to their claim of negligent hiring, claimed that the general contractor was liable for not supervising the contractor whom he knew was alone with the girl in an empty apartment building. Peters v. Ashtabula Metropolitan Housing Authority, 89 Ohio App. 3d 458, 626 N.E.2d 1008 (1993).

While there is very little case law on this issue in this area, there has been a cause of action allowed for negligent security in some states. This liability is created where the employer was aware of a potentially dangerous situation and failed to provide adequate security to protect its patrons, customers, or others lawfully entering its premises from the potential threat. Again, while this theory has not been substantially litigated in Ohio or Kentucky, the increase of violence may lead to the creation of a duty on the part of those who are aware of past incidents of violence in a particular circumstance, or on certain premises, to protect others from that potential threat. The Kentucky courts have alluded to the possibility of allowing such claims to be brought under extraordinary circumstances. See, Thoni Oil Benzol Gas Stations, Inc. v Johnson, 488 S.W.2d 355 (Ct. App. Ky. 1972).

Finally, negligent failure to warn is another tort which would allow an employer to be found liable for negligently failing to warn employees or supervisors of an individual's suspected dangerous propensities. This theory may also allow a former employer who fails to disclose an employee's violent or similar

misbehavior to prospective employers during reference checks to be liable for negligent failure to warn.

Both the Second Circuit and Sixth Circuit Courts of Appeals have held employers liable for negligently failing to warn employees of unusual risks of violence. The Second Circuit held Amtrack liable where its management had knowledge of an employee's past violent tendencies and failed to discipline him or notify his supervisor. Smith v. National R.R. Passenger Corp., 856 F.2d 467 (2d Cir. 1990). The employee eventually shot his supervisor in another incident after he was reprimanded for taking an unauthorized break. Similarly, the Sixth Circuit has held that an employer has a duty to inform employees of all perils which he knows or should reasonably know. McCalman v. Illinois C.R. Co., 215 F. 465 (6th Cir. 1914).

Based on the evolution of these theories, it seems that the employer's duties include informing employees of any threat by other employees, customers or clients, as well as taking appropriate precautions to protect them from injury.

B. Occupational Safety and Health Administration (OSHA)

The "General Duty" Clause of the Occupational Safety and Health Act requires that employers provide a place of employment that is free from "recognized hazards" likely to cause death or serious physical harm to workers. In an effort to address the increasing incidents of violence in the American workplace, OSHA laid out its policy on workplace violence in a May 1992 memo that stated that employers could be cited, under the General Duty Clause, for failing to adequately protect employees from acts of violence in the workplace.

The first of these citations went to a Chicago psychiatric hospital in September of 1993. The workers at the hospital suffered from various physical injuries including fractures, bites, torn cartilage and head injuries. The patients included gang members and others who had histories of acting out in violent ways or in psychotic rages. OSHA proposed a \$5,000 fine against the hospital for exposing workers to serious physical injury during "seclusion/restraint" incidents.

OSHA has also issued citations to one organization for "not protecting its workers who drive vans and buses to shuttle developmentally disabled adults and children to and from homes and their work or school," since this exposed them to, "the hazard of being assaulted by passengers," according to a recent BNA report. The report also noted that another organization was cited for having staff work alone at night in one of its group homes, since this exposed the workers to assaults by residents.

The BNA reports also indicated that according to one OSHA official, only "recognized" dangers will be cited by OSHA. "Criminal acts of violence that are not 'recognized' as part of the nature of doing business and are 'random antisocial acts which may occur anywhere' would not subject the employer to a citation. . . ."

C. Worker's Compensation as a Limit to Liability.

Under the doctrine of respondeat superior in Ohio, an employer can be liable for the intentional, malicious acts of an employee performed within the scope of employment. Weibold Studio, Inc. v. Old World Restorations, Inc., 19 Ohio App.3d 246, 484 N.E.2d 280 (1986). Traditionally, in order for the doctrine to apply, the employee must have been acting in furtherance of the business of the employer. In Kentucky, the courts have limited this doctrine and held that even if the employee is acting within the scope of employment:

[T]he well-settled-rule in Kentucky is that 'it is not within the scope of a servant's employment to commit an assault upon a third person and the master is not liable for such an assault, though committed while the servant was about his master's business.'

Flechsig v. United States, 786 F. Supp. 646 (E.D. Ky. 1991) (citing Southeastern Greyhound Lines v. Harder's Admin'x, 281 Ky. 345, 136 S.W.2d 42, 45 (1940)).

The doctrine of respondeat superior was developed to allow innocent third parties to recover from employers, who were perceived to have "set things in motion" by hiring the employee, without having to prove any negligence on the part of the employer. Generally, as workplace violence continues to grow, the doctrine of respondeat superior liability is expanding to allow both employees and third parties to bring actions where the employer is found to have known or been able to determine with reasonable investigation, that an employee had violent tendencies. As discussed earlier, the Kerans decision may have put the final blow on the doctrine as a means of limiting employers' liability for intentional injuries caused by their employees.

Because both Ohio and Kentucky have worker's compensation statutes which govern injuries arising out of the employment relationship, the doctrine of respondeat superior would usually only come into play for injuries by employees to non-employees. However, there are certain situations not covered under worker's compensation such as supervisor assaults on employees, personal disputes that are not connected to employment, or injuries to employees from intoxication or self-inflicted violence. Because the Ohio and Kentucky statutes require the employee's injury to have

occurred within the scope of employment, certain employee injuries may fail outside the scope of those provisions.

IV. IDENTIFYING POTENTIAL OFFENDERS

Experts say that in almost every case of workplace violence, the individual had given multiple clues to multiple people. Learning to identify those signs is a key to reducing the risk of harm from workplace violence.

Applicant screening is the first chance that an employer has to identify a potentially volatile employee. This is also the potential basis for future claims of negligent hiring. But, as discussed earlier, applicant screening also poses many challenges, as concerns for liability under discrimination laws and privacy laws also have to be weighed. Studies show that up to 42% of job applicants are untruthful on their applications, so verification of the job applications can be an important first step for identifying potential offenders. Failure to follow through in an investigation can be deadly. For instance, the United States Postal Service failed to follow up on a special designation on the military discharge of a postal worker who killed four workers in Michigan in 1991. Had it done so, it would have found that the worker had run over another officer's car with a tank in a fit of anger.

Another method often used to identify potentially volatile employees are psychological tests. According to experts, however, psychological tests are not good predictors of a volatile employee. They are rarely done at the time when the potential offender reaches the point of becoming violent. A seemingly normal individual can become violent after he loses his wife, is humiliated by a co-worker, and then discharged for insubordination.

It is difficult, if not impossible to determine in advance, at what point an individual will "lose it." On the other hand, experts studying workplace violence have developed a profile of a violent employee.

Offenders tend to be:

- * Male
- * 35 years of age or older
- * White
- * few interests outside of work
- * a fascination with guns or the military

- * a history of family problems
- * possible history of violence
- * a tendency to hold grudges and blame others for problems
- * drug and or alcohol abuse
- * has violent influence on the work force
- * chronically discontented
- * has an unstable work record
- * often violates company policies
- * withdrawn, loner

These profiles have also sparked controversy. Jess Kraus, a UCLA epidemiologist who served on a federal panel on workplace violence, was quoted in a recent TIME Magazine article as saying, "relying on profiles carries a two-fold risk: that people will be wrongly tagged as dangerous simply because they match the list, and others will be mistakenly disregarded because they don't." According to Kraus, more accurate predictors are paranoid behavior, depression or suicidal tendencies, and the filing of unreasonable grievances and lawsuits.

Experts also note some behavioral tendencies that give clues that an employee may be becoming volatile:

- * Verbal threats, implied or express warnings that "something" will or may happen, should be taken seriously.
- * Physical acts of intimidation or harassment of other workers.
- * Attempting to gain access to unauthorized areas.
- * Bizarre thoughts, paranoia, or indications that the individual's perception is skewed, or where the individual demonstrates a perception that he or she has been unjustly denied an entitlement or humiliated by a seemingly insignificant act.
- * An individual focuses on a specific target of revenge or an escalating grudge against another employee or supervisor.

V. DEVELOPING STRATEGIES TO REDUCE THE RISK OF A VIOLENT INCIDENT

Experts and consultants recommend several options to employers as a way to reduce the risk of workplace violence. While most acknowledge that workplace violence cannot be eliminated, since many of the factors contributing to the epidemic are not within the control of the employer, there are programs both preventive and remedial which can be implemented to assist both before and after an incident in the workplace. While strategies differ among the experts, most, if not all, agree that workplace violence is predictable, since the offender always leaves a trail of clues.

In implementing any preventive workplace violence program, employers should consult with human resource personnel, security, upper management, supervisory staff and legal counsel. The bottom line is that it is easier to deny employment to someone than to fire someone. There is also a greater risk in terminating employment and greater defenses to denying employment. The more potentially violent employees screened out in the interview process, the less risk of a violent outburst by an employee.

There are steps employers can take before a violent incident occurs:

1. Screening of applicants. Employers may want to engage in a more thorough screening of applicants for employment by reference checking, testing, and complete interviewing.

(a) Interviews: Conduct in-depth interviews with applicants. Questions should be consistently asked of all applicants or those applying for certain positions, and carefully phrased to avoid potential discrimination charges. While individuals may not voluntarily supply information on applications or during interviews, they may be more likely to respond to direct questions. Ask applicants questions such as: Have you ever been disciplined or discharged for theft or a related offense? Have you ever been disciplined or discharged for fighting, assault or related behavior? Have you ever been discharged or disciplined for insubordination or for violating safety rules? While knowledge of a mental illness alone cannot be used as a basis for denying an applicant, specific questions relating to past behavior or reactions to situations specific to the job can be used.

(b) Application forms: Should satisfy state and federal equal employment opportunity requirements. Require applicants to sign the form indicating that the information is accurate and truthful.

(c) Background investigation: Obtain the applicant's signed agreement to allow the employer to perform a background investigation. If the employer can verify the job-related need for obtaining an applicant's criminal conviction record, such information should be requested.

(d) Verify references and past employment: Gather as much information as possible from prior employers and obtain copies of required and/or claimed licenses and credentials.

Employers might note that courts are beginning to look at the documentation of the screening process in evaluating negligent hiring claims. Courts are beginning to find liability for seemingly small oversights.

2. Comprehensive written plan for dealing with emergency situations. This plan should include such things as charts of company officials to be contacted in the event of an emergency; evacuation plans; telephone numbers for building security, medical staff, and local hospitals; appointment of employees on each floor to coordinate activities in case of emergency.

(a) Emergency training: Emergency training should be conducted with at least two employees per department, floor level, or other physical division. Training two individuals increases the likelihood of always having someone on site with necessary training. Training should include evacuation plans and procedures for fires, bomb threats, earthquakes, tornadoes, violent employees or other persons, or other potentially violent circumstances. Training can be conducted either by company or building security, or fire/police department representatives. Employers may also want to have key employees trained in CPR.

(b) Checklist: A checklist can be devised and made available to all employees on how to handle situations such as bomb threats or menacing phone calls or visitors.

3. Emergency Procedure for Employees. Educate all employees on emergency procedures and who they are to contact providing names and phone numbers.

4. Referral Policy. On-site Employee Assistance Programs (EAP) should be prepared to provide necessary support after a crisis. If an employer does not have an EAP, then local agencies or counselors should be identified and used as contacts in the event of a crisis. Depending upon the particular situation, employees can either be referred to the agency or counselor(s), or support professionals can provide

on-site services. If a violent event does occur, professional emotional support must be readily and immediately available.

5. Employee Assistance Programs. EAP's can play critical roles in prevention and crisis management. EAP's can provide Human Resource professionals trained in crisis management and can assist in preventive training and follow-up counseling. Noting the strong relationship between job stress and workplace harassment and violence, Surgeon General M. Joycelyn Elders urged employers to educate their employees on how to resolve conflicts as a way to curb the growing epidemic of violence. She recommended education and conflict resolution programs as among some strategies that employers might use to reduce workplace violence. Employers need to be aware that there are some situations in which confidential information obtained through an EAP is required to be disclosed. These include when employers or physicians learn of an employee or client's potentially dangerous behavior that may endanger others. (See Tarasoff v. the Regents of the University of California) Legal counsel should be contacted to clarify the employer's responsibilities in this area.
6. Policies against harassment. Clearly communicate written policy against harassment including enforcement and disciplinary action for violations. Zero tolerance.
7. Train supervisors. Indications of a troubled employee can be hard to detect. Supervisors need special training in order to be skilled and knowledgeable in this area. Incidents of previous violence, etc., should signal the need for additional observation of the employee.
8. First line supervisors. Usually the first line supervisors are the primary target of workplace violence and are the agents of the employee who are in the best position to deal most frequently with employees. Therefore, their ability to handle confrontations, stress, and conflicts can gravely impact the degree to which a small incident can grow into one leading to workplace violence.
9. Tighten security programs. Create a safe workplace with prohibitions on weapons and tight disciplinary action for violations. Clearly communicate these policies with all employees on a routine basis.
10. Grievance Procedures. Strong grievance procedures need to be in place to deal with problems and allow employees to express their views. Discuss ways to eliminate concerns. Solicit employee involvement in the development of creative solutions so that the employee feels empowered and listened to.

Employers need to allow some constructive way to channel concerns, along with access to greater resources, so that an employee is not left with one person to deal with who can frustrate their objectives and make them feel disempowered.

11. Work Environment. Part of the reason the workplace has become so hostile is because of the negative way that employees perceive they are being treated. As employers downsize and place greater demands on fewer employees, they should also be mindful of a need to offer additional compensation in the form of money or perks or special privileges to make the employees feel more appreciated.
12. Handling Terminations. Offer outplacement service. The economy is bad and employers need to make employees feel that there is hope for future employment, as a way to defuse potential feelings of frustration and hopelessness, which are often precursors to acts of violence.

HOW TO HANDLE THREATS

Employers should establish procedures for employees to follow in circumstances such as bomb scares, employees or others with weapons, or verbal threats of violence.

A checklist can be developed for threats received over the phone. Most threatening situations, especially those of immediate threats, will need intervention from trained professionals such as the company or building security police, or the local police department.

All employees should know who to contact and under what circumstances.

IN THE EVENT OF A CRISIS

In the event of a crisis in the workplace, it is recommended that:

1. Employers keep employees informed of what is happening in order to reassure and provide needed support. Communications should be immediate, as thorough as possible, and ongoing. Management needs to remain visible and supportive.
2. Human Resources representatives need to be especially sensitive to employee concerns. Depending upon the incident, Human Resources may need to assist in grief counseling, communicating with families that may be involved, and providing appropriate referral services.

3. Establish peer-support group to enable employees to counsel each other.
4. Identify employees that may be especially debilitated due to a crisis in the workplace and ensure they receive necessary emotional support. Such employees may be either directly affected by the crisis or just recovering from an unrelated trauma.

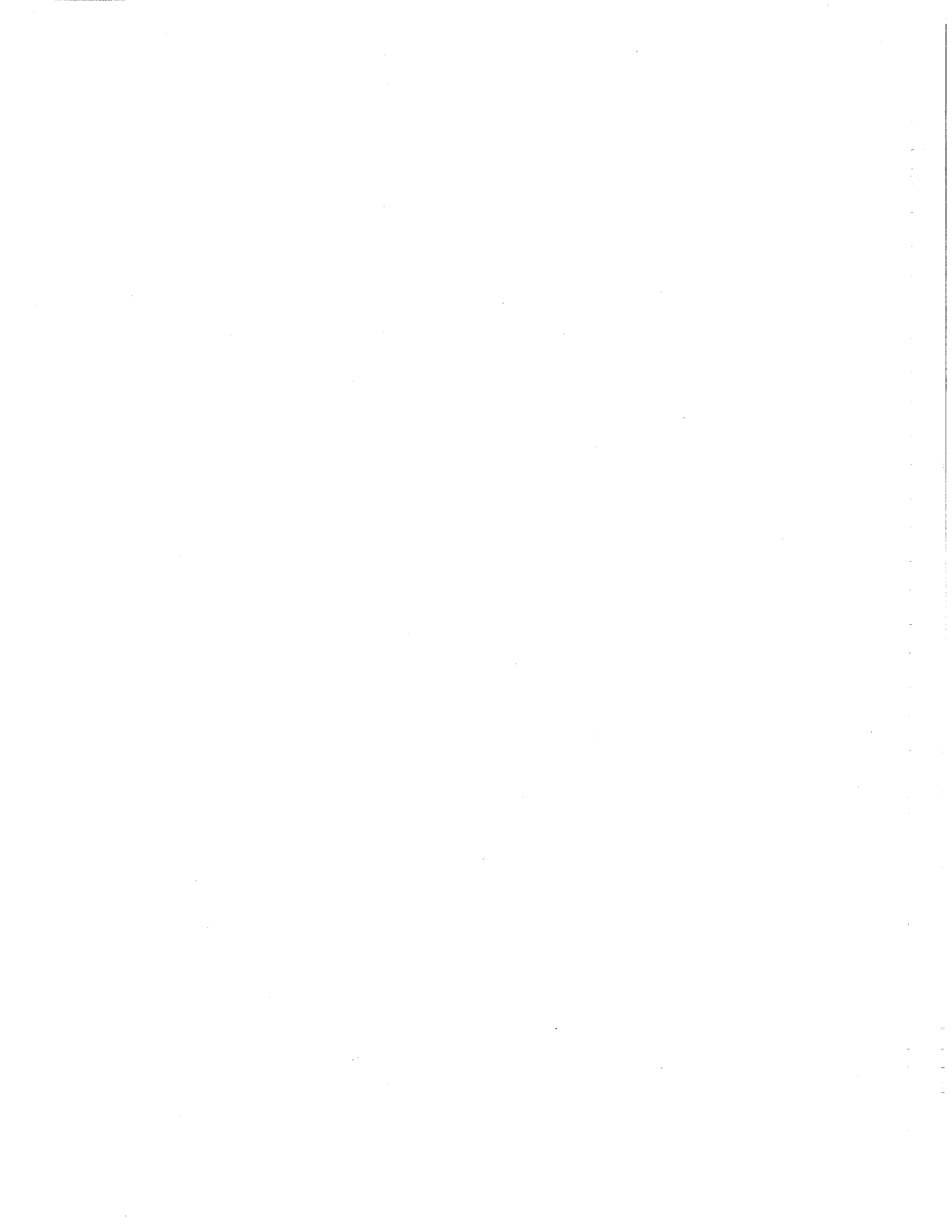
By taking these basic steps, employers may lessen the likelihood of violence occurring in the workplace or at least decrease the possibility of serious harm to a number of employees and third parties. Unfortunately, however, violent episodes are often unpredictable. The key then is to be prepared for the possibility of violence in the workplace with the realization that no company, no manager, and no employee is immune from this very real problem.

PRACTICING THE EMPLOYMENT LAW CASE

Plaintiff View: Marvin L. Coan
Hummel & Coan
Louisville, Kentucky

Defense View: Jon L. Fleischaker
Wyatt, Tarrant & Combs
Louisville, Kentucky

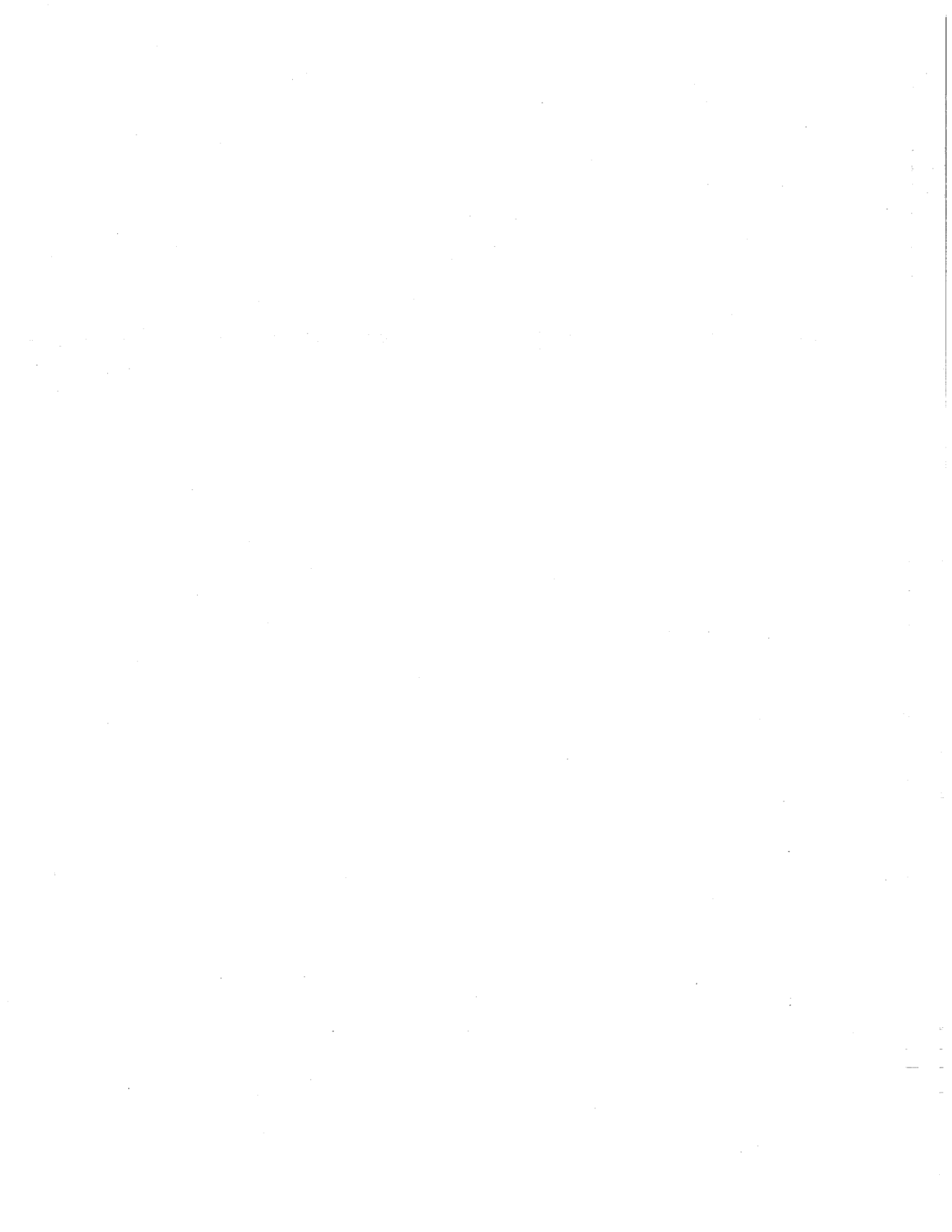
View From The Bench: Honorable Joseph M. Hood
Judge, U.S. District Court for the
Eastern District of Kentucky
Pikeville, Kentucky



PRACTICING THE EMPLOYMENT LAW CASE

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**PRACTICING THE EMPLOYMENT LAW CASE:
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- A. Where to file: state or federal court
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- B. Investigation-Prefiling
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H. Discovery, timing, and breath of discovery

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WRONGFUL TERMINATION - SOME PRACTICAL THOUGHTS

by

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I. "SELECTING" THE RIGHT PLAINTIFF

- A. You must have a plaintiff whom the judge and jury will like in order to secure a favorable verdict, unless the facts are so overwhelmingly in your favor that you cannot help but prevail. Such is not usually the case when it comes to going to trial, as most of those type cases tend to be settled.
- B. Make sure the plaintiff will have a sufficient amount of damages to justify filing suit and possible trial. For example, a minimum-wage plaintiff who works at a fast food restaurant is probably not a good plaintiff in most situations since the person can easily get another comparable job within a matter of days within that industry.
- C. DO NOT take a case involving a wrongful termination thinking that it will be easily settled. These type cases are vigorously defended, as most employers do not want to send out any signal that they are easy marks in this type of litigation.

II. IMPORTANT POINTERS

- A. Always request a jury trial in your Complaint because employers are concerned about the prospects of having to justify their actions to a jury. In these type of cases, it is almost malpractice not to seek a jury trial unless the judge is so obviously oriented to this type of litigation, which would be a rare situation.
- B. If the employer does not try to take plaintiff's deposition prior to expiration of 30 days after service of the summons, always file a notice to take the depositions of all key defendant employer personnel involved in the termination decision of plaintiff. Under Rule 30.01 of the Kentucky Rules of Civil Procedure, the defendant employer may notice plaintiff's deposition first. Only in rare circumstances outlined in Rule 30.02(2) may the plaintiff obtain permission to take a deposition within the period prior to 30 days from service of summons.

- C. Always schedule the depositions of all key defendant employer personnel involved in the decision to terminate plaintiff on the same day, one right after the other, so there can be no coordination of the reasons for the contested termination. Hopefully, by taking these depositions in this manner, some of the defendant's own witnesses will create factual disputes that will be helpful in overcoming any motion for summary judgment. See Steelvest, Inc., et al. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 485 (1991).
- D. When your client's deposition is to be taken, spend a great deal of time with the person going over all documents, including the allegations in the Complaint. Make sure there is a thorough practice deposition with all of the hard questions asked. This will enable the plaintiff to do a good job at the deposition, which is very critical to the success of the case. Often the defense attorney will form an opinion about whether the plaintiff will be a bad or good trial witness and whether there will be a lot of good ammunition for impeachment at trial based upon how plaintiff's deposition turns out.

III. THEORIES OF RECOVERY

- A. Contracts for permanent employment are very difficult to prove unless there is written documentation and there is strong evidence that the employee provided sufficient consideration for such a promise. Other jurisdictions have in some rare instances found there was a contract for permanent employment in situations where a plaintiff gives up stock ownership or where they have been seriously injured while working on the job. For the most part, these type of cases should be avoided.
- B. A contract for a fixed term of a year may be oral or in writing with the written contractual agreement often being able to be proved through something as simple as a letter at the time of hire expressing plaintiff's salary in an annual sum. See Humana, Inc. v. Fairchild, Ky., 603 S.W.2d 918 (Ct.App. 1980); Putnam v. Producers' Livestock Marketing Ass'n, Ky., 75 S.W.2d 1075 (Ct.App. 1934). These type of documents are very valuable and would clearly enable you and your client to get to a jury for a determination. However, see Judge Heyburn's new decision in McNutt v. Mediplex of Kentucky, Inc., 836 F.Supp. 419 (W.D.Ky. 1993).
- C. Promissory estoppel may also be used as a theory with it being most likely to be successful in the situation where a plaintiff gives up a job and moves with family from one state to another. This is not to say you cannot use that theory simply where a move occurs within the same locale, but in that type of situation the theory would appear to be stronger if the plaintiff is giving up a good job with superior salary and benefits, as well as a significant amount of tenure or potential for advancement. While Kentucky apparently has no employment

cases directly on point known to this author using such a theory, the theory has been used recently in other type matters. See Lichtefeld-Massaró v. R. J. Manteuffel, Ky., 806 S.W.2d 42 (Ct.App. 1991); McCarthy v. Louisville Cartage Co., Inc., Ky., 796 S.W.2d 10 (Ct.App. 1991).

- D. Any and all claims involving wrongful termination premised upon the employer's breach of implied covenant of good faith and fair dealing do not have much prospect for success in Kentucky, although other jurisdictions have recognized these type of claims. See Webster v. Allstate, 689 F.Supp. 689 (D.C.W.D.Ky. 1987); Harvey v. ITW, Inc., 672 F.Supp. 973 (D.C.W.D.Ky. 1986).
- E. The parties may enter a contract which is terminable only for cause provided that there is specific proof that was their intent. See Shah v. American Synthetic Rubber Co., Ky., 655 S.W.2d 489 (1983).
- F. Oral promises of employment will under certain circumstances enable a plaintiff to get the case to a jury for a determination. See Hammond v. Heritage Communications, Inc., Ky., 756 S.W.2d 152 (Ct.App. 1988). However, in these type of cases, defense of the statute of frauds under KRS 371.010 will be raised and must be considered in advance to avoid summary judgment. See Audiovox Corp. v. Moody, Ky., 737 S.W.2d 468, 470-471 (Ct.App. 1987).
- G. A plaintiff may be able under certain limited circumstances to use an Employee Handbook or Policy and Procedure Manual as a means of pursuing a claim for wrongful termination. Unfortunately, the leading case in Kentucky is not favorable. See Nork v. Fetter Printing Co., Ky., 738 S.W.2d 824 (Ct.App. 1987). You should always look at such documents when the employee comes to your office to discuss the potential case. Look thoroughly to see whether or not there is clear language in the document explaining that it is not a contract and that all employees are terminable at will. You should also look carefully at any section dealing with discipline and termination in order to see if there is a progressive discipline scheme which is followed or not. In certain circumstances an employer may have a progressive discipline scheme, but will also reserve unto itself the right to deviate from it and terminate the employee for any reason it deems appropriate. These are very tough cases, but under some limited circumstances where the employer may have the established custom of following a progressive discipline system and the handbook or manual requires it to be done, a judge may allow the case to go before the jury for a determination.
- H. An employee may, of course, pursue a wrongful termination claim based upon a termination that violates public policy as set forth in the Constitution or a statute. The landmark case in this area, which is a must to understand this

theory, is Firestone v. Meadows, 666 S.W.2d 730 (Sup.Ct, 1984). Basically, in Firestone the Kentucky Supreme Court recognized that an employee cannot be terminated for pursuing a workmen's compensation claim, as that right was protected by statute and is a clearly-articulated public policy which must be followed. The cause of action was premised upon a combination of KRS 446.070 and the violation of public policy expressed in the statute. However, please note in this decision that if you premise your claim on a statute setting forth a public policy which provides its own remedy, you must use that statute exclusively and not the procedure via KRS 446.070 set forth in Firestone. There are many public policies that can be found within the KRS. For example, see KRS 61.102 (whistleblowers), KRS 337.015 (leave of absence to employee that adopts child under age of seven), KRS 427.140 (garnishments), and KRS 29A.160 (jury service).

IV. MISCELLANEOUS CONSIDERATIONS

- A. Although the Kentucky Supreme Court appears to be "in the middle" within all jurisdictions throughout the country when it comes to protecting plaintiffs in wrongful termination litigation, the Kentucky Court of Appeals has appeared to be somewhat more sympathetic. See Willoughby v. Gencorp, Inc., Ky., 809 S.W.2d 858 (Ct.App. 1990); Overnite Transport Co. v. Gaddis, 793 S.W.2d 129 (Ct.App. 1990).
- B. It will be very important to instruct your client to keep a good and detailed record of all efforts made to secure other employment after termination since the plaintiff does have the burden to mitigate damages (i.e., where applied, copies of applications, with whom he spoke, etc.). It appears as though the Kentucky Supreme Court in most situations will find this question of mitigation of damages to be a "classic jury question." See Lewis v. Bledsoe, 798 S.W.2d 459 (Sup.Ct. 1990).
- C. From an evidentiary standpoint, the Court of Appeals in Willoughby, supra, at 862, ruled that the trial Court erred in excluding the testimony of two other workers who alleged that they were harassed and treated wrongfully after they sustained a work-related injury and sought benefits. This could be a very crucial piece of evidence in terms of getting your case to the jury so similar employer practices must be considered and proved.
- D. Make sure you think about whether your claim is premised as a breach of contract action or a tort claim which was brought out as a subject of interest to the Kentucky Supreme Court in Lewis, supra, although the parties did not preserve the issue for appeal. Certainly, if you are using solely a contract claim theory, there can be no claim for punitive damages as a result of a breach of contract. See KRS 411.184(4). On the other hand, if there is a tort

claim theory, you may be able to seek and prove punitive damages provided that you specifically comply with KRS 411.184 in terms of both the allegations in your Complaint and the proof at trial. You will also need to consider KRS 411.186 in this regard.

- E. Consider carefully how your jury instructions are worded, as it could make an important difference in how the jury understands what they may do for the plaintiff during deliberations. See First Property Management v. Zarebidaki, Ky., 867 S.W.2d 185 (1994); Overnite Transport Co., *supra*, at 132-133.
- F. BEWARE of res judicata being applied from any Unemployment Insurance decision which is affirmed by a Circuit Court. This may prevent a successful wrongful termination action thereafter.
- G. An excellent reference to use, which is relatively inexpensive, is the two-volume set, Unjust Dismissal by Larson & Borowsky, from Matthew Bender. This is updated yearly. Also, you may want to join the National Employment Lawyers Association, which has its national office at 535 Pacific Avenue, San Francisco, California 94133, (415) 397-6335.

After-Acquired Evidence of Employee Misconduct: Affirmative Defense or Limitation on Remedies?

What can an employer do with evidence of employee misconduct discovered long after a challenged employment decision was made? Can it be used as an affirmative defense? Does it limit a plaintiff's damages? Or is it completely irrelevant? While employers are often ecstatic when evidence such as resumé fraud or work-related misconduct is uncovered during the course of litigation, their attorneys would be well-advised to temper this enthusiasm. In the 11th Circuit, such evidence may only limit plaintiff's remedies, rather than support dismissal of the suit.

The Summers Rule

Summers v. State Farm Mutual Automobile Insurance Co., 864 F.2d 700 (10th Cir. 1988), is the seminal case regarding an employer's use of "after-acquired evidence," or evidence discovered after commencement of an employment discrimination action. Summers brought a suit alleging age and religious discrimination after his dismissal based upon insubordination and poor interpersonal skills. During discovery, and over four years after his discharge, State Farm discovered that Summers had falsified company records in 150 separate instances. In its motion for summary judgment, State Farm argued that Summers would have been fired for these falsifications immediately upon discovery regardless of any other alleged illegal motivation.

Although the after-acquired evidence could not have been a "cause" for the termination, the 10th Circuit Court of Appeals held that it was highly relevant to plaintiff's claim of injury and precluded the plaintiff from recovering any relief. The court then made the following statement, which has been

However after-acquired evidence is used, it is important that the employer demonstrate that in previous cases termination resulted for the same infraction

by Elizabeth Pryor Johnson

quoted approvingly by a number of courts:¹

To argue . . . that this after-acquired evidence should be ignored is utterly unrealistic. The present case is akin to the hypothetical wherein a company doctor is fired because of his age, race, religion, and sex and the company, in defending a civil rights action, thereafter discovers that the discharged employee was not a "doctor." In our view, the masquerading doctor would be entitled to no relief, and Summers is in no better position.

Id. at 708 (footnote omitted). The 10th Circuit affirmed the grant of summary judgment in favor of State Farm because the plaintiff suffered no legal damage as a matter of law.

Since *Summers*, after-acquired evidence has been used by the courts² in two ways: 1) as an affirmative defense to liability,³ and 2) as a limitation upon plaintiff's remedy.⁴ The 11th Circuit has adopted the latter approach.

Eleventh Circuit Rejects *Summers*

The court of appeals for the 11th Circuit squarely addressed the *Summers* issue in *Wallace v. Dunn Construction Co.*, 968 F.2d 1174 (11th Cir. 1992). Plaintiff Neil sued her former employer for causes of action under the Equal Pay Act⁵ and Title VII. During her deposition, Neil admitted that she had pled guilty to possession of cocaine and marijuana, despite the fact that she had checked the "no" box on her employment application after the question: "Have you ever been convicted of a crime?"

After discovering this evidence, the defendant filed a motion for partial summary judgment on the ground that the after-acquired evidence of Neil's convictions and application fraud constituted legitimate grounds for termination irrespective of any alleged illegal motives. Neil countered that motion with evidence that other people who had lied on their employment applications had retained their jobs. The district court denied the defendant's motion on the ground that, *inter alia*, a material issue of fact existed as to whether Neil would have been hired had she responded truthfully in the application.

On appeal, a divided panel of the 11th Circuit rejected the *Summers* approach to the extent the defendant employer relied on it as an affirmative defense to Title VII liability. Calling the *Summers* rule "antithetical to the principal purpose of Title VII," the court reasoned that it "invites employers to establish ludicrously low thresholds for 'legitimate' termination" and might encourage "rummaging through an unlawfully-discharged employee's background for flaws." As the court saw it, "the law governing after-

acquired evidence should not ignore the time lapse between the unlawful act and the discovery of a legitimate motive." *Id.* at 1180-81.

This holding should come as no surprise. The 11th Circuit has rejected several previous attempts to rationalize adverse employment decisions with information unknown to the decision-maker at the time the decision was made. See *Joshi v. Florida State Univ. Health Ctr.*, 763 F.2d 1227, 1235 (11th Cir.) (noting that the applicant's qualifications were not considered at all in that case, and therefore the defendant could not rely on the superior qualifications of other candidates to explain its hiring decision), *cert. denied*, 474 U.S. 948 (1985); *Eastland v. Tennessee Valley Auth.*, 704 F.2d 613, 626, *modified*, 714 F.2d 1066 (11th Cir. 1983) (rejecting the defendant's attempt to justify its hiring decision on the ground the applicant chosen had superior qualifications because the decisionmaker was unaware of those qualifications prior to hiring decision), *cert. denied*, 465 U.S. 1066 (1984).

Although the 11th Circuit's holding has some logical appeal in that the relevant motive issue ought to be what the employer actually knew at the time of its decision, the opinion does not reflect the current trend in the caselaw on the issue. Most courts in other jurisdictions have granted summary judgment when presented with undisputed facts showing that either the employee would never have been hired or termination would have resulted⁶ upon discovery of the evidence of misconduct.⁷

A Glimmer of Hope for Employers

The 11th Circuit did, however, embrace the *Summers* approach to the extent it impacts upon the relief available to a successful Title VII plaintiff. In what the dissent called the creation of "an enormously complicated body of law," the court discussed the *Summers* impact upon the remedies available under Title VII and the Equal Pay Act.⁸

The court explained that if the after-acquired evidence would have caused the plaintiff's discharge, then reinstatement, front pay, and injunctive relief would not be appropriate because such remedies would go beyond the make-whole relief available under Title VII.⁹

The determination of backpay, however, is more complicated. The 11th Circuit rejected the argument that the backpay period should end on the date of discovery of the after-acquired evidence, and concluded that, to terminate the backpay period, the employer must prove that it would have discovered the evidence prior to what otherwise would be the end of the backpay period in the absence of the challenged employment decision and the litigation.¹⁰ This conclusion provides yet more incentive for employers to conduct aggressive independent investigations to verify information given in resumés and employment applications.

Of course, in the case of post-hiring employee misconduct, it will be extremely difficult to prove that such evidence would have been discovered absent the termination, because it is the termination itself (and resulting litigation) which normally brings such matters to light. To that end, the 11th Circuit may have created a virtually insurmountable evidentiary hurdle for employers to overcome in halting the

backpay period.

Resumé Fraud v. Work Misconduct

Judge Godbold filed a dissenting opinion in *Dunn* and stated that he would have upheld summary judgment for the employer on the grounds that plaintiff lacked standing to maintain the suit.¹¹ More interestingly for employment lawyers, however, Judge Godbold also distinguished a resumé fraud case (the *Dunn* facts) from a case in which the employee is properly hired, and the employer discovers work misconduct after the suit is filed (the *Summers* facts). Thus, *Dunn* may not be applicable in the latter situation.

The majority of cases applying *Summers* involve resumé fraud. There are, accordingly, relatively few decisions applying *Summers* when an employee has been properly hired, is discharged for an alleged illegal motive, and the employer subsequently discovers work misconduct unrelated to the proffered reasons for discharge. For now, employers and counsel will have to be

guided by the resumé fraud decisions.

Typically, in resumé fraud cases, the employer makes alternative arguments: First, had the employer known of the misrepresentation, it never would have hired the plaintiff; and second, regardless of its hiring decision, the misrepresentation itself would have constituted sufficient grounds for dismissal. The first inquiry is inherently speculative, which probably explains why courts are more comfortable relying upon the second argument. The courts which have addressed this second argument have generally granted summary judgment for the employer when there are undisputed facts demonstrating that the employee would have been fired had the misconduct been known. Under this line of cases, summary judgment is appropriate when the misrepresentation or omission was material, directly related to the qualifications for the job, and relied upon by the employer in making the hiring decision.¹²

However after-acquired evidence is used—as an affirmative defense or as a limitation upon remedies—it is important that the employer demonstrate that in previous cases termination resulted for the same infraction.¹³ If the employee can show that another employee received less severe discipline for the same misconduct, or that the employer did not follow its own policies consistently, then the discharged employee has created a genuine issue of material fact precluding summary judgment.¹⁴

Evidence to support the employer's summary judgment motion should include, when possible: 1) Copies of personnel handbooks and policy manuals clearly stating that the employee's misconduct directly violated company policy and would have resulted in immediate termination;¹⁵ 2) an affidavit from the personnel director stating that plaintiff would have been fired immediately had the employer known of the misconduct; and 3) any instances in which employees have been terminated under similar circumstances. Deposition testimony from the plaintiff that the plaintiff was aware of the company policy prohibiting the misconduct and understood the significance and the likely adverse consequences had the employer been aware of it, would also be helpful.¹⁶ Employers who are not relying upon violations of spe-

cific company policies and cannot proffer any evidence of terminations made under similar circumstances are unlikely to prevail on summary judgment.¹⁷

The Civil Rights Act of 1991

How after-acquired evidence will be treated in a mixed-motive case brought under the Civil Rights Act of 1991¹⁸ has not been definitively resolved. The EEOC takes the position that after-acquired evidence cases should not be analyzed as mixed-motive cases, because the latter analyze the employer's liability, and the former, the employer's remedy only.¹⁹ The 11th Circuit has indicated that it would take a similar position. Although *Dunn* was brought under Title VII prior to its amendment, the court stated that its analysis was "fully consistent" with the mixed-motive provisions of §107 of the act.²⁰ In the 11th Circuit, therefore, employers will probably face the same evidentiary hurdles in cases brought under the new Civil Rights Act when invoking the after-acquired evidence defense as the defendant faced in *Dunn*.

Conclusion

The 11th Circuit has not yet addressed the issue of how *Summers* should be applied in the case of a properly hired employee when evidence of misconduct is discovered after litigation commences. Although the recent trend in the caselaw is to grant summary judgment when there is no issue of fact that the employee²¹ would have been fired had the employer known of the misconduct, the decision in *Dunn* suggests a contrary result. It appears more likely that the 11th Circuit will continue to hold that *Summers*' usefulness lies only in its limitation upon plaintiff's remedies. Nonetheless, until such time as the court of appeals is presented with this specific issue, and given the strength of the caselaw in other jurisdictions and the vehemence of the dissent filed in *Dunn*, attorneys representing employers should consider asserting the *Summers* rule as a basis for summary judgment in cases where the employer discovers, after commencement of the litigation, that a properly hired employee has engaged in misconduct sufficient to warrant termination, though that misconduct was not known to the employer at the time of the

termination. □

¹ E.g., *Washington v. Lake County*, 762 F. Supp. 199, 202 (N.D. Ill. 1991), *aff'd*, 969 F.2d 250 (7th Cir. 1992); *Churchman v. Pinkerton's, Inc.*, 756 F. Supp. 515, 519 (D. Kan. 1991).

² The Equal Employment Opportunity Commission takes the position that after-acquired evidence of employee misconduct is not a complete defense to liability and may be used, therefore, only to limit damages to the period between the unlawful termination and the date termination would have resulted for a nondiscriminatory reason. EEOC General Counsel Memorandum on Civil Rights Act of 1991, dated Feb. 22, 1993, 34 DAILY LAB. REP. (BNA) at E-1.

³ See, e.g., *Johnson v. Honeywell Info. Sys., Inc.*, 955 F.2d 409 (6th Cir. 1992); *Washington v. Lake County*, 969 F.2d 250 (7th Cir. 1992); *Agbor v. Mountain Fuel Supply Co.*, 60 FAIR EMPL. PRAC. CAS. (BNA) 1142 (D. Utah 1993); *O'Day v. McDonnell Douglas Helicopter Co.*, 784 F. Supp. 1466, 1468-69 (D. Ariz. 1992); *Guzman v. United Airlines, Inc.*, 53 FAIR EMPL. PRAC. CAS. (BNA) 1419 (D. Mass. 1990) (applying Massachusetts statute).

⁴ See, e.g., *Wallace v. Dunn Constr. Co.*, 968 F.2d 1174 (11th Cir. 1992); *Smith v. Equitable Life Assurance Soc'y*, 60 FAIR EMPL. PRAC. CAS. (BNA) 1225 (S.D. N.Y. 1993) (denying summary judgment; jury may consider misconduct in assessing damages).

⁵ Efforts to invoke the *Summers* defense in Equal Pay Act and sexual harassment suits have met with little success. See, e.g., *Boyd v. Rubbermaid Commercial Prod., Inc.*, No. Civ. A. 91-0083-H, 1992 WESTLAW 404398 (W.D. Va. Dec. 11, 1992) (rejecting *Summers*' applicability to plaintiff's ability to recover unpaid equal wages and liquidated damages in Equal Pay Act claim); *Davis v. Utah Power & Light Co.*, 53 FAIR EMPL. PRAC. CAS. (BNA) 1047 (D. Utah 1990) (refusing to consider *Summers* in sexual harassment suit, noting that being qualified for the job is not an element of the cause of action).

⁶ Employers should take care to note they must prove they would have fired the employee, not simply that they could have done so. E.g., *Reed v. Amax Coal Co.*, 971 F.2d 1295, 1298 (7th Cir. 1992).

⁷ See *supra* note 3.

⁸ It should be noted, however, that the court's statement that "the effect of after-acquired evidence on Title VII remedies is best decided on a case-by-case basis," *Dunn*, 968 F.2d at 1181, is sure to promote further confusion in this area.

⁹ *Dunn*, 968 F.2d at 1181-82.

¹⁰ The 11th Circuit's creation of an additional evidentiary burden for employers to overcome in order to halt the backpay period goes beyond even the EEOC's position. The EEOC has taken the position that the backpay period ends upon the date of discovery of the misconduct. See *supra* note 2.

¹¹ Judge Godbold also participated in the Sixth Circuit decision holding that *Summers* could be used as a complete defense.

See *Johnson v. Honeywell Info. Sys., Inc.*, 955 F.2d 409 (6th Cir. 1992) (Godbold, J., sitting by designation) (even assuming violation of state civil rights act, resumé fraud barred any entitlement to relief). The *Dunn* court explicitly rejected the standing argument. *Dunn*, 968 F.2d at 1181 n.10.

¹² *Johnson v. Honeywell Info. Sys., Inc.*, 955 F.2d at 414.

¹³ E.g., *Churchman v. Pinkerton's, Inc.*, 756 F. Supp. at 518.

¹⁴ See, e.g., *DeVoe v. Medi-Dyn, Inc.*, 782 F. Supp. 546, 552-53 (D. Kan. 1992); *Grzenia v. Interspec, Inc.*, No. 91C 290, 1991 WESTLAW 222105, at *4 (N.D. Ill. Oct. 21, 1991); *Punahale v. United Air Lines, Inc.*, 756 F. Supp. 487, 490-91 (D. Colo. 1991).

¹⁵ *Kristufek v. Hussmann-Foodservice Co.*, 61 FAIR EMPL. PRAC. CAS. (BNA) 72 (7th Cir. 1993), illustrates the danger of having an employment policy which provides only that a particular act of misconduct "may be" grounds for dismissal as opposed to "will be" grounds for dismissal.

¹⁶ See *Churchman v. Pinkerton's, Inc.*, 756 F. Supp. at 520-21.

¹⁷ See *Mackey v. Board of Pensions*, No. 91C 5739, 1993 WESTLAW 11674 (Jan. 15, 1993).

¹⁸ Pub. L. No. 102-166, 105 Stat. 1071 (1991).

¹⁹ See *supra* note 2.

²⁰ *Dunn*, 968 F.2d at 1184 n.17.

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This column is submitted on behalf of the Labor and Employment Law Section, John W. Robinson IV, chair, and Kevin E. Hyde, editor.

Resume Fraud as a Defense to Bias Claims

by Gregory A. Hearing

In the last several months, several significant court decisions have come down regarding the significance of the discovery of resumé fraud in bias claims. In addition, the Equal Employment Opportunity Commission (EEOC) recently issued a policy memorandum which adopted the holdings of recent cases with regard to an employer's discovery of after-the-fact evidence in bias claims.

The Seventh Circuit Court of Appeals decided two cases on this issue in July and August. In the first case, *Washington v. Lake County*, No. 91-1819 (7th Cir. 1992), the court announced the standard it will apply in these types of cases. Factually, Eddie Washington, a jailor at the Lake County Illinois Sheriff's Department who was fired in 1987 filed suit, alleging that he was terminated due to his race. During the pendency of the suit, the Lake County Sheriff's Office determined that Washington falsified his employment application by concealing two criminal convictions. The district court for the Northern District of Illinois held that even if Washington was the victim of race bias, he was not entitled to relief because Washington lied on his employment application.

On appeal, the Seventh Circuit announced that a routine policy of rejecting bias claims under a "would-not-have-been-hired" theory is misguided. Instead, the court stated that "the appropriate issue in an employment discrimination case where the plaintiff lied on his application and was later fired for an unrelated reason, is whether the employer, acting in a race-neutral fashion, would have fired the employee upon discovery of the misrepresentation, not whether the employee would have hired the employee had it known the truth." The court said that the proper inquiry is whether Washington was treated differently than similarly situated employees because of his race. The court placed the burden on the employee in such cases to show that he would not have been fired in a resumé fraud situation. The court determined that Washington did not produce such evidence and dismissed his claim.

In a decision following closely upon the heels of *Washington*, the Seventh Circuit further refined its earlier pronouncement on the significance of resumé fraud in bias claims. In *Reed v. AMAX Coal Co.*, Nos. 90-1127 and 92-1730 (7th Cir. 1992), the court held that employers must offer proof that they would have fired an employee for a resumé fraud so that employers cannot avoid "Title VII liability by pointing to minor rule violations which may technically subject the employee to dismissal, but would not, in fact, result in discharge."

The facts of the *Reed* case showed that Elius Reed was hired by AMAX Coal Company after submitting an application in which Reed failed to disclose a felony conviction. The job application contained a provision that falsification on the application was grounds for dismissal. Reed was subsequently dismissed in 1982 for sleeping on the job. Reed believed that he was dismissed because of his race and filed a charge of discrimination with the Illinois Department of Human Rights. During the pendency of his charge, AMAX discovered Reed's falsification. Reed's charge was rejected and he filed suit in federal district court. The district court entered judgment for AMAX on the ground that Reed had lied on his job application, finding that was grounds for dismissal. On appeal, the Seventh Circuit said that the type of proof the court would require from an employer claiming that it would fire an employee for resumé fraud is proof that other employees were fired in similar circumstances in the past. The obvious problem with this requirement is that if the employee is the first to have lied on the application and been caught, then the employer has no past history to rely upon as proof.

In another recent case involving this issue, the United States District Court for the District of Colorado granted judgment in favor of an employer in a sex and national origin bias claim. In *Bonger v. American Water Works*, No. 90-C-1592 (D.C. Colo. 1992), American Water Works learned for the first time that Bonger did not have a

college degree while Bonger's lawsuit for sex and national origin discrimination was pending. In 1988, Bonger, a hispanic woman, applied for the position of Director of Human Resources at American. On her application, she represented that she had a college degree. Two years later, Bonger was fired for allegedly poor performance. Bonger sued alleging sex and national origin discrimination, but during the pendency of action, American discovered that Bonger did not have a college degree. American submitted an affidavit insisting that it would have fired Bonger for misrepresenting that she had a college degree and has consistently had a policy that resumé fraud was grounds for termination. The district court determined that American showed that it would have fired Bonger had it known of her resumé fraud either before or at the time of her termination and therefore granted American's motion for summary judgment.

Not to be outdone by the recent case law, the EEOC, on July 7, 1992, adopted a guidance memorandum which included a section setting forth its policy on the effect of discovery of after-the-fact evidence in bias cases. The EEOC memorandum states:

If the employer produces proof of a justification discovered after-the-fact that would have induced it to take the same action, the employer will be shielded from an order requiring it to reinstate the complainant or to pay the portion of back pay accruing after the date that the legitimate basis for the adverse action was discovered, and the portion of compensatory damages (in charges based on post-1991 Act conduct) that would cover losses arising after that date. If the date of the discovery is unknown, then an appropriate percentage reduction should be made, based on an assessment of the approximate date of the discovery. Thus, if a complainant is terminated for discriminatory reasons, but the employer has an absolute policy of firing anyone who commits theft, then the employer would not be required to reinstate the charging party or to pay compensatory damages for injuries arising after the date that the theft was discovered, or back pay accruing after that date.

A copy of the EEOC Guidance Memorandum can be found at 131 DLR (BNA) E1-E19.

Although the EEOC guidance memorandum would cut off the amount of pecuniary

and non-pecuniary damages, the memorandum points out that if an employer's sole motivation was discriminatory and that it acted with malice or with reckless indifference to the claimant's rights, after-the-fact evidence would not operate to shield the employer from having to pay punitive damages to the claimant.

The Eleventh Circuit recently spoke on this issue in *Wallace v. Dunn Construction Co., Inc.*, No. 91-7406 (1992 WL 180276) (11th Cir. 1992). In *Wallace*, one of the plaintiffs, who was suing Dunn for, *inter alia*, sex harassment under Title VII, lied on her employment application by failing to disclose criminal convictions. Dunn discovered this evidence after deposing the plaintiff. Dunn moved for partial summary judgment on the grounds that the after acquired evidence of the plaintiff's application fraud was a legitimate cause for her termination, irrespective of any unlawful bias. The United States District Court for the Northern District of Alabama denied the motion and Dunn took an interlocutory appeal.

The Eleventh Circuit reversed but set forth certain limitations as to the extent of the significance of after acquired evidence. The court held that the plaintiff could not be awarded any prospective relief such as front pay, reinstatement, or injunctive relief but could be awarded backpay unless Dunn could show that it would have discovered the application fraud prior to the end of the backpay period. The court specifically rejected the argument that backpay should be cut off on the day that Dunn actually discovered the application fraud. The court rejected that approach on the ground that a bias victim should never be placed in a worse position than if she was not in a protected class because, without the lawsuit, the employer would not have discovered the fraud. The court said to hold otherwise would have the effect of providing the em-

ployer a windfall. Nevertheless, the court stated that the after acquired evidence should have the result of reducing the attorneys' fee award if the plaintiff prevails.

No indication was given in the opinion as to whether the *Wallace* court considered the EEOC policy memorandum on this subject even though it was issued approximately one month before the court's opinion was issued. It is therefore unknown what effect, if any, the EEOC's policy memorandum will have on cases in this jurisdiction.

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Company A is a company incorporated and with its principal place of business in New York. Company A does business and has employees in every state in the nation. Employee B is a former employee for Company A in the state of Florida. Employee B has an agreement with Company A that provides that an employee will be given an opportunity to improve any unsatisfactory performance. The agreement specifically provides, however, that Company A reserves the right to terminate an employee immediately in the case of fraud, dishonesty, or falsification of company records. The agreement also provides for an internal appeal process, but without right to counsel, access to documents, and sworn testimony.

Company A had reason to suspect that Employee B was falsifying information on company documents and engaging in other fraudulent practices. After an internal investigation, Company A terminated Employee B without warning for falsifying company documents, dishonesty, and fraud. B filed suit in state court against A alleging breach of his employment contract, violations of ERISA, RICO violations, defamation, and tortious interference. In addition to Company A, Employee B named his immediate supervisor, several members of upper management, and other employees in the suit.

Issues:

1. Removal. Although there are some federal claims, there are state claims against nondiverse defendants. Fraudulent joinder?

2. Mediation.

3. Counterclaims.

4. Counsel for B begins to informally contact non-management employees of A, as well as individual customers.

5. Employee B applies for unemployment compensation on the basis that there has been no misconduct in connection with his work. During the hearing, the hearing officer will not allow Company A to testify from the records regarding instances of dishonesty, fraud, and falsification of company documents and grants B his unemployment compensation. Does the unemployment decision have any collateral estoppel or res judicata effect on this lawsuit? Should the employer appeal the unemployment compensation award?

6. Employee B serves Company A and the individual defendants with voluminous discovery requests seeking nationwide discovery of information about other employees. How should Company A respond?

7. There is an ongoing investigation of B by an independent state regulatory agency. How should the parties react?

8. Motion practice.

HYPOTHETICAL

You are counsel for a MegaCorp, a large national corporation with branches in every state. On returning from vacation one Monday, you are met by the usual pile of mail, along with several frantic phone messages from the Human Resources Manager for one of the local branches in your territory. When you return her call, she tells you that she has spent the last week dealing with a highly sensitive situation involving allegations of sexual harassment.

It seems a female employee has made a very serious charge against one of her coworkers, John Groper (who is not her supervisor). She claims that when she first began working in a small local office with Groper over a year ago, he cornered her in a room and tried to force himself on her. The attack was only stopped when Groper overheard a customer enter an outer office. The female employee never reported the incident because she thought the situation would improve, she says.

The atmosphere did not improve, however, and the female employee also alleges that throughout the last year, she has had to endure frequent remarks of a sexual nature from Groper. For his part, Groper vigorously denies every allegation, asserting that the female employee was motivated by jealousy of his better work performance and a desire to be transferred to a more prestigious location. Groper adds that he believes MegaCorp is on a crusade to fire him based on unsubstantiated allegations. "You'll hear from my lawyer," he tells the human resources manager. The human resources manager needs your advice.

1. At this early stage, what is your first move?
2. If you separate the two employees, whom should you transfer? How do you handle the move?

On your advice, MegaCorp begins an investigation of Groper. No one can corroborate the attack (the customer is nowhere to be found), but two other coworkers report that Groper made sexual comments at work and inquired into their sex lives in a manner that made them uncomfortable. One employee from another office alleges that Groper "pulled" her onto his lap at a social event and touched her inappropriately. A witness at that event suggests that the woman voluntarily sat in Groper's lap. Groper has retained counsel, who threatens to sue MegaCorp and any person associated with the case if he is discharged.

3. What is your next move? Groper's employment contract maintains employment at will. Do you discharge Groper?
4. During the investigation of the accusation, it comes to light that the accuser has filed two other allegations of sexual misconduct, one against her child's daycare provider and another against her chiropractor. Does this affect your course of action?
5. Groper's counsel asks for the names of his accusers and documents relating to their accusations. He maintains that without access to these documents a discharge would be manifestly unfair and "violate due process." What, if anything, do you reveal to Groper's lawyer?

The human resources manager recommends that Groper be discharged. Meanwhile, Groper sues the first accuser for defamation and intentional infliction of emotional distress.

6. MegaCorp has a policy of indemnifying employees sued for actions in the course of their employment. Do you pay for the accuser's defense of Groper's lawsuit? If so, should you also pay for her pursuit of a counterclaim against Groper?
7. Are there conflict of interest problems here? Who should MegaCorp retain to represent the accuser?
8. Assume the accuser complains that she has been treated unfairly in the investigation and in her transfer to a new job and hints about going to the EEOC. Does this affect the answers to the last two questions?

MegaCorp receives a subpoena for all documents, notes, tapes, etc. relating to the investigation, including the personnel file of the accuser. Meanwhile, Groper's lawyer accuses MegaCorp of being "scum" and threatens to go to the press to expose how his client has been railroaded. The employees involved express their concern for their own privacy.

9. How do you respond to the subpoena? How do you protect the privacy of the individuals involved?
10. What other measures would you pursue to protect the confidentiality of the documents released in re-

sponse to the subpoena? How would a "gag order" help or hinder MegaCorp?

The human resource manager is concerned, as you are, that when Groper's discharge is final, he will sue MegaCorp.

11. What actions can you take now to fend off further litigation?
12. Groper has threatened to sue each and every manager involved in the investigation. Do you have an obligation to notify employees that they may be the subjects of future litigation?
13. In planning to defend an action by Groper for defamation, breach of contract, wrongful discharge and intentional infliction of emotional distress, what is your theory of the case? What legal theories would you pursue to defend the action?



ETHICS IN EMPLOYMENT LAW

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ETHICS IN EMPLOYMENT LAW

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ETHICAL CONSIDERATIONS IN REPRESENTING EMPLOYERS

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I. IDENTIFYING THE CLIENT.

A. RELEVANT RULE*

Rule 1.13 Organization As Client.

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a manner related to representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary and in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration of the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

- (1) asking reconsideration of the matter;
- (2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and
- (3) referring the matter to higher authority in the organization including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

* "Rule" refers to both KBA Rules of Professional Conduct and ABA Model Rules of Professional Conduct.

(c) If, despite the lawyers efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is a clear violation of law and is likely to result in substantial injury to the organization, the lawyer may resign in accordance with Rule 1.16.

(d) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of a client when it is apparent that the organization's interests are adverse to those constituents with whom the lawyer is dealing.

(e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

The Comment accompanying Rule 1.13 anticipates potential conflict between the interests of the corporate client and the interests of its officers, directors, employees, shareholders and other constituents. Such conflicts create unique problems for counsel representing the corporate entity, which can only act through these constituents. Thus, in order to properly and ethically represent the corporate client, i.e. the employer, counsel will necessarily engage in contact, investigation and advice with persons who may have or develop adverse interests during the course and scope of the representation.

The Comment clearly indicates that at such times, the lawyer must advise any individual constituent whose interest the lawyer finds adverse to that organization that the conflict exists, that the lawyer does not represent the individual constituent and that constituent may wish to seek independent counsel. Most

importantly, both the constituent and the counsel must realize and acknowledge - and act accordingly - that discussions between them may not be privileged.

The parameters and prescriptions of Rule 1.13 are not limited to formally incorporated businesses. The Rule refers to "organizations," which can include partnerships, joint ventures, franchisees, unions, trade associations, and other distinct separate entities.¹

The difficulty of the Rule is demonstrated by Oliver v. Kalamazoo Board of Education, 346 F. Supp. 766 (W.D. Mich. 1972) wherein the Court imposed a duty on the attorney representing a school board to maintain confidentiality as to individual members who "are the only available conduit of information between the client corporate body entity and the attorney."

II. CONTACT WITH CURRENT AND/OR FORMER EMPLOYEES OF AN ADVERSE CORPORATE PARTY

A. RELEVANT RULE

Rule 4.2 Communication With Person Represented by Counsel

In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Comment [2] to the Rule states as follows:

In the case of an organization, the Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization. If an agent or employee of the

organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f).

B. ABA FORMAL OPINION 91-359, MARCH 22, 1991

1. EX PARTE CONTACT WITH FORMER EMPLOYEES OF AN ADVERSE CORPORATE PARTY DOES NOT VIOLATE RULE 4.2

The Comment to Rule 4.2 separates the inquiry as to a present employee into three categories: (a) an employee who has a managerial responsibility on behalf of the employer-corporation, (b) an employee who is one whose act or omission in connection with the matter that is the subject of the potential communicating lawyer's representation may be imputed to the corporation, or (c) an employee whose statement may constitute an admission by the corporation.² However, neither the text of Rule 4.2 nor its Comment mention former employees. Thus, given that "the effect of the Rule is to inhibit the acquisition of information about one's case," the Opinion held that Rule 4.2 should be strictly construed so as not to cover former employees.³ Although "the concerns reflected in the Comment to Rule 4.2 may survive the termination of the employment relationship,"⁴ by delineating categories of corporate employees who may not be the subject of ex parte communication, the Comment to Rule 4.2 "clearly implies that communication with all other employees on 'the matter of representation' is permissible without consent."⁵

The Opinion cautioned, however, that an attorney considering contacting a former employee of an adverse corporate party must not "seek to induce" the employee to violate the corporate attorney-client privilege.⁶ In addition, the contacting attorney

must observe other applicable rules. As examples, the Committee cited Rule 4.1 (truthfulness in statements) and Rule 4.3 (contact with unrepresented persons).⁷

2. APPLICABILITY OF THE ABA OPINION

The scope of Rule 4.2 has been the subject of conflicts among the courts and, as the ABA noted, judicial interpretation of Rule 4.2 varies.⁸ The ABA's position is not binding on the courts and thus attorneys wishing to contact former employees of adverse corporate parties should check the interpretation of the Rule in their jurisdiction. For example, in Porter v. Arco Metals, Div. of Atlantic Richfield, 642 F.Supp. 1116 (D.Mont. 1986), the Court prohibited contact with "present or former employees with managerial responsibilities concerning the matter in litigation." The responsibility for knowing which employees are covered by the Rule rests squarely on the contacting attorney.⁹

"Whether an employee falls into any of [the] three categories is inevitably an issue affected by a host of factors These include at least the terms of the relevant statutory and common law of the state of the corporation's incorporation; applicable rules of evidence in the relevant jurisdiction; and relevant corporate documents affecting employees' duties and responsibilities.¹⁰ As the Committee points out, attorneys should also be aware that the Comment to Rule 4.2 covers non-employees (e.g. independent contractors) insofar as their statements may bind the corporation.¹¹

C. KBA ETHICS OPINIONS KBA E-65 AND E-213¹²

Opinions of the Kentucky Bar Association clearly indicate that a lawyer representing a party adverse to a corporation or

governmental entity may not contact any employee "having access to confidential matters" of the entity without prior consent of opposing counsel.¹³

KBA E-213 states that the attorney may contact "employees who are not managing agents and hourly wage earners who have no access to privileged or confidential information." However, the text of the opinion states as follows:

"If any attorney can independently determine that a management employee or hourly wage earner does not have any access to privileged or confidential information, they may be contacted by an adversary attorney."

Where such an independent determination cannot be made, however, KBA E-213 requires an inquiry through the appropriate officials of the corporation. Since the corporation would be represented by counsel, the appropriate inquiry should be directed to counsel.

The opinion offers no further guidance on counsel's ability to "independently determine" whether an employee would have access to privileged or confidential information. Clearly, the attorney risking contact with the employee to determine whether such access exists risks inadvertent or unintentional violation of the Rule.

D. SHONEY'S, INC. V. LEWIS

The Kentucky Supreme Court has interpreted Rule 4.2 in its January, 1994 decision in Shoney's, Inc. v. Lewis, No. 93-CA-286-0A (January 31, 1994). There, the Court ruled that meetings between Plaintiff's counsel and two employees - a general manager and a relief manager - without consent from or notice to opposing counsel violated the Rule. The contacts occurred following actual

notice to plaintiff's counsel that the defendant employer was represented.

The Court relied upon the following Comment to the Rule in finding the violation:

(2) In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other persons whose act or omission in connection with that matter may be imputed to the organization for purpose of civil or criminal liability or whose statement may constitute an admission on the part of the organization.

SCR 3.130 Rule 4.2, comment 2 (emphasis supplied by the Court). The Court concluded that the "senior managerial" employees involved "are precisely within the group of persons provided for in the comment."

In fashioning a remedy for the violation of the Rule, the Court both disqualified Plaintiff's counsel and suppressed the evidence gathered in violation of the Rule stating:

"With respect to the statements wrongfully obtained, the only satisfactory remedy is suppression."¹⁴

E. ONE STATE-THREE STANDARDS

1. CONTACT WITH FORMER EMPLOYEES PROHIBITED

In Public Serv. Elec. & Gas v. Associated Elec. and Gas Insurance Services, 745 F.Supp. 1037 (D.N.J. 1990), the defendant insurance company sought to interview former employees of the plaintiff in order to determine the extent of its liability for environmental clean-up costs at plaintiff's coal gasification sites. The district court broadly interpreted Comment 2 as

extending to "any individual whose acts or omissions 'may' be imputed to the organization"¹⁵ and held that Rule 4.2 prohibits informal contact with an adverse corporate party's former employees.

As the court observed, "The Rule, as described in the Comment protects the organizations [sic] interest in the acts and omissions" that may be imputed to the corporation and is not limited to statements.¹⁶ Thus, although a former employee's statements made during an informal conference will not themselves be imputable to the corporation¹⁷, a former employee could testify to actions taken during his employment that could be imputed to the corporation.¹⁸ For this reason, "the harm caused by [imputable acts] is the same whether the witness is a present or former employee."¹⁹

In contrast to the ABA opinion, the P.S.&G. court felt that the twin policy goals of Rule 4.2, (1) to protect the corporate attorney-client relationship and (2) to prevent trained lawyers from extracting "damaging concessions from the unshielded layman,"²⁰ outweighed the need for liberal discovery.

The P.S.&G. court did not limit its ban on informal contacts to only those situations where the contacting attorney can determine that the corporate party may incur liability as a result of ex parte communications with former employees. Rather, the court held that such an approach is unwieldy and should be abandoned in favor of a blanket ban against all ex parte contacts with former employees.

2. CONTACT WITH FORMER EMPLOYEES ALLOWED

In Curley v. Cumberland Farms Inc., 134 F.R.D. 77 (D.N.J. 1990), plaintiffs, employees at defendant's chain of convenience stores, alleged that employee interrogations to recover store losses were conducted in such a manner as to constitute a pattern of extortion under state and federal RICO laws. Plaintiffs sought to interview 80 of defendant's former "Loss Prevention Specialists" (employees authorized to conduct interrogations), none of whom were known to have had direct contact with the plaintiffs, but could provide information relative to plaintiffs' claims. Defendants sought a protective order to prevent plaintiffs' attorney's contact with defendant's former employees.

The court first determined that the former loss prevention specialists were not management-level employees.²¹ Second, the court surmised that the actions taken by the 80 former employees were unlikely to be imputed to the corporation because none were known to have had contact with the plaintiffs. Indeed, plaintiffs' claims were not based on an imputation theory. Rather, plaintiffs contended that any information received by the former loss prevention specialists would constitute mere evidence of an alleged unlawful management-level policy. For this reason, the court found that the former loss prevention specialists were comparable to "witnesses to an accident who did not participate in the accident."²²

Although it was conceivable that actions taken by some of the 80 former loss prevention specialists could be imputed to the corporation, this was largely because lack of information prevented

the plaintiffs from discovering the extent of the former employees' relevant knowledge. Under these circumstances, the court found a broad interpretation of Rule 4.2 would unduly infringe on the "truth-finding process" and "extract an enormous price unwarranted by the ethical concerns."²³ The court thus declined to follow P.S.&G., and held:

[I]nformal interviews of former nonmanagerial employees of a corporate defendant are not ethically prohibited by RPC 4.2 unless the person's act or omission is believed to be so central and obvious to a determination of corporate liability that the person's conduct may be imputed to the corporation. . . . If it is not reasonably likely that the person may be a central actor for liability purposes, nothing in RPC 4.2 precludes informal contact with such a former employee.²⁴

As concerns admissions, the court concluded that statements made by former loss prevention specialists would not constitute admissions under FRE 801(d)(2)(D) (statements made by employees during the existence of the relationship) nor FRE 801(d)(2)(E) (statements made by co-conspirators during the course of the conspiracy) and thus were not prohibited.

3. CONTACT WITH "ALTER EGOS" ALLOWED

The New Jersey Superior Court, Appellate Division, adopted a third approach to regulate ex parte contact with a corporate party's current employees. In New Jersey v. CIBA-GEIGY Corp., 589 A.2d 180 (1991), the court specifically rejected "bright line" extremes prohibiting all ex parte interviews with employees. Instead, the court held that ex parte contact could not be made with any corporate employee whose acts or omissions would be binding on the corporation or imputed to the corporation for purposes of its liability, as well as any employees who are imple-

menting the advice of corporate counsel. Consequently, it rejected both the "bright line" prohibition in P.S.&G., and the so-called "control group" test utilized in Curley v. Cumberland Farms, Inc. The court cited and effectively adopted the approach utilized by the New York Court of Appeals in Niesig v. Team I, 559 N.Y.S.2d 493 (N.Y. Ct. App. 1990).

III. INTERVIEWING CLIENTS' EMPLOYEES

A. RELEVANT RULES

Rule 1.13: Organization As Client

* * * * *

(d) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of a client when it is apparent that the organization's interests are adverse to those constituents with whom the lawyer is dealing.

Rule 4.3: Dealing With Unrepresented Person

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

Rule 4.4: Respect For Rights Of Third Persons

In representing a client, a lawyer shall not knowingly use means that have no substantial purpose other than to embarrass, delay or burden a third person, or knowingly use methods of obtaining evidence that violate the legal rights of such a person.

These Rules clearly guide counsel when representation of the organizational client calls on counsel to engage in contacts with that organization's employees. The lawyer must specifically advise the employee that counsel represents the employer, and, where necessary, advise the employee that the interests of the employer

are adverse and that the employee should consider obtaining counsel.

Rule 4.4 prohibits violating the "legal rights" of persons. The Comment states that while it is impracticable to catalogue all such rights, "they include legal restrictions on methods of obtaining evidence from third persons." Clearly, rights enjoyed by persons pursuant to the Rules of Civil Procedure would become relevant.

B. Johnnies Poultry Co., 146 NLRB 770 (1964).

The National Labor Relations Act imposes additional affirmative duties on counsel when interviewing or interrogating employees of a client. Where that client is unionized, or even subject to a unionization effort, the Act places special restrictions on interviews of employees who enjoy rights under the Act.

Specifically, when investigating a labor related matter, the specific purpose of the questioning must be communicated to the employee. In addition, the employee must be given assurances of no reprisals regardless of whether the information provided, if any, ultimately proves harmful to the employer. The investigation must be conducted in an atmosphere free from anti-union animus, must occur in a non-coercive fashion. The questioning must only be relevant to the specific issue involved in the instant matter, and cannot include the probing of the employee's subjective state of mind. Finally, the investigation must be entirely voluntary on the part of the employee.

IV. EX PARTE CONTACT WITH NLRB OFFICIALS

NLRB Rules and Regulations and Statements of Procedure, Part 102, Subpart P, prohibit ex parte communications with the Regional Director, members of the Board, administrative law judges, hearing officers and support staff involved in preparing decisions in the following situations:

1. After a formal hearing is opened on a pre-election or post-election petition filed under 9(c)(1) or 9(e) of the NLRA. (102.128(a-b)).

2. After a decision is issued on unit clarification, certification amendments or post-election proceedings in which no formal hearing was held. (102.128(c)).

3. After a hearing on a jurisdictional strike is opened pursuant to section 10(k) of the NLRA. (102.128(d)).

4. After a complaint or notice of hearing is issued in an unfair labor practice proceeding or after it is known that a complaint or notice will be issued, whichever occurs first. (102.128(e))

5. By specific Board order in any proceeding. (102.128(f)).

Communications not prohibited by the rule include those authorized by Board rule (102.130(a)), questions about the status of a proceeding (102.130(b)), communications that the parties agree may be made ex parte (102.130(c)), settlement proposals (102.130(d)), and general communications not specifically related to the on-the-record proceedings (102.130(e)).

The NLRB prohibition against ex parte communication applies to

any "interested person" (102.126, 102.127(a)), and also prohibits knowingly causing others to violate the rule. (102.126, 102.131).

Violation of the rule against ex parte communication can cause the offending party's claim to be "dismissed, denied, disregarded, or otherwise adversely affected." (102.133(a)). In addition, an attorney's privilege to practice before the Board can be revoked or suspended. (102.133(b)).

V. DISCLOSURE REQUIREMENTS FOR ATTORNEYS

A. RELEVANT STATUTES

1. § 203 (b,c,f) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §433 (b,c,f) (1982):

* * * * *

(b) Every person who pursuant to any agreement or arrangement with an employer undertakes activities where an object thereof is, directly or indirectly --

(1) to persuade employees to exercise or not to exercise, or persuade employees as to the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing; or

(2) to supply an employer with information concerning the activities of employees or a labor organization in connection with a labor dispute involving such employer, except information for use solely in conjunction with an administrative or arbitral proceeding or criminal or civil judicial proceeding;

shall file within thirty days after entering into such agreement or arrangement a report with the Secretary, signed by its president and treasurer or corresponding principal officers, containing the name under which such person is engaged and doing business and the address of its principal office, and a detailed statement of the terms and conditions of such agreement or arrangement. Every such person shall file annually, with respect to each fiscal year during which payments were made as a result of such an agreement or arrangement, a report with the Secretary, signed by its president and treasurer or corresponding principal officers, containing a statement

(A) of its receipts of any kind from employers on account of labor relations advice or services, designating the sources thereof, and (B) of its disbursements of any kind, in connection with such services and the purposes thereof. In each such case such information shall be set forth in such categories as the Secretary may prescribe.

(c) Nothing in this section shall be construed to require any employer or other person to file a report covering the services of such person by reason of his giving or agreeing to give advice to such employer or representing or agreeing to represent such employer before any court, administrative agency, or tribunal of arbitration or engaging or agreeing to engage in collective bargaining on behalf of such employer with respect to wages, hours, or other terms or conditions of employment or the negotiation of an agreement or any question arising thereunder.

* * * * *

(f) Nothing contained in this section shall be construed as an amendment to, or modification of the rights protected by, section 158(c) of this title.

2. § 204 of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §434 (1982):

Nothing contained in this Act shall be construed to require an attorney who is a member in good standing of the bar in any State, to include in any report required to be filed pursuant to the provisions of this Act any information which was lawfully communicated to such attorney by any of his clients in the course of a legitimate attorney-client relationship.

B. WHO MUST DISCLOSE: PERSUADERS VS. ADVISORS

In International Union UAW v. Dole, 869 F.2d 616 (D.C. Cir. 1989), attorneys formulated a personnel policy for their client, Kawasaki Motor Corp., designed to discourage unionization. The UAW claimed that the law firm's preparation of the policy constituted persuader activity under the LMRDA and thus reporting was required. The court held that the policy formulation fell within the 203(c) exception for advice. In its holding, the court adopted the Secretary of Labor's position that:

(1) If an arrangement can be properly characterized as advice then the services fall under §203(c) regardless of whether "the object" of the service performed involves employee persuasion.²⁵

(2) "'An activity is characterized as advice if it is submitted orally or in written form to the employer for his use, and the employer is free to accept or reject the oral or written material submitted to him.'"²⁶

C. WHAT MUST BE DISCLOSED

In Humphreys, Hutcheson and Moseley v. Donovan, 755 F.2d 1211 (6th Cir. 1985), attorneys who made anti-union speeches to a client's non-union employees prior to election were "persuaders" for the purposes of §203(b) and thus required to comply with the reporting provisions.

Appellants stipulated that they had acted as persuaders but argued: (a) that the persuader-attorneys had identified themselves as representatives of management and thus the goal of §203(b) to publicize persuader activities is not furthered by subjecting the firm to the reporting requirements; (b) under §203(c), the firm is not obligated to disclose other clients for whom it performs no persuader activities; (c) information required by the annual report is protected by the broad attorney-client privilege delineated in §204; (d) the disclosure requirements are unconstitutional.

The Sixth Circuit rejected each of these arguments reasoning that the goal of §203(b) is not limited simply to publication of persuader activities. "Rather, Congress determined that persuasion itself was a suspect activity and concluded that the possible evil

could best be remedied through disclosure. It was hoped that persuasive activity would be curbed by subjecting persuaders to glaring publicity."²⁷ (Cf. Donovan v. Rose Law Firm, 768 F.2d 964 (8th Cir. 1985)). Furthermore, "[T]he purpose of section 203(c) is to clarify what is implicitly in section 203(b) -- that attorneys engaged in the usual practice of labor law are not obligated to report under section 203(b)."²⁸ However, once an attorney "crosses the boundary between the practice of labor law and persuasion, he is subject to the extensive reporting requirements."²⁹ (Cf. Rose Law Firm) (§203(c) is a limitation of the content of the report which is unaffected by the activity giving rise to the duty to report).³⁰

The Court further held that the attorney-client privilege protected by §204 is identical to the common law attorney-client privilege and thus exempts only communications from the reporting requirements and does not protect against the disclosure of the facts required by §203(b).³¹ (Cf. Rose Law Firm) (attorney-persuaders not required to report advice given clients if the clients themselves would not be subject to the reporting requirements).³²

Finally, the court held that the governmental interest in "maintaining harmonious labor relations" is compelling and outweighs the moderate chill on First Amendment rights occasioned by the reporting requirements of §203(b).³³ (Cf. Rose Law Firm) (statute should be construed to avoid infringement of constitutional rights).³⁴

VI. ADVISING MANAGEMENT DURING UNION ORGANIZATIONAL/ DECERTIFICATION ELECTIONS

A. THE UNION VIEW

"While employers are, of course, entitled to legal advice and counsel, the range of attorney services has deviated far beyond the mere provision of legal representation. Attorneys now operate as strategists for employer 'vote no' campaigns and often observe neither the law nor professional ethics in so doing. Lawyers also conduct seminars where they teach not only election strategies but also how an employer can encourage and campaign in deauthorization and decertification elections. Under the law, employer prompting of these efforts is prohibited, but attorneys have nevertheless taught employers how to do so without being discovered." Address by Jules Bernstein of the Washington, D.C. firm, Connerton, Bernstein & Katz.³⁵

B. THE MANAGEMENT VIEW

"Employers need effective counsel in order to comply with the complex provisions of the NLRA." Note, Liability of Labor Relations Consultants for Advising Unfair Labor Practices, 1983 Harv. L. Rev. 529, 540. An employer's right to counsel is a "precious right and is to be preserved and given effect." NLRB v. Guild Indus. Mfg. Corp., 321 F.2d 108, 112 (5th Cir. 1963). In St. Francis Hospital, 263 NLRB 834 (1982), the Administrative Law Judge observed that any improper intrusion on an employer's right to counsel would result in the "commission of more, rather than fewer, unfair labor practices by uninformed parties." Id. at 848.

C. BOARD REACTION

1. RULE-MAKING AUTHORITY

The Board has authority to promulgate rules governing the discipline of attorneys practicing before it. (See e.g., NLRB Rules and Regulations and Statements of Procedure, Rule 102.133(b) ("Board may censure, suspend, or revoke the privilege of practice before the Agency of any person who knowingly and willfully makes or solicits the making of a prohibited ex parte communication") and Rule 102.66(d)(2) ("misconduct of an aggravated character, when engaged in by an attorney [at a hearing or before an agent of the Board] shall be grounds for suspension or disbarment by the Board from further practice before it")).

However, despite the high profile of attorneys and professional consulting services providing employers with advice in labor relations, the Board has yet to formulate a rule, or a policy, for dealing with such practices.³⁶ As the above cited rules indicate, the Board has confined its disciplinary authority "to conduct which either takes place at the hearing or is closely connected with it."³⁷

2. RECOURSE UNDER THE NLRA

The Board's authority under the NLRA is remedial, not punitive.³⁸ As a result, the Board's ability to deal with attorney's who advise management who commit unfair labor practices is severely limited. Absent repeated, willful violations, the Board is hard-pressed to characterize any limitations imposed on attorneys under the NLRA as remedial.³⁹ Of course, the prospect of a bargaining order has a significant deterrent effect on pre-

election misconduct.⁴⁰

Naming employer's counsel in a complaint is a maneuver which should be given careful thought by the Board and charging party. The Fifth Circuit Court of Appeals has described this as an "intimidatory and coercive" restraint on the attorney-client relationship.⁴¹

The Board will hold outside consultants responsible for the unfair labor practices committed by them.⁴² In one case, the Board has entered into an unpublished settlement agreement with a consulting firm by which the firm agreed to cease and desist from interfering with the rights of workers to join a particular union "or any other labor organization."⁴³ To date, the majority of cases naming consultants as codefendants for violations of the Act involve situations where the consultant directly contacted employees and had a past history of engaging in such unlawful conduct. In NLRB v. Selvin, 527 F.2d 1273 (9th Cir. 1975), the court enforced the Board's order that the consultant-bargaining agent bargain in good faith. The same consultant had been involved in approximately nine cases, working as a bargaining agent for various employers, before she was actually named as a party and subjected to a Board order.⁴⁴

In St. Francis Fed. of Nurses & Hlth. Pro. v. NLRB, 729 F.2d 844 (D.C. Cir. 1984), management employed a consulting firm for advice on how to resist an organizational effort on the part of its non-unionized nurses. The firm did not directly contact employees but advised supervisory personnel how to lawfully approach employees and persuade them to vote against unionization. The union

sought to hold the consulting firm directly responsible for unfair labor practices committed by hospital supervisors at the firm's direction.

The federal court upheld the Board's determination that the consulting firm could not be held liable under the Act for acts committed by the hospital supervisors. However, it was not the court's determination that a consulting firm can never be directly responsible for violation of the Act. Rather, it was found that the firm did not advise the supervisors to commit unlawful acts of interrogation.

a. Agency Theory

In Bill Scott Oldsmobile, 282 NLRB 1073 (1987), an employer was held to have violated §8(a)(1) when its attorney interrogated several employees in preparation for an unfair labor practice hearing concerning unlawful discharges. Although the attorney told each employee that there would be no reprisals for information provided, the attorney failed to inform several employees of the purpose of the interview and to ensure that participation in the interview was voluntary.⁴⁵ The Board issued a cease and desist order directing management to refrain from interrogating employees without first informing them of the purpose and voluntary nature of the interview. (Cf. Cook Paint & Varnish Co. v. NLRB, 648 F.2d 712 (D.C. Cir. 1981) (employer can compel employee to submit to limited, pre-arbitration interview as long as the interview does not pry into protected union activities)).

D. BAR DISCIPLINE

Rule 1.2(d) and (e) Scope of Representation

* * * * *

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

(e) When a lawyer knows that a client expects assistance not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the relevant limitations of the lawyer's conduct.

Comment: Criminal, Fraudulent and Prohibited Transactions --

[6] A lawyer is required to give an honest opinion about the actual consequences that appear likely to result from a client's conduct. The fact that a client uses advice in a course of action that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action. However, a lawyer may not knowingly assist a client in criminal or fraudulent conduct. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[7] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is not permitted to reveal the client's wrongdoing, except where permitted by Rule 1.6. However, the lawyer is required to avoid furthering the purpose, for example, by suggesting how it might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposes

is legally proper but then discovers is criminal or fraudulent.
Withdrawal from the representation, therefore, may be required.

ENDNOTES

1. See e.g., Yablonski v. United Mine Workers of America, 448 F.2d 1175, enforced, 454 F.2d 1036 (CADC 1971) (labor union dispute); Margulies v. Upchurch, 696 P.2d 1195 (Utah 1985) (limited partnership).
2. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 91-359 (BNA) 901:140, 142 (1991) (emphasis in original).
3. Id. at 901:143-144.
4. Id. at 901:142.
5. Id.
6. Id. at 901:144. See: Upjohn v. United States, 499 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981).
7. Id. at 901:142.
8. Id. at 901:142-143.
9. Id. at 901:142. For an excellent discussion of various jurisdictions decisions on the issue, see Valassic v. Samelson, 143 F.R.D. 118 (E.D. Mich. 1992).
10. Id.
11. Public Serv. Elec. & Gas v. Associated Elec. & Gas, 745 F.Supp. 1037, 1041 (D.N.J. 1990).
12. Pursuant to SCR 3.530, parties may obtain judicial review of KBA formal opinions. Counsel acting pursuant to an opinion obtained pursuant to their own petition may not be disciplined if the petition "clearly, fairly, accurately and completely" described the contemplated conduct.
13. KBA E-213; KBA E-65.
14. The Court cited similar suppression of "depositions" from Papanicolaou v. Chase Manhattan Bank, N.A., 720 F. Supp. 1080 (S.D.M.Y. 1989). Similar suppression of improperly obtained statements occurred in Trans-Cold Express, Inc. v. Arrow Motor Transit, Inc., 440 F.2d 1216 (7th Cir. 1971), People of the State of Illinois v. Zagier, 241 N.E. 2d 195 (Ill. 1968). See also Obser v. Edelson, 96 N.Y.S. 2d 817, affirmed 276 A.D. 999 (1949); Massa v. Eaton Corporation, 109 F.R.D. 312 (W.D. Mich. 1985) ("managerial level" employees).
15. Id. (emphasis in original).
16. Id. at 1042 (emphasis in original).

17. See: Wright by Wright v. Group Health Hosp., 103 Wash.2d 192, 691 P.2d 564 (1984).
18. P. S. & G., 745 F.Supp. at 1042.
19. Id. at 1042.
20. Id. at 1039.
21. Curley v. Cumberland Farms, Inc., 134 F.R.D. 77 (D.N.J. 1990).
22. Id. at 88.
23. Id. at 90.
24. Id. at 91.
25. International Union UAW v. Dole, 869 F.2d 616 (D.C. Cir. 1989).
26. Id. at 619-620 (quoting Secretary of Labor January 1983 Statement of Reasons).
27. Humphreys, Hutcheson and Moseley v. Donovan, 755 F.2d 1211, 1215 (6th Cir. 1985).
28. Id. at 1215-16.
29. Id. at 1216.
30. Donovan v. Rose Law Firm, 768 F.2d 964, 971 (8th Cir. 1985).
31. Humphreys, 755 F.2d at 1219.
32. Rose Law Firm, 768 F.2d at 975.
33. Humphreys, 755 F.2d at 1221-22.
34. Rose Law Firm, 768 F.2d at 975.
35. Reprinted at 42 Daily Labor Report E-1 (BNA) (1985).
36. Bernstein, Union-Busting: From Benign Neglect to Malignant Growth, 14 U.C. Davis L. Rev. 1 (1980).
37. Id. at 51.
38. Republic Steel Corp. v. NLRB, 311 U.S. 7, 12 (1940).
39. Liability of Labor Relations Consultants for Advising Unfair Labor Practices, 1983 Harv. L. Rev. 529, 531-36.
40. See: NLRB v. Gissel Packing Co., 395 U.S. 575, 614 (1969).

41. NLRB v. Guild Indus. Mfg. Corp., 321 F.2d 108, 112 (5th Cir. 1963).
42. See: Plastic Film Products Corp., 238 N.L.R.B. 159 (1978); Meyer Stamping & Mfg. Co., Inc., 237 N.L.R.B. 1322 (1978); Flex Plastics, Inc., 262 N.L.R.B. 651 (1982).
43. West Coast Industrial Relations Assn. v. Operating Engineers Local Union No. 501, No. 31-CA-9499 (1980). Cited in 1983 Harv. L. Rev. at p. 534 n.35.
44. Bernstein, Union Busting, 14 U.C. Davis L. Rev. 1, 48.
45. See: Johnnie's Poultry Co., 146 N.L.R.B. 770, 775 (1964), enf. denied 344 F.2d 617 (8th Cir. 1965).

Kentucky Legal Ethics

Formal Ethics Opinions

Opinion KBA E-65

Question: May an attorney contact an opposing party to obtain information relating to a pending controversy, without the consent of opposing counsel?

Answer: No.

References: Canon 9, 22; DR 7-104

Opinion (May 1973)

Defendant's attorney gave notice to take depositions of three plaintiffs. On the day of the scheduled deposition, the plaintiff's attorney, upon being advised of an illness to one of the plaintiffs by the wife of such plaintiff, who was also a party to the action, notified the chief counsel for the defendants approximately two hours before the scheduled depositions. The chief counsel preferred to take all three plaintiffs' depositions at the same time, so he agreed to postpone the depositions and to notify his co-counsel of such a decision.

In reliance upon the agreement with the defendant's chief counsel, the plaintiffs' attorney did not appear for the depositions, nor did either of the plaintiffs. The defendant's co-counsel had been advised at least one hour before the scheduled depositions that they would not be taken.

Defendant's co-counsel, with one of the defendants, then searched out the plaintiffs and inquired of the nature of the illness and attempted to determine whether or not in fact the plaintiff was ill or was tending to other business. No leave of court was obtained and no effort was made to contact the plaintiffs' attorney prior to contacting the plaintiff.

The defendant's co-counsel interrogated the plaintiff concerning the advice he had received from the plaintiff's attorney about attending the deposition and communications between them about the deposition. Defendant's co-counsel later testified as a witness in support of his motion to dismiss the case and for an affirmative award of counsel fees and expenses for attending the deposition.

The issue arises as to whether or not it was proper to communicate with an adverse party pending litigation without the consent of his counsel.

Canon 9 of the Canons of Professional Ethics holds:

A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel... but should deal only with his counsel.

And, DR 7-104 states:

- (a) During the course of the representation of a client a lawyer shall not...
 - (1) Communicate or cause another to communicate on the subject of

representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

Through the years, the ABA has dealt with Canon 9 in numerous situations. In ABA Formal Opinion 187 (1938), the Committee held:

It is clear from the earlier opinions of this Committee that Canon 9 is to be construed literally and does not allow a communication with an opposing party, without the consent of his counsel, though his purpose be merely to investigate the facts.

It is evident from reading the earlier opinions and later ones that this is the clear intent of the Canon. ABA Informal Decision C-426, issued March 16, 1961, held that the materiality or the immateriality of the information which the attorney might obtain from the adverse party in a statement would have no bearing on the question of ethics involved. And, later in ABA Informal Decision C-517, issued February 15, 1962, the Committee again held for its strict application and listed but two exceptions to such application: (1) If the attorney for the other party consents to the contact, then contact will be proper, and (2) If information vital to the settlement of the case is not communicated by the other attorney to his client.

Despite the increased liberality of the Civil Rules and forms of discovery, the rules do not contemplate discovery of privileged information between attorney and client. While it is the duty of an attorney to represent his client zealously, it is also his duty to represent him within the bounds of the law.

It is also proper to note that Canon 22 provides that the conduct of the lawyer before the court and with other lawyers should be characterized by candor and fairness. Clearly this includes trust in one's opposing counsel and acceptance in good faith of what he conveys to you. The results of gross mistrust in the legal profession are immeasurable.

The reasons for the prohibition upon communications are clear and convincing. They arise out of the nature of the relation of attorney and client and are imperative to the rights and interests of the adverse party and his attorney. To preserve the proper functioning of the legal system, as well as to shield an adverse party from improper approaches, the Canons and Disciplinary Rules are to be strictly applied.

Kentucky Legal Ethics

Formal Ethics Opinions

Opinion KBA E-213

Question 1: May a lawyer who has a suit pending against a corporation or governmental entity contact the President, General Manager, or other employee having access to confidential matters without prior consent of the other lawyer?

Answer 1: No.

Question 2: May a lawyer who is presently suing a corporation or governmental entity contact employees who are not managing agents and hourly wage earners that have no access to privileged or confidential information?

Answer 2: Yes.

References: Opinion KBA 65; DR 7-104

Opinion: (March 1979)

The general proposition of communicating with one of adverse interest is set out in DR 7-104(A)(1), which simply states that an attorney shall not communicate on the subject of the representation with the party he knows to be represented by a lawyer unless he has prior consent of the lawyer representing the other party. The general application of DR 7-104 is set out in Opinion KBA E-65.

The question before us today is to what extent this restrictive communication applies to employees of a corporation. Beyond a doubt, the restriction would apply to any corporate officer, member of the Board of Directors or any management employee with access to any privileged or confidential information of the corporation. If any attorney can independently determine that a management employee or hourly wage earner does not have any access to privileged or confidential information, they may be contacted by an adversary attorney.

If an opposing attorney cannot truly find out the relationship of any employee with the employer corporation and whether or not the employee has any access to privileged or confidential information, it will be necessary to inquire through the proper officials of the corporation. Since the proper officials of the corporation are represented by an attorney, the proper individual to contact before questioning any doubtful employee would be the opposing attorney for the corporation or governmental agency.

To paraphrase Canon 7 of the Code, even though a lawyer has a duty to represent his client zealously, it must be within the bounds of the law. The Rules of Civil Procedure provide for discovery of relevant information from any employees of any corporation. Therefore, if there is any question concerning the relationship of an employee to the corporation or governmental entity, it is necessary to contact the attorney of the corporation before taking any statements from the employee or from questioning any employee of the adversary corporation.

**EMPLOYMENT LITIGATION:
INSURANCE COVERAGE AND ETHICAL ISSUES**

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Employment Litigation: Insurance
Coverage and Ethical Issues

I. INTRODUCTION

The insurance defense lawyer representing insurers and insureds in employment-related matters is subject to the same rules of professional ethics as are all other lawyers; however, the unique relationship of counsel, insurer, insured and often, insured's employees, presents some special problems in the application of those rules in insurance litigation.

This outline discusses the current ethical rules and how they apply in insurance related matters.

II. MODEL CODE AND MODEL RULES

The Model Code of Professional Responsibility (1986) ("Model Code") and the Model Rules of Professional Conduct (1983) ("Model Rules"), which has superseded the Model Code in most states, provide the general principles for resolution of ethical issues. The typical ethical dilemma faced by an insurance defense lawyer comes from multiple party representation: an attorney representing multiple clients who are co-plaintiffs or co-defendants in the same litigation (the problem being adverse interests which lead to a conflict of interest for the attorney in question.) Courts will often permit this multiple representation to occur, partly because the potential for conflicting loyalties is less compared to the benefits of multiple representation.

However, the duty of undivided loyalty that an attorney owes his or her client can be compromised in this type of situation. The Model Code and Model Rules are sensitive to this duty and provide some guidance concerning this potential conflict. However, neither give specific guidance when a conflict of interest exists between an insurer and insured. Ethical Consideration 5-17 in the Model Code identifies the insurer/insured situation as a typical problem, which requires a case-by-case analysis to determine the "chance of adverse effect" of differing interests on the lawyer's judgment.

Canon 5, the conflict of interest canon of the Model Code and Rule 1.7 "Conflict of Interest: General Rule", of the Model Rules set forth the duty of undivided loyalty and address the conflicts that arise from simultaneous representation of multiple clients. Canon 4 of the Model Code sets forth the duty to preserve client confidences. Canon 9 dictates the avoidance of the appearance of impropriety.

A. The Model Code.

The Model Code specifically addresses concurrent adverse representation conflicts in its Disciplinary Rules, at DR 5-105, which provides, in pertinent part:

(A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).

(B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, or it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).

(C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of the lawyer's independent professional judgment on behalf of each.

Disqualification is therefore called for, absent common client interests and client consent, if representation would either result in the representation of "differing interests" or an adverse effect on an attorney's judgment on behalf of a client. The Model Code defines the term "differing interests" to "include every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest." Model Code, Definitions.

The Code also provides a number of Ethical Considerations that provide guidance for the insurance defense counsel.

The first of the ethical representations stated under Canon 5 provides for the duty of loyalty:

EC 5-1 The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interest of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.

The following ethical considerations apply specifically to representation of multiple parties and are provided below, in pertinent part:

EC 5-14 Maintaining the independence of professional judgment required of a lawyer precludes his acceptance of continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client. This problem arises whenever a lawyer is asked to represent two or more clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse or otherwise discordant.

EC 5-15 If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment. He should resolve all doubts against the propriety of the representation. A lawyer should never represent in litigation multiple clients with differing interests; and there are few situations in which he would be justified in representing in litigation multiple clients with potentially differing interests ...

EC 5-16 In those instances in which a lawyer is justified in representing two or more clients having differing interests, it is nevertheless essential that each client be given the opportunity to evaluate the need for representation free of any potential conflict and to obtain other counsel if the client so desires. Thus before a lawyer may represent multiple clients, the lawyer should explain fully to each client the implications of the common representation and should accept or continue employment only if the clients consent. If there are present other circumstances that might cause any of the multiple clients to question the undivided loyalty of the lawyer, the lawyer should also advise all clients of those circumstances.

EC 5-17 Typically recurring situations involving potentially differing interests are those in which a lawyer is asked to represent ... an insured and insurer ... Whether a lawyer can fairly and adequately protect the interests of multiple clients in these and similar situations depend upon an analysis of each case. In certain circumstances, there may exist little chance of the judgment of the lawyer being adversely affected by the slight possibility that the interest will become actually differing; in other circumstances, the chance of adverse effect upon the lawyer's judgment is not unlikely.

B. Model Rules of Professional Conduct.

The Model Rules, like the Model Code specifically provide a standard for attorneys to reference concerning concurrent adverse representation.

Model Rule 1.7, on Conflict of Interest states:

(a) a lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonable believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interest, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of

the common representation and the advantages and risks involved.

The term "differing interests" is not used in the Model Rules. Instead, the Model Rules prohibit an attorney from representing interests that are "directly adverse" or accepting employment when "representation of that client may be materially limited by the lawyer's responsibilities to another client."

However, when a lawyer reasonably believes that the representation will be adversely affected is not clear. According to the comments to Model Rule 1.7, this reasonable belief exists when a "disinterested lawyer would conclude that the client should not agree to the representation under the circumstances." In addition, the Model Rules list the following facts to be considered in determining whether representation of one client will have a "directly adverse" affect on another client: (a) duration and intimacy of the lawyer's relationship with the client or client involved; (b) the functions being performed by the lawyer; (c) the likelihood that actual conflict will arise; and (d) the likely prejudice to the client. Model Rules. Rule 1.7 Comment.

III. POTENTIAL CONFLICTS OF INTEREST

Conflicts of interest potentially affecting the representation are inherent in situations in which an insurance carrier has agreed to provide a defense for its insured. Analysis of any conflict situation must begin with the question of client identity.

A. Identifying the Client.

ABA Formal Opinion 282, issued in 1950, states that a lawyer may ethically undertake the dual representation of the insurer and the insured in the defense of a third party action against the insured, based on the commonality of interest:

From an analysis of their respective undertakings in the insurance contract it is evident at the outset that a community of interest exists between the company and the insured growing out of the contract of insurance with respect to any action brought by a third person against the insured within the policy limitations. The Company and the insured are virtually one in their common interest.

Some authorities and many practitioners hold that in the typical liability situation, the lawyer provided by the carrier represents both insured and insurer and the

lawyer is ethically obligated to protect the interest of each. See Bogard v. Employers Casualty Co., 164 Cal. App. 3d 602, 609, 210 Cal Rptr. 578, 582 (1985).

Although both insurer and insured will share the goal of defeating the claim, they still may have different interests with respect to trial tactics and/or settlement. When the interest of the insurer and the insured differ, the prevailing view is that the insurance defense lawyer's duty of undivided loyalty is owed to the insured. Ethical consideration 5-1 explicitly states the lawyer's obligation under Canon 5 of the Model Codes is to serve the client with undiluted loyalty. The Comment to Model Rule 1.7, states: "Loyalty is an essential element in the lawyer's relationship to a client".

Therefore, if differing interests of the insurers and the insured arise, then the lawyer's ethical duty of undivided loyalty to the client is owed to only the insured. See e.g., Gibson v. Western Fire Insurance Co., 682 P.2d 725, 736 (Mont. 1984). ABA Formal Opinion 1476 (1981) states: "when a liability insurer retains a lawyer to defend an insured, the insured is the lawyer's client."

However, this situation is still not free from difficulty. The situation is still one in which the lawyer is being compensated by a third party (the insurer) and must analyze his or her ability to put aside any loyalties he or she may feel to the company. In this situation, Rule 1.7(b), provided above, would still apply, because the lawyer may feel loyalty to the insurance company, which may lawyer must reasonably believe that the representation will not be adversely affected and the client must consent after full disclosure.

B. Causes of Potential Conflict Situations Involving the Insurer and Insured.

There is no presumption of a conflict situation simply because multiple plaintiffs or defendants are represented by the same attorney; actual evidence of a conflict is required before the question of disqualification of counsel arises. In Shelter Mut. Ins. Co., 160 Ill. App. 3d 146, 155, 513 N.E. 2d 490, 496 (1987), the Illinois Appellate Court for the Fifth District explained that "[A] conflict cannot be inferred merely because an insurance company is asserting noncoverage in a separate suit." Rather, the "test is whether or not there are conflicting interests based upon the allegations found in the complaint". See also Hartford Accident and Indemnity Co. v. Foster, 528 So2d 255, 268 (Miss. 1988).

Therefore, conflicts of interest arise when there is a factual question which will decide whether the insured is covered by the policy. The insurer has an interest in resolving the factual questions against coverage, even though this result may undermine the insured's defense.

The following are typical situations that may give rise to a conflict of interest:

1. Coverage Issues.

In cases where coverage may be at issue, the insurer will make a "reservation of rights", where it will provide a defense to the claim raised, but may not indemnify. In this situation, the insurer must both (1) notify the insured that it is undertaking the defense, subject to a reservation of rights, promptly after the potential coverage conflict has been discovered and (2) specifically outline the exact nature of the coverage conflict. Not to do so, will prejudice the insured and may subject the insurer to liability. See e.g., Salerno v. Western Casualty and Sur. Co., 336 F.2d 14 (8th Cir. 1964); St. Paul Mercury Ins. Co., v. Ralee Engineering Co., 804 F. 2d 520 (9th Cir. 1986).

In cases where the insurer provides for the insured's defense while asserting a reservation of rights, some courts may require the insurer to pay for independent counsel to represent the insured so as to avoid any conflicts of interest. The most often cited case for this approach is San Diego Navy Federal Credit Union v. Cumis Insurance Inc. 208 Cal. Rptr 494 (4th Dist. 1984), where the insurer notified the insured that it was retaining counsel to defend the insured, but was doing so under a reservation of rights. The California Court of Appeals stated that "A conflict arises once the insurer takes the view a coverage issue is present." 208 Cal. Rptr. at 502.

However, most courts taking this approach will not order such an action simply because the insurer has asserted a reservation of rights. The grounds for contesting coverage must rely on the assertion of factual or legal theories that conflict with positions asserted by the insured. In McGee v. Superior Court, 176 Cal App 3d 221, 221 Cal. Rptr. 421, (4th Dist. 1985), where the basis for the reservation of rights was a coverage issue, McGee held that the reservation of rights did not ipso facto create a conflict of interest between the insurer and the insured that required

disqualification of the insurer-designated counsel. 221 Cal. Rptr. at 423. McGee limited the Cumis rule to apply only where the reservation of rights is "based on the nature of the insured's conduct, which as developed at trial would affect the determination of coverage." 221 Cal. Rptr., 423-24. See also State Farm and Casualty Co. v. Superior Court, 216 Cal. App 3d 1222, 265 Cal Rptr. 372, 374 n3 (1989).

Also, in Tews Funeral Home, Inc. v. Ohio Casualty Insurance Co., 832 F.2d 1037 (7th Cir. 1987), the court held that under Illinois law, the insurer's conducting the defense under a reservation of rights did not create a conflict of interest. Tews arose in the context of the insurer's action for a declaratory judgment on the insurer's duty to pay the fees and costs of independent counsel in defending a third party suit, as well as the insurer's right to control the third party litigation. The court held that the insurer's denial of coverage of any of the claims in the third party complaint did not give rise to a conflict of interest. It also stated: "we will not anticipate that counsel selected by Ohio (the insurer) at its expense will violate the strict fiduciary duty owed to Tews and Ohio. 832 F. 2d at 1039.

2. Claims for damages in excess of policy limits.

Another difficult conflict situation arises when damages in excess of policy limits are claimed against the insured. In Lysick v. Walcom, 258 Cal. App. 2d, 65 Cal. Rptr. 406 (1968), the "classic" case with regard to ethical obligations of the insurance defense lawyer resulted. There, the policy limits were \$10,000 and the defense lawyer rejected a settlement offer of \$12,500, despite the insured's offer to pay the additional \$2,500. The case went to trial and resulted in a judgment against the insured for \$225,000. The insured successfully sued the lawyer who had represented both the insured and the insurer.

In a situation where the settlement offer is in excess of the policy limits, and there is a reasonable possibility of winning the case, the insurer will want to proceed to trial and a conflict may result for the lawyer. If the case is won, the insurer has saved the amount of the settlement; if lost, the insurer's liability is locked in at the policy limit. However, for the insured, trial instead of settlement within the

policy limits is a serious risk. The insured could become liable for payment of whatever is over the policy limits. See Wunnicke, The Eternal Triangle: Standards of Ethical representation by the Insurance Defense Lawyer, 31 For the Defense 2 (1989).

3. Settlement Issues.

An insured may contract away his or her rights to be part of a settlement and the following situation might result. In Mitchum v. Hudging, 533 So. 2d 194 (Ala. 1988), a lawyer was sued for legal malpractice after he had settled a medical malpractice claim against an insured doctor without the knowledge or consent of the doctor. Although the settlement was within policy limits, and cost the doctor no defense or other financial costs, the doctor claimed that his reputation was injured. Although the Alabama Supreme Court recognized that the insured alone was the lawyer's client, the court found that the lawyer had not breached his duty of loyalty to the client. The court relied on the terms of the insurance contract, which gave the insurer exclusive control over settlement. In New York, as well, if the policy provides the insurance company the absolute right to settle the action, counsel can settle the case without the insured's consent. Feliberty v. Damon, 517 N.Y.S.2d 632, 633-34 (N.Y. App. Div. 1987).

But see Arana v. Koerner 735 S.W.2d 729, 735 (Mo. Ct. App. 1987), where a Missouri court held that the attorneys who settled a case without the insured's consent breached their duty to the insured as his attorney. The court reasoned that

{T}he obligations of an attorney to his client 'are in no way abridged by the fact that an insurer employs him to represent an insured.' ... The attorney owes the insured the same obligation of good faith and fidelity as if the insured had retained the attorney personally and at his own expense. 735 S.W.2d at 733.

Both the Model Rules and the Model Code prohibit group settlements in civil cases without disclosure to and the consent and participation of each client.

Mode Code DR 5-106(A) states:

(A) lawyer who represents two or more clients shall not make or participate in the making of an aggregate settlement of the claims of or against his clients, unless each client has consented to the settlement after being advised of the existence and nature of all claims involved in the proposed settlement, of the total amount of the settlement, and of the participation of each person in the settlement.

Model Rule 1.8(6) provides:

A Lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients.... unless each client consents after consultation, including disclosure of the existence and the nature of all the claims or pleas involved and of the participation of each person in the settlement.

IV. HOW TO AVOID CONFLICTS OF INTEREST

If anything is to be learned from examining the conflicting rulings of courts on multiple representation questions, it is that conflicts of interest should be avoided, if possible, and if unavoidable, then they must be immediately addressed.

A. Identification of Issues.

Timely identification of potential conflicts can protect an attorney from the need to withdraw as counsel or from possible disqualification. There are options available to deal with the conflicts, such as client consent, but the attorney must make an early identification of the issues, in order to take advantage of the options available.

B. Client Consent.

The insured must be informed of an actual or potential conflict of interest. In Tomczuk v. American Mut. Ins Co., 517 A.2n 1053, 1055 (Conn. App. Ct. 1986), the Appellate Court of Connecticut held that when a conflict problem arises, it is the "attorney's duty to withdraw

from the representation or to disclose the conflict of interest."

Representation in conflict situations is permitted by both the Model Rules and the Model Code, but only when there is both fully counseled client consent and a reasonable belief on the part of the lawyer that the conflict is not insurmountable. In some cases, client consent will therefore suffice and in other cases, it will not and should not even be sought.

However, a standard reservation of rights notice may not be sufficient to give the insured notice of the specific conflict that may exist. In Texas Farmers Inc. Co. v. McGuire, 744 S.W.2d 601 (1987), McGuire, an insured driver, was involved in an accident that occurred while he was driving a company vehicle in the course of his employment. The company sent a non-waiver reservation of rights letter to McGuire, who signed it. Subsequent to that, the insurance company took a statement from McGuire, which was the basis for its defense of non-coverage against McGuire. The insurance company then sent a letter informing McGuire that the policy limit might not cover him, but that it would defend him in the lawsuit without waiving any of its rights and that McGuire was at liberty to engage counsel of his own choice at his own expense. Judgment was rendered against McGuire and Texas Farmers refused to satisfy the judgment. McGuire argued that Texas Farmers was estopped from denying coverage because the insurance company failed to advise McGuire of the specific conflict before it secured a second statement from him.

The Texas Court of Appeals agreed with McGuire, but the Texas Supreme Court reversed. The court held that the doctrine of estoppel could not be used to create coverage when none existed by the terms of the policy. However, the lawyer for both the insurer and insured was still subject to disciplinary action, because of inadequate disclosure and consent.

In American Bar Association (ABA) Informal Opinion 1476 (August 11, 1981), the ABA Committee advised on disclosure and consent in an employment-related insurance defense matter.

In the action, the plaintiff alleged that he had sustained injury as a result of a tort inflicted by the employee in the course of employment. The employer maintained liability insurance, and the insurance extended to employees acting within the scope of employment. The employer and employee knew from the outset that the lawyer was assigned to represent both of them. The insurance company did not raise any questions

of coverage applicability. Neither the insurance company nor the lawyer cautioned or advised the employee at the outset that facts could exist to create conflicting or divergent interest between employee and employer or between employee and insurance company or that information gained by the lawyer during the representation and affecting insurance coverage might be given to the insurance company. In the course of a conversation with the lawyer, the employee related facts indicating that the employee may have acted outside the scope of his employment and that, under the terms of the insurance contract, the employee, may not be entitled to the protection of the employer's liability insurance. The employee made the disclosures in the belief that he was doing so in a lawyer-client relationship, and apparently without understanding the implications of the circumstances he related to the lawyer. The lawyer learned similar but more limited information when interviewing another witness. The lawyer believed that the insurance company may have a contractual right to deny protection to the employee because of scope of employment circumstances. It is also possible that the employer could invoke scope of employment circumstances to defend against his own liabilities to the plaintiff.

The Committee advised that the lawyer should not reveal to the insurance company the information gained by the lawyer from either the employee or the witness, when the revelation might result in denial of insurance protection to the employee, without the employee's consent, after full disclosure of the consequences of such revelation.

The Committee recognized that when a liability insurer retains a lawyer to defend an insured, the insured is the lawyer's client. ABA Informal Opinions 728 (1963), 822 (1965) and 723 (1965). The Committee stated that "Among a lawyer's foremost professional responsibilities are fidelity to a client and preservation of confidences and secrets of a clients. These responsibilities exist even if a person other than the client is paying the lawyer's fee."

V. CONCLUSION

With the history of the Model Code and now the adoption of the Model Rules, the attorney is given much more latitude in determining whether its representation of both the insured and the insurer is proper, however, the insurance defense case should always be studied carefully. Attorneys in multiple party representation situations should always take care to identify any possible conflicts as early in their representation of clients as possible and act quickly to resolve the possible conflict as soon as evidence of it

arises. Acting in good faith compliance with the ethical rules will always place the attorney in the best possible position to defend against disqualification motions or subsequent malpractice actions.

ATTORNEY *EX PARTE* INTERVIEW
OF THE FORMER EMPLOYEES OF AN
OPPOSING PARTY:
A TWO-HAT PERSPECTIVE

By Kathleen Chancler and Wendy Cherner Maneval

Today, despite numerous cases and commentaries on the subject, the ethical and legal responsibilities of attorneys regarding *ex parte* contracts with former employees of an opposing party remain unclear. Litigators of both the plaintiff's and defense bars grapple with both sides of this problem. They frequently wear both "hats" (sometimes, even in the same case): the hat of counsel seeking information *ex parte* from former employees of an opposing party and the hat of counsel for the former employer seeking to block any damaging information provided in such contacts.

HYPOTHETICAL SCENARIO

HAT 1: *Counsel Seeking Information from Former Employee*

Your client is woman who has sued her company for sexual discrimination.

You have heard that a number of your client's former co-workers (some managers, some clerical workers), have left employment with the defendant. Your client tells you that these witnesses have information pertinent to her case. In order to access this information, must you (a) prepare a notice of deposition, coordinate the schedules of all counsel involved, incur the expense of hiring a court stenographer, prepare in depth for a full deposition, participate in a formal deposition, and review the transcript or can you (B) pick up the phone and call the witness.

HAT 2: *Counsel of Former Employer*

Now, change hats. You represent the company that is a defendant in a sexual discrimination case. You get a call from the corporate personnel manager who informs you that she just learned that the plaintiff's attorney has been calling around and conducting ex parte interviews with various former employees, many of whom have material evidence in the case. She is afraid that they will disclose damaging confidential information or change their stories after talking with the plaintiff's attorney. Do you have any recourse?

ETHICAL REQUIREMENTS

This dilemma is based upon the ethical rules in the codes of professional conduct of attorneys adopted by the courts in each state. For example, Rule 4.2 of the American Bar Association's Model Rules of Professional Conduct, which has been adopted or used as a paradigm for the ethical rules in at least 40 states and the District of Columbia, provides in pertinent part:

In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so.

The official ABA comment on this rule states in pertinent part:

In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.

This rule specifically prohibits *ex parte* communications with certain employees of an opposing party. It does not explicitly apply to former employees of a party.

Importantly, the ABA Standing Committee on Ethics and Professional Responsibility, in a solely advisory opinion, has determined that the rule does *not* cover former employees. The Committee emphasized:

While the committee recognizes that persuasive policy arguments can be and have been made for extending the ambit of Model Rule 4.2 to cover some former corporate employees, the fact remains that the text of the Rule does not do so and the comment gives no basis for concluding that such coverage was intended.

Especially, where, as here, the effect of the Rule is to inhibit the acquisition of information about one's case, the Committee is loath, given the text of Model Rule 4.2 and its Comment, to expand its coverage to former employees by means of liberal interpretation.

Accordingly, it is the Opinion of the Committee that a lawyer representing a client in a matter adverse to a corporate party that is represented by another lawyer may, without violating Model Rule 4.2, communicate about the subject of the representation with an unrepresented former employee of the corporate party without the consent of the corporation's lawyer.

The ABA Committee's opinion is merely advisory and does not constitute law.

JUDICIAL OPINIONS

Despite the language of the Rule and the advisory opinion of the ABA Standing Committee, some courts have extended the application of Rule 4.2 of its counterpart to *ex parte* communications with *former* employees of a party. The courts dealing with this issue have taken three approaches. A minority of courts have prohibited such contacts outright. Some courts have validated all such contacts. Other courts, however, have validated such contacts only under certain conditions: (1) when the attorney does not inquire into privileged matters; (2) when the attorney abides by rules of professional conduct regarding contacts with unrepresented parties; (3) when the acts or omissions of the former employee did not give rise to the matter at issue and cannot be used to impute liability to the former employer.

Courts' interpretation of the rule, rather than being simply inconsistent, appear to be based upon the factual context in which the issue arises. Courts tend to interpret the rule expansively when the former employees contacted were high-level or confidential employees or had an active role in the subject matter of the litigation. Courts tend to narrowly interpret this provision when the *ex parte* interviews were conducted with lower-level former employees who primarily constitute fact witnesses.

Due to the wide range of factual contexts in which these issues arise, some courts have articulated a number of factors to be considered in determining whether such *ex parte* communications violate the ethical rules. These courts have considered: (1) the positions of the former employees (especially whether they were managerial); (2) whether the former employee was privy to communications between the former employer and its counsel concerning the subject matter of the litigation or issues involved in the lawsuit; (3) whether the former employee could impute liability on the corporation;

(4) whether the employee could make statements that would constitute admissions on the part of the organization; (5) the nature of the inquiry by opposing counsel; and (6) the time that has elapsed between the end of the employment and the *ex parte* interview. One court has suggested that, when this analysis indicates a substantial risk of disclosure of privileged matters, the attorney should carefully instruct the employee not to divulge attorney-client confidences and, in certain circumstances, should notify counsel for the former employer prior to conducting any *ex parte* interviews.

Courts also face formidable problems in attempting to fashion a suitable remedy for the damage caused by *ex parte* contacts (e.g., the disclosure of information protected by the attorney-client privilege and/or the imputation of liability to the former employer). Courts and affected parties may have difficulty ascertaining what information was actually provided during such a contact. Courts may require the offending attorney to provide opposing counsel all notes of the interviews or statements obtained during the interviews. Courts will be reluctant to do so, however, if such documents contain trial strategies or other attorney work product information. Thus, it may be difficult for a court to craft an appropriate order precluding evidence (and the fruits of the evidence) obtained through *ex parte* communications from being introduced at trial. Some courts have imposed the draconian penalty of attorney disqualification; this punishment, however, may not remedy the harm inflicted to the opposing party (e.g., new counsel may obtain the same information from the file or discussions with the disqualified attorney).

COMPETING POLICY CONSIDERATIONS

A primary reason for this continuing dilemma is that there are competing policy considerations at issue. Courts and commentators have had difficulty harmonizing these important values through a workable rule.

The extension of this rule to former employees is based upon five primary policy objectives: (1) to protect parties and witnesses from overreaching by attorneys, (e.g., the prevention of harassment, intimidation and manipulations of witnesses); (2) to preserve the integrity of the attorney-client relationship; (3) to avoid the disclosure of privileged information; (4) to help facilitate settlement by channeling disputes through lawyers accustomed to the negotiation process; and (5) to avoid uncertainty with regard to the legal and ethical responsibilities of lawyers.

In contrast, the allowance of such *ex parte* contracts enables the parties to reduce the cost and burden of the discovery process (and often to prosecute their rights) and furthers the litigation objective of permitting equal access to information.

STRATEGIES FOR DEALING WITH THE UNCERTAINTY

As a general rule, courts will permit such contacts as long as privileged matters are protected and the attorney making the *ex parte* contact abides by the ethics rules on contacts with unrepresented persons. Nevertheless, litigators of both "hats" need to consider available strategies to deal with the uncertainty in this area.

Attorneys seeking information need not subject their clients to the expense involved in taking depositions of each witness previously employed by a party or risk disqualification.

First, an attorney seeking to interview former employees may seek court approval prior to the interviews. While this may be the safest approach, it does have detrimental side effects; the attorney must apprise opposing counsel of the witnesses to be interviewed. Of course, opposing counsel may quickly conduct his or her own interviews and gain a tactical advantage. In addition, such information may be tantamount to disclosure of trial strategy.

Second, litigators should engage in a risk analysis to determine likelihood that an *ex parte* contact will pose an ethical violation. The attorney should consider the following factors: (1) whether the person is likely to be represented by corporate counsel; (2) the person's position with the former employer; (3) the level and nature of the person's participation in the incidents that gave risk to the litigation; (4) the nature of the inquiry and the type of information that the person is likely to possess; and, (5) the time interval from the end of employment to the interview.

Third, if the risk presented by the *ex parte* communications appears to be too great, the attorney may request permissions from opposing counsel to conduct an informal interview in opposing counsel's presence. Opposing counsel may agree to this interview if the only alternative is a deposition of the witness.

Fourth, at the inception of the interview, the attorney should clearly disclose to the person being interviewed the following information: (1) the attorney's name and firm; (2) the client who is represented; (3) the basic controversy; and, (4) the purpose of the interview. In addition, the attorney should inquire as to whether the person is represented by counsel in connection with the matter. The person should be informed that the interview is completely voluntary and that they may choose to have their own attorney present during the interview. The person interviewed should be instructed not to disclose any information regarding advice from or communication with corporate counsel.

Attorneys representing the former employer may also take certain steps to protect their clients against the adverse effects of *ex parte* interviews of former employees.

First, as soon as practicable after the inception of a lawsuit, the attorney should identify all current and former employees who may have relevant information regarding the subject matter of the lawsuit.

Second, the attorney should, as soon as practicable, conduct interviews of all pertinent individuals. The attorney should provide the witness with basic information regarding the litigation and identify the attorney's role in the litigation (as attorney for the employer). The attorney may offer to present the witness, if necessary, at a deposition. Further, the attorney should explain that the corporation intends to keep the information derived from the interview confidential.

Third, during the interview, the attorney should inform witnesses that they are under no obligation to discuss any matters with opposing counsel except under subpoena. Also, the attorney may ask witnesses to permit the attorney to represent them at any interview with opposing counsel.

Fourth, the attorney should consider obtaining formal statements from these witnesses. Such statements would be admissible in a trial, for example, to impeach the credibility of witnesses who decide to change their stories after speaking with opposing counsel.

Fifth, the attorney should request copies of any and all statements made by such witnesses to opposing counsel in *ex parte* interviews.

Sixth, if there are certain witnesses who cannot be interviewed without impairing the employer's position or the attorney-client relationship, the attorney should seek a protective order to prevent opposing counsel from conducting *ex parte* interviews.

In sum, the ethical and legal responsibilities of attorneys with regard to *ex parte* contacts with former employees of an opposing party remains uncertain. The competing policy considerations and the failure of the courts to develop a workable rule indicate that this dilemma will not be resolved in the near future. The above strategies, while admittedly imperfect, may assist litigators in determining what course of conduct should be pursued to assure that they observe their ethical and legal responsibilities in this situation.

EMPLOYMENT LAW - ETHICS HYPOTHETICAL - Burger Queen

Client Martina Polles has come to you for legal advice. You had represented her earlier through the public defender's pro bono referral program and defended her on a marijuana possession charge. Her case went to trial and she was found guilty, but you were able to have her sentence set up for a 12 month probation. Martina is now working as an Assistant Food Preparation Manager at a local Burger Queen. The last time you saw her she looked well and was very happy with her new job. Today she seems extremely distraught.

Martina tells you that she was moved from the day shift to the evening shift at Burger Queen. One afternoon several weeks ago Martina's boyfriend Bernie Gamara and one of his male friends drove her to work. They sat in the parking lot for a while before her shift started. While the three of them were sitting in the car, two men approached and began talking with the man in the back seat. They conversation went on for some time and when the two men walked away several police officers approached and arrested the two men who had been talking to the man in the back seat. A bag of cocaine was found on one of the men who had been talking outside the car. The man in the back seat was also questioned and the car was searched. The man in the back seat had two fifty dollar bills on him. He was arrested and traces of cocaine were found on the bills.

Neither Martina nor her boyfriend were arrested, but when she entered the Burger Queen to start work, Bill Sleeze the night manager called her over and said he had seen her in the car where the arrests had been made. Sleeze and Martina had a good and friendly working relationship, but he now expressed serious concern about her ability to keep working if her probation officer learned of her "involvement" with the men who were arrested. Later that night, Sleeze and Martina were alone in the Burger Queen cleaning up after hours. Sleeze began talking about how lonely he was and then noted how lonely Martina would be if her probation were revoked and she was put in jail. This conversation pattern followed for several successive nights and was accompanied by the night manager's added expressed concerns about whether he had any obligation to "explain" the arrest situation to his superiors or possibly to Martina's probation officer. Finally, on the fourth night Sleeze was alone with Martina in the kitchen and told her that his worries for Martina over the arrest situation would be greatly relieved if she were to prove her sincerity to her job by making love to him. Martina reluctantly participated. The sexual contacts have continued for about 10 days.

Martina is very upset and wants your advice on how to deal with the drug arrest and her "problem" with her supervisor. She is very much in love with her boyfriend and she does not want to jeopardize her relationship with him. She wants to keep her job and finish out her probation, but feels trapped. You are very busy, but agree to handle her situation. You advise her that you will give it some thought and that she should come back to your office in three days. She thanks you, pays you \$25 and leaves.

The next day you have lunch with Joe Schmoe from the law firm's corporations and securities law department. He tells you that he has been talking to a new corporate client on what could turn out to be a big acquisition deal. The client is CEO for Mega Burger Restaurants and they are hoping to take over the smaller Burger Queen Restaurant chain. Mega's offer is being considered in a somewhat friendly atmosphere but Giant Burger Restaurants are also pursuing a takeover of Burger Queen. Giant's offer is being received in a fairly hostile fashion by Burger Queen. Schmoe thinks the deal is about to close in favor of his client Mega Burger. Burger Queen is considered to be well run and very successful fast food chain. You see two other clients at lunch and begin talking to them, not finishing your conversation with Schmoe.

The next day Martina shows up at the reception desk and insists on speaking to you. She comes into your office in tears and says there is something else that she has to tell you. Her boyfriend, who she has lived with for three years, tested positive for the HIV virus about 8 months ago and is failing physically as a result of AIDS. She cares deeply for her boyfriend and does not want others to know that he has AIDS. She says she is telling you this in strict confidence and wants to keep the "AIDS thing" quiet. Yet she worries whether she should say anything to the Burger Queen night manager, Sleeze. She has continued to have intercourse with him over the past two nights. She tells you that above all she wants to keep her job, not go to jail, and be with her boyfriend as he deals with his physical situation.

What are the ethical / professional responsibility issues?

What obligations do you have to what parties?

What do you advise the client?

Do you say anything to your partner Joe Schmoe?

Do you have any obligation to the night manager, Sleeze?

Do you have any obligation to Burger Queen?

Do you have any other obligations?

EMPLOYMENT LAW - ETHICS HYPOTHETICAL - Melton Union Bank

Your firm has represented Melton Union Bank for many years. Today the bank personnel officer, Terry Minate, has come to you concerned about a recent conversation he had with the chair of the bank's board of directors, Ed Straightarrow. You have grown up in Melton, Kentucky and are familiar with most of the bank's officers and directors. Before Minate gets to your office, you recall...

George Melton, sometimes known to his friends as "Gorgeous George" Melton has been the chief operating officer of the Melton Union Bank for over 23 years. He and his father started the bank and George is very protective of it. Over the past three to four years he has been known to lose his temper at bank board meetings, often over relatively minor issues. He has always been known to "party hard" and carries somewhat of a reputation for being a drinker. Last year Melton became estranged from his wife of 21 years after she filed a domestic violence petition against him. She later dropped the charges. The bank's loan officer, William Cash, (known as "Big Bill" to many) had a close friendship with Melton. They shared an apartment until a few months ago. Both Melton and Cash are sportsmen and both are officers in the High Range Gun Club which is located about 15 miles south of town. Melton and Cash had been known to be "drinking buddies" ever since high school. Two years ago Melton, Cash and another gun club member Ed Schwartz were deer hunting. By the accounts of both Melton and Cash, Cash's gun accidentally discharged when he laid it down to cross over a fence and Schwartz was fatally wounded in the head. The coroner ruled it to be an accidental death.

With that the bank personnel officer enters your office and tells you the latest, including the recent conversation he had with the bank board chair Ed Straightarrow. Four months ago, Melton and Cash had a heated argument outside of Melton's office at the bank. Ed Straightarrow, chair of the board, apparently heard about it from two bank employees. Soon after that time Melton went to visit Straightarrow and told him that it was apparent that Cash was juggling bank books and had embezzled money from Melton Union. He had no direct proof, but said that he would get the auditor to run a check on Cash next weekend. At this point Straightarrow became very upset and contacted Minate, the personnel officer. Together they decided to wait and "let it blow over". However, four days later Melton approached Cash's desk and told him, "you're fired as of this minute, but before you leave you need to put the money you have stolen back in the till." Cash left his desk and the bank. Melton never contacted Minate to complete the normal employee termination paperwork.

No one saw Cash until about two weeks later at the Melton Union Bank annual picnic at the High Range Country Club. Cash arrived and spoke quietly to a few people. He then walked directly over to Melton and said, "You know I pack a rod and I'm going to put you and all of the rest of your stinking bank employees in the same kind of grave that we put Schwartz in." He then turned away and drove off in his Nissan Pathfinder 4X4. Mary Sure, the bank safe deposit box department manager overheard Cash's comment to Melton. Attending the same church as Ed Straightarrow, she decided to go directly to him. On hearing her story, Straightarrow admitted that he had been extremely embarrassed for some time with the actions of both Melton and Cash. Immediately after that Straightarrow contacted bank personnel officer Minate. He apologized to Minate for maybe "getting into his area" but noted that when the safe deposit manager pressed the matter with him again about a week ago he was very explicit with her. When Minate asked Straightarrow what he meant, Straightarrow noted that he told the safe deposit manager, "This bank has a spotless history and reputation and doesn't need someone creating morale problems, so if that little incident at the annual picnic bothers you so much you should just look for another job."

You tell Minate not to take any action for a few days and that you will get back with him by the first of next week. Later that afternoon you get a call from Ed Straightarrow, the Melton Bank board chair. He wants to talk with you the first thing tomorrow about some bank employees "who are getting a little out of line."

To whom do you owe your primary responsibility as counsel for the bank?

What actions, if any, should you take given what the personnel officer has told you?

What counsel should you give to the personnel officer?

What should you plan to say to the bank board chair tomorrow?