

THE 2013 EMPLOYMENT LAW GUIDE

**A Practical Guide for California, Minnesota,
Utah and Washington Employers**

**Federal Law
California, Minnesota, Utah and Washington State Law**

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Introduction

The field of employment-related law has exploded in scope and complexity during the past decades, from one largely focused upon union-management relations, to one involving race and gender, age and disability, drug and alcohol use, libel and slander, contracts and leaves of absence, and a host of other workplace concerns.

This Guide is intended to help employers understand the many and varied legal issues that can arise from everyday employment-related decisions, including hiring, discipline, and termination. The format we have chosen is designed principally to heighten awareness and facilitate discussion of these and other subjects, rather than present a formal set of rules listing “dos” and “don’ts.” Instead, we have selected certain topics that may be suitably covered in a condensed format such as this.

A few words of caution: this Guide is published for general information purposes only. These materials do not provide legal opinions or legal advice, and should not be relied upon as such. No attempt has been made to address all of the legal issues involved in the employment relationship, or treat any one issue comprehensively. Moreover, while the cases and statutes have been updated as of February, 2013, the law in this area changes rapidly and dramatically. For all of these reasons, one should always consult an attorney in regard to the legal implications of any particular employment situation.

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CHAPTER I

COMMENCING EMPLOYMENT

SECTION 1.1 ADVERTISEMENTS

State regulations in Washington, California, Minnesota, and Utah prohibit an employer from printing, circulating, or causing to be printed or circulated any statement, advertisement, or publication of job opportunities that disclose a preference or limitation based upon a protected category such as age, race or sex.¹ Therefore, the language of any advertisement must be chosen carefully to avoid ambiguous statements that might imply an illegal bias in favor of, or against, one group or another. For example, consistent reference to the applicant by way of a gender-designated pronoun (*i.e.*, “he” or “she,” “waitress” or “waiter”) or language that implies possible age bias (a direct reference to age categories or references to “recent college graduates”) may imply a preference. Advertisements should include a statement that the employer is committed to equal employment opportunity.

Employers must be candid and honest when recruiting out-of-town or out-of-state applicants. Minnesota law makes it unlawful for an employer to induce an individual to move within Minnesota, or from out-of-state into Minnesota, on the basis of knowingly false representations regarding the character of the work or the compensation for employment. The law provides for misdemeanor penalties and a private action for damages, as well as attorneys’ fees.²

SECTION 1.2 APPLICATIONS AND INTERVIEWING

(a) Washington Law

Under the Washington Law Against Discrimination (“WLAD”) it is an “unfair employment practice” to use any form of application for employment, or to make any inquiry in connection with prospective employment, which expresses any limitation, specification, or discrimination as to age, sex,³ marital status, sexual orientation, military or veteran status, race, creed, color, national origin, the presence of any sensory, mental, physical disability (protected categories) or the use of a trained dog guide or service animal by a disabled person, or any intent to make any such limitation, specification, or discrimination, unless based upon a *bona fide* occupational qualification (“BFOQ”).⁴ To comply with the WLAD, employment applications should be carefully reviewed and interviewers should be trained to avoid asking for information that relates to an applicant’s protected status or is unrelated to the job.

An improper application or interview question that elicits information about a protected category may lead to a lawsuit by disgruntled applicants and trigger an obligation on the employer to prove that the information was not used to discriminate against the applicant. This can be a difficult burden for employers to meet because most courts assume that if the employer asks a question on an application or in an interview, the answer is used in the hiring process.

¹ Washington Administrative Code (“WAC”) § 162-16-260 (1999); Cal. Gov’t Code § 12940; Minn. Stat. § 363A.08, subd. 4(a)(3); Utah Code Ann. § 34A-5-106(1)(d).

² Minn. Stat. § 181.65.

³ See *Hegwine v. Longview Fibre Co., Inc.*, 162 Wn.2d 340 (2007) (holding that discriminating against a pregnant woman is a form of gender discrimination).

⁴ Revised Code of Washington (“RCW”) 49.60.180(4).

For this reason, application and interview questions should only ask questions that reasonably relate to the job for which the applicant is applying and avoid certain areas of inquiry, including, but not limited to, the following:⁵

- age, if question implies preference for person under forty;
- arrests;
- criminal convictions when recency and job-relatedness are not considered;
- U.S. citizenship, rather than the right to work legally in the United States;
- national origin;
- childcare plans and plans for having children;
- credit history or credit checks, without substantial job-relatedness and appropriate disclosure;
- bankruptcy;⁶
- the identity of an emergency contact person;
- marital status;
- health history, physical examinations, illnesses, injuries, or disabling conditions;
- medications or other lawful drug use;
- workers' compensation history;
- physical or mental impairments;
- religion or creed;
- dates of school attendance;
- dates of military service; or
- sex.

Interviewers also should avoid making notations on application forms or elsewhere that could be used by an applicant to indicate that his or her protected status was relevant in the hiring decision.

Washington prohibits employers from requiring an individual to take an HIV or Hepatitis C test as a condition of hiring, promotion or continued employment except under very limited situations.⁷ Furthermore, an employer generally may not ask about test results, or compel an applicant to disclose whether they are HIV or Hepatitis C positive or have been tested for HIV or Hepatitis C.⁸

As discussed more fully in Chapter X, employment in Washington is generally “at-will,” meaning that an employer may terminate an employee for any reason or no reason (except for discriminatory reasons, such as race, gender, age, etc.). To prevent unintentionally changing an employee’s “at-will” status, those involved in recruiting, interviewing, and hiring prospective employees must be careful not to make oral or written representations to job candidates that ultimately may limit the employer’s right to terminate the employee “at-will.”

To comply with Washington law, written employment applications should include:

- an authorization by the applicant allowing the employer to obtain information regarding the applicant’s records from former employers, schools, and others;

⁵ The Washington State Human Rights Commission has developed a guide for employers regarding acceptable and unacceptable pre-employment inquiries. WAC 162-12-140.

⁶ 11 United States Code (“U.S.C.”) § 525(b).

⁷ RCW 49.60.172.

⁸ RCW 49.60.172; RCW 70.24.105. For information on drug testing, *see* Chapter II.

- a statement that the employer reserves the right to unilaterally rescind or modify personnel policies without prior notice;
- a statement that the applicant acknowledges that all information he or she provides is true and complete;
- a statement that false or incomplete information may be grounds for discharge; and
- a statement that the employer is committed to equal employment opportunity.

(b) California Fair Employment and Housing Act

Similar to Washington, the California Department of Fair Employment and Housing has developed guidelines relating to pre-employment inquiries that can be made to applicants and employees.⁹ The California Fair Employment and Housing Act (“FEHA”) prohibits any non-job-related inquiries of applicants or employees, either verbally or through an application form, that express directly or indirectly a limitation, specification or discrimination as to race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation, or any intent to make such a limitation, specification, or discrimination.¹⁰

Effective January 1, 2013, employers in California are prohibited from requiring applicants and employees to disclose or access social media information.¹¹

(c) Minnesota Human Rights Act

Similarly, under the Minnesota Human Rights Act (“MHRA”) it is an “unfair employment practice” to require or request an applicant, prior to an offer of employment, to provide information regarding race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, disability, sexual orientation, or age, except when based upon a BFOQ.¹²

(d) Utah Law

Under the Utah Antidiscrimination Act (“UADA”), employers who have had at least 15 employees within the state for each working day in 20 calendar weeks or more in the current or preceding calendar year may not advertise employment or refuse to hire a person on account of race, color, sex, pregnancy, age (if 40 or above), religion, national origin or disability.¹³ There are no state-law restrictions for discrimination based upon sexual orientation, but several cities have enacted local ordinances prohibiting this practice. The restrictions of the UADA do not apply to religious organizations, associations, or corporations, or corporations or associations that are wholly-owned subsidiaries of religious organizations, associations or corporations.¹⁴ State law allows advertisements for employment to indicate a preference based upon race, color religion, sex, pregnancy, age, national origin, or disability if such distinction is based upon a BFOQ.¹⁵

SECTION 1.3 BACKGROUND CHECKS

At a minimum, employers should check an applicant’s references. Beyond that, the scope of a background check depends on the nature of the position and the employer’s business.¹⁶ A background check may include the following actions:

⁹ See <http://www.dfeh.ca.gov> for more information.

¹⁰ Cal. Gov’t Code §§ 12900 *et seq.*

¹¹ Cal. AB-1844 (2012).

¹² Minn. Stat. § 363A.08, subd. 4(a)(1).

¹³ Utah Code Ann. § 34A-5-106.

¹⁴ Utah Code Ann. § 34A-5-102.

¹⁵ Utah Code Ann. § 34A-5-106(1)(f)(ii).

- inquiring as to any gaps in employment;
- confirming that the applicant has all necessary licenses and registrations;
- checking educational background;
- checking relevant driving records when the applicant is hired to drive a vehicle; and
- for commercial motor vehicle drivers, contacting prior employers for the Department of Transportation alcohol and drug test information (going back two years).¹⁷

Whether a more formal background check, such as obtaining credit reports or criminal background checks, is necessary, will depend upon the employee's particular duties, the extent to which those duties could pose a risk of danger to others, and whether any "red flags" arise during the course of the investigation that require further inquiry. This is a difficult area because lawsuits for negligent hiring may result when an employer is careless in screening new employees.¹⁸ These claims are based on the premise that an employer has a duty to protect its employees, customers, clients, visitors, and the general public from injury caused by an employee whom the employer knew, or reasonably should have known, posed an unreasonable risk to others.¹⁹

In 2006, California passed a law establishing requirements for background checks of certain administrators, executives, and employees in the health care industry, and a process for transmission of fingerprint images.²⁰ The law requires specified health-related workers to submit electronic fingerprint images to the Department of Justice ("DOJ") and requires applicants to be responsible for any cost associated with transmitting the fingerprint images. The law applies to: (1) certified nurse assistants and home health aides; (2) nursing home administrators; (3) administrators, program directors and fiscal officers of adult day health care centers; (4) owner or owners, anyone having a ten percent or greater interest in the corporation, partnership or association, and administrators of home health agencies and private duty nursing agencies.²¹

In 2011, California passed a law affirming private employers' right to use the E-Verify system for employment background checks. Although employers can use E-Verify in California, the new law states that employers may not be required to use E-Verify by any state or local government agency, unless required by federal law or as a condition of receiving federal funds.²²

Under Minnesota law, certain employers are required to perform pre-employment background checks on specific prospective employees. These include, among others, school employees, school bus drivers,

¹⁶ For example, the federal government may also conduct background checks of its employees and workers employed by government contractors. In 2011, the U.S. Supreme Court, after assuming (without deciding) that there was a constitutional right to informational privacy, concluded that the government's inquiries in an employment background check do not violate a constitutional right to informational privacy when the inquiries are reasonable and are protected by statutory non-disclosure requirements. *Natl Aeronautics & Space Admin. v. Nelson*, 131 S. Ct. 746 (2011).

¹⁷ 49 Code of Federal Regulations ("C.F.R.") § 382.413.

¹⁸ These claims are based on the premise that an employer has a duty to protect its employees, customers, clients, visitors, and the general public from injury caused by an employee who the employer knew, or reasonably should have known, posed an unreasonable risk to others.

¹⁹ See, e.g., *Ponticas v. K.M.S. Invs.*, 331 N.W.2d 907, 911 (Minn. 1983).

²⁰ See Cal. Health & Safety Code §§ 1265.5, 1338.5, 1416.26, 1522.

²¹ See *id.*

²² Cal. Lab. Code § 2811.

property managers, children's service workers, certain health care workers, and some public employees.²³ Employers in those areas should consult the appropriate statute(s).

Generally, an employer "may not require an employee or prospective employee to pay for expenses incurred in criminal or background checks" or credit checks (with some specific exceptions for certain types of employers).²⁴

Utah law is similar to Minnesota law in that it requires background checks for certain prospective employees. In Utah, the list of professions requiring a background check include, among others, teachers, school employees, lawyers, nurses, healthcare professionals, realtors, persons working with minors in internships, personnel working in establishments with liquor licenses, and personnel working with children or vulnerable adults.²⁵

To comply with federal and state anti-discrimination laws, an employer who performs background checks should do so uniformly on all persons considered for a particular position. Checks limited to certain protected classifications of applicants should never occur.

(a) Consumer Reports/Credit Checks

The Federal Fair Credit Reporting Act ("FCRA")²⁶ governs an employer's use of "consumer reports" in the application or employment process. State laws regulating outside background checks and investigations for employment purposes include the Washington Fair Credit Reporting Act ("Washington Act"),²⁷ the Minnesota Access to Consumer Reports Act ("Minnesota Access Act"),²⁸ and California's Consumer Credit Reporting Agencies Act.²⁹ The Washington, Minnesota, and California Acts generally mirror the FCRA; however, to the extent they differ, employers must comply with both laws.

The Washington Act stands out in that an employer is prohibited from obtaining a consumer report bearing on an applicant or employee's creditworthiness, unless the information is substantially job-related or required by law. If such information is substantially job-related, the employer may obtain it only after the reasons for the use of such information are disclosed to the consumer (applicant or employee) in writing. This provision does not apply to credit reports of an employee "who the employer has reasonable cause to believe has engaged in specific activity that constitutes a violation of law."³⁰

²³ Minn. Stat. § 123B.03 (school employees); Minn. Stat. § 171.3215, subd. 3 (school bus drivers); Minn. Stat. § 122A.18, subd. 8 (teachers); Minn. Stat. § 148E.055, subd. 8, (social workers); Minn. Stat. § 148F.10, subd. 4 (alcohol and drug counselors); Minn. Stat. § 144A.46, subd. 5, Minn. Stat. § 157.17, subd. 2(2) and Minn. Stat. § 144.057 (home care providers); Minn. Stat. § 256B.0659, subds. 11(a)(3), 13(a), 24(4), 25 (personal care assistants); Minn. Stat. § 299C.68 (property managers); Minn. Stat. § 326.336 (private detectives); Minn. Stat. § 349A.02, subd. 6 (lottery employees); Minn. Stat. § 241.021, subd. 6 (correctional facility employees).

²⁴ Minn. Stat. § 181.645.

²⁵ Utah Code Ann. § 53A-6-401 (teachers); Utah Code Ann. § 53-1a-512.5(1) (charter schools); Utah Code Ann. § 53A-6-109 (substitute teachers); Utah Code Ann. § 53A-6-410 (school employees); Utah Code Ann. § 53B-1-110 (college employees); Utah Code Ann. § 61-2e-201 (owners of appraisal management companies); Utah Code Ann. § 58-17b-307 (pharmacists); Utah Code Ann. § 78A-9-101 (lawyers); Utah Code Ann. § 62A-3-104.3, 62A-2-120 (personal care attendants working with children or vulnerable adults); Utah Code Ann. §§ 31A-23a-105, 31A-25a-203, 31A-26-203 (insurance industry); Utah Code Ann. § 58-31-b-302 (nurses); Utah Code Ann. § 53B-1-305 (employers who hire student interns); Utah Code Ann. § 53B-16-404 (college interns); Utah Code Ann. § 32B-1-305 (personnel working in places with liquor licenses); Utah Code Ann. § 13-49-203 (immigration consultants); Utah Code Ann. § 26-8a-310 (health care professionals); Utah Code Ann. § 63G-12-205 (undocumented workers); Utah Code Ann. § 61-2f-204 (realtors); Utah Code Ann. § 11-40-102 (waterworks); Utah Code Ann. § 72-10-602 (airport ground transportation personnel); Utah Code Ann. § 58-47b-302 (massage therapists); Utah Code Ann. § 17B-2a-825 (public transportation); Utah Code Ann. § 53-6-302 (police dispatchers); Utah Code Ann. § 41-3-205.5 (motor vehicle salespeople); Utah Code Ann. § 58-63-302 (private security companies).

²⁶ 15 U.S.C. §§ 1681 *et seq.*

²⁷ RCW 19.182 *et seq.*

²⁸ Minn. Stat. §§ 13C.001-13C.04.

²⁹ Cal. Gov't Code §§ 1785.1-1785.36.

³⁰ RCW 19.182.020(2)(c).

In 2011, California passed a law, similar to Washington's, prohibiting employers and prospective employers from obtaining and using consumer credit reports when determining whether to hire an applicant. This provision does not apply to managerial employees and also does not apply to: (1) law enforcement positions and positions for which the information is required by law; (2) positions that involve regular access (other than in connection with routine solicitation and processing of credit card applications in a retail establishment) to bank or credit card information, Social Security numbers, and date of birth; (3) positions in which the person is, or would be, a named signatory on the employer's bank or credit card account, or authorized to transfer money or enter into financial contracts on behalf of the employer; (4) positions that involve access to confidential or proprietary information, as defined by law; and (5) positions that involve regular access to cash totaling \$10,000 or more of the employer, a customer, or a client during the workday.³¹

Utah does not have any laws regulating an employer's ability to obtain credit reports on employees or prospective employees.

(i) Definitions

The FCRA imposes certain requirements on an employer's use of "consumer reports" and "investigative consumer reports," for employment purposes.

A "consumer report" includes any written, oral, or other communication of any information by a consumer-reporting agency bearing on a consumer's creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used, expected to be used, collected in whole or in part for certain enumerated purposes, including employment purposes.³²

A "consumer reporting agency" is any person which, for monetary fees, dues, or on a cooperative non-profit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.³³

An "investigative consumer report" is a consumer report, or portion thereof, in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends, or associates of the individual or others with whom he or she is acquainted or who may have knowledge concerning any such items of information.³⁴ It does not include information obtained from personal interaction with the individual.

(ii) Employer's Written Disclosure Requirements

Employers must satisfy certain disclosure requirements before obtaining a "consumer report" or an "investigative consumer report."

1) Initial Disclosure

Before obtaining a credit report, an employer must: (1) inform an applicant or employee in a written disclosure statement that a report may be obtained for employment purposes, and (2) obtain the individual's written authorization to obtain the report.³⁵ The employer also must certify to the consumer reporting agency that it has complied with all disclosure requirements.³⁶

³¹ Cal. Lab. Code § 1024.5.

³² 15 U.S.C. § 1681a(d)(1); RCW 19.182.010(4)(a); Minn. Stat. § 13C.001, subd. 3.

³³ 15 U.S.C. § 1681a(f); RCW 19.182.010(5); Minn. Stat. § 13C.001, subd. 4.

³⁴ 15 U.S.C. § 1681a(e); RCW 19.182.010(10); Minn. Stat. § 13C.001, subd. 6.

³⁵ 15 U.S.C. § 1681b(b)(2).

³⁶ 15 U.S.C. § 1681d(a)(2).

The Washington Act imposes additional requirements on employers. For current employees, the disclosure must notify the employee that the consumer report may be used for employment purposes.³⁷ A statement to this effect contained in an employee manual will suffice.³⁸ This requirement does not apply with respect to a consumer report on an employee the employer has reasonable cause to believe has engaged in illegal activity.³⁹

Under the Minnesota Access Act, the disclosure must: (1) be included with any written employment application form; (2) notify the individual of the right to request additional information from the consumer reporting agency about the nature and scope of the report; and (3) include a box that the individual can check to receive a copy of the consumer report. If the individual requests a copy of the report, the employer must request a copy from the agency and return a copy to the individual within a certain period. The individual cannot be charged for receiving such a report.

2) Additional Disclosure for Investigative Consumer Reports

There are additional disclosure requirements for “investigative consumer reports.” Under the FCRA an employer must, within three days of requesting the investigative consumer report: (1) inform the person that a request for information regarding the person’s character, general reputation, personal characteristics, and mode of living may be made; (2) inform the person of the right to request additional disclosures of the nature and scope of the investigation; and (3) provide a copy of “A Summary of Your Rights Under the Fair Credit Reporting Act.”⁴⁰ An employer may satisfy all disclosure requirements at once by combining this disclosure with the initial disclosure required for consumer reports.

The Washington Act contains similar additional disclosure requirements for “investigative consumer reports”⁴¹ and provides an exception from these disclosure requirements if the report is to be used for employment purposes for which the person has not specifically applied.⁴²

California law also contains disclosure requirements for “investigative consumer reports.”⁴³

The Minnesota Access Act requires the employer to inform the individual that “the report may include information obtained through personal interviews regarding the [individual’s] character, general reputation, personal characteristics, or mode of living.”⁴⁴

3) Additional Disclosures Regarding Nature and Scope of Investigation

If, in the course of an “investigative consumer report,” the person being investigated makes a written request for additional disclosures, the employer must provide “a complete and accurate” disclosure of the nature and scope of the investigation. This disclosure must be in writing and delivered to the person no later than five days after the date the employer received the person’s request for the disclosure or the date the employer requested the investigative report, whichever is later.⁴⁵ The additional disclosure must include a description of the types of questions asked, the number and types of persons interviewed, and the name

³⁷ RCW 19.182.020(2)(b).

³⁸ *Id.* Note that the same may not be true under the Federal FCRA, discussed below.

³⁹ *Id.* Note that the suspected activity must be “illegal” in order to satisfy this exception, and that no such exception applies to the FCRA.

⁴⁰ 15 U.S.C. § 1691d(a)(1).

⁴¹ RCW 19.182.050(1)(a).

⁴² RCW 19.182.050(1)(b).

⁴³ *See* Cal. Civ. Code §§ 1786 *et seq.*

⁴⁴ Minn. Stat. § 13C.02, subd. 1.

⁴⁵ 15 U.S.C. § 1681d(b).

and address of the investigating agency.⁴⁶ The Minnesota Access Act places this obligation to respond on the consumer reporting agency, not the employer.⁴⁷

4) Exception Under the Minnesota Access Act

Under the Minnesota Access Act, the disclosure requirements do not apply to: (1) a consumer report to be used for employment purposes for which the individual has not specifically applied; or (2) a consumer report used for investigation of a current violation of a criminal or civil statute by a current employee or an investigation of employee conduct for which the employer may be liable, until the investigation is completed.⁴⁸

(iii) Disclosures Before Adverse Action

The FCRA, the Minnesota Access Act, and the Washington Act place certain requirements on employers before taking an adverse employment action, including denial of employment, if such action is based in whole or in part upon information contained in either type of consumer report.⁴⁹

The FCRA requires that after the report is completed, but before taking any adverse action, an employer must provide the individual with: (1) an unedited copy of the report, and (2) a copy of “A Summary of Your Rights Under the Fair Credit Reporting Act.”⁵⁰ After taking adverse action based, even partially, on information in the report, the employer must orally or in writing: (1) give notice of the adverse action to the person; (2) provide the name, address, and telephone number of the consumer reporting agency making the report; (3) state that the consumer reporting agency did not take the adverse action and is unable to give specific reasons for the action; and (4) provide notice of the person’s right to obtain a free copy of the consumer report from the consumer reporting agency within 60 days and the right to dispute the accuracy of any information in the report.⁵¹

The Washington Act requires the employer to provide to the employee written notice of the adverse action,⁵² plus: (1) the name, address, and telephone number of the consumer reporting agency; (2) a description of the consumer’s rights under the Washington Act; and (3) a reasonable opportunity to respond to any information in the report that is disputed by the employee.⁵³

The Minnesota Access Act requires the employer to: (1) inform the employee that an adverse action was taken as the result of information in the report; (2) notify the employee of the right to receive a copy of the report, if one has not been already received; (3) state the name and address of the consumer reporting agency; and (4) give notice of the right to dispute and correct errors in the report.⁵⁴

(b) Criminal Background Checks

Inquiries into an applicant’s arrest record may violate Title VII due to the disparate impact these inquiries tend to have on minorities.⁵⁵ The extent to which an employer can ask job applicants about convictions is an unresolved question. An employer cannot use a prior felony or misdemeanor conviction as an absolute

⁴⁶ 16 C.F.R. pt. 600, App. (Section 606); RCW 19.182.050(2).

⁴⁷ Minn. Stat. § 13C.02, subds. 1-3.

⁴⁸ Minn. Stat. § 13C.02, subd. 4.

⁴⁹ 15 U.S.C. § 1681m(a); RCW 19.182.020(2)(c); RCW 19.182.110.

⁵⁰ 15 U.S.C. § 1681b(b)(3); 16 C.F.R. pt. 601, App. A (FTC’s disclosure form).

⁵¹ 15 U.S.C. § 1681m(a).

⁵² RCW 19.182.110(1).

⁵³ RCW 19.182.020(2)(c); RCW 19.182.110(2).

⁵⁴ Minn. Stat. § 13C.03.

⁵⁵ See Chapter IX: Employment Discrimination.

bar to employment in all situations, as a blanket policy of excluding all applicants with conviction records is likely to constitute unlawful discrimination.⁵⁶

To minimize the risk of a disparate impact claim, employers must show a business necessity to justify the exclusion of an applicant on the basis of prior criminal convictions. In other words, an employer should only exclude an applicant on the basis of prior convictions if it can show a relationship between the nature of any such conviction and likely job performance. Such pre-employment inquiries should be accompanied by a statement that convictions will not disqualify the job applicant automatically and the employer will consider the particular circumstances of each case when deciding whether employment of that particular person for the particular job is manifestly inconsistent with the safe and efficient operation of the employee on the job. Facts to consider include time since conviction(s), number of convictions, relationship between the job and the nature of the conviction(s) and the applicant's past employment and personal history.⁵⁷

Narrow policies excluding only applicants convicted of certain job-related offenses have been upheld in a few reported decisions.⁵⁸ Because of the small number of decisions upholding such policies, any blanket conviction policy probably poses a substantial risk of liability or, at the very least, may invite discrimination claims.

SECTION 1.4 IMMIGRATION REQUIREMENTS

Foreign workers provide employers with access to talent and workers who are unavailable in the United States or are able to provide a competitive edge in the global economy. The following summary provides a brief discussion of U.S. immigration laws that can assist an employer to obtain the services of a foreign worker. Given the complex and dynamic nature of immigration law, regulation and policy, employers are advised to contact immigration counsel well in advance of their need for a foreign worker's services.

(a) Employment Verification

In an effort to deal with illegal immigration to the United States, Congress enacted the Immigration Reform and Control Act of 1986 ("IRCA"), portions of which the Immigration Act of 1990 and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") amended.⁵⁹ Under the IRCA, it is illegal to hire, recruit or refer a foreign national for employment knowing that the foreign national is not authorized to work in the United States. Under a 2004 amendment, violations of IIRIRA may result in criminal penalties.

It also is unlawful to continue to employ a foreign national knowing that the foreign national was either unauthorized or has become unauthorized to work in the United States. The IRCA requires employers to verify that all individuals hired after November 6, 1986, are either U.S. citizens or foreign nationals properly authorized to work in the United States. Verification is achieved by examining original documents that establish both the person's identity and his or her authorization to hold employment. The verification process must be documented by completing the Employment Eligibility Verification Form, known as "Form I-9." The Form I-9 has been recently revised in an effort to increase the security of the employment authorization verification process.

Pursuant to the revised Form I-9, any one of the following unexpired documents will establish an individual's identity and employment eligibility:

⁵⁶ See, e.g., *Green v. Mo. Pac. R. Co.*, 523 F.2d 1290 (8th Cir. 1975) (policy excluding all applicants convicted of crimes other than minor traffic offenses unlawful).

⁵⁷ *Id.*

⁵⁸ See, e.g., *Davis v. City of Dallas*, 777 F.2d 205 (5th Cir. 1985); *EEOC v. Carolina Freight Carriers Corp.*, 723 F. Supp. 734 (S.D. Fla. 1989).

⁵⁹ 8 U.S.C. §§ 1324a-b.

- U.S. Passport or U.S. Passport Card;
- Permanent Resident Card or Alien Registration Receipt Card (Form I-551);
- Foreign passport that contains a temporary I-551 stamp or temporary I-551 printed notation on a machine-readable immigrant visa;
- Employment Authorization Document that contains a photograph (Form I-766);
- In the case of a non-immigrant alien authorized to work for a specific employer incident to status, a foreign passport with an Arrival-Departure Record (Form I-94 or Form I-94A), bearing the same name as the passport and containing an endorsement of the foreign national's non-immigrant status, so long as the period of endorsement has not yet expired and the proposed employment is not in conflict with any restrictions or limitations identified on the Form I-94; or
- Passport from the Federated States of Micronesia ("FSM") or the Republic of the Marshall Islands ("RMI") with Form I-94 or Form I-94A indicating non-immigrant admission under the Compact of Free Association Between the United States and the FSM or RMI.⁶⁰

In the alternative, the employee may choose to present one document which establishes employment authorization (*e.g.*, Social Security card (other than one which states it is not valid for employment), birth certificate, unexpired employment authorization document issued by USCIS, etc.) and one document that establishes identity (*e.g.*, driver's license or identification card issued by a state if it contains a photograph or identification information such as: name, date of birth, sex, height, color of eyes, and address; voter's registration card; U.S. military identification card, etc.).⁶¹

The employer also must obtain the applicant's signed attestation, under penalty of perjury, that he or she is: (1) a citizen or national of the United States; or (2) a foreign national lawfully admitted as a permanent resident; or (3) a foreign national authorized by the USCIS to be hired for such employment.⁶²

The original identification and work authorization documents must be presented to the employer for inspection within three days of hire. The employee must determine which document he or she will present to the employer to verify identity and employment eligibility. If the employee presents a document on the list, the employer cannot inquire about or request other documents. In addition, the employer must be very careful not to demand more or different documents than those outlined in the statute. As discussed in more detail below, demanding more or different documents could result in a charge of discrimination.

Finally, the employer must retain the verification forms and make them available for inspection by the DOJ, USCIS and the Department of Labor ("DOL") for three years after the date of hire or one year after the date the employment is terminated, whichever is later.⁶³ It is advisable that employee Form I-9s and other documents be kept in a separate file from personnel records.

The IRCA also requires all employers to terminate the employment of foreign nationals hired after November 5, 1986, if they learn that such foreign nationals are not, or have ceased to be, authorized to work in the United States. With respect to employees hired before November 5, 1986, employers are not required to complete a Form I-9 or examine the documents referred to above, and employers do not have to terminate such employees upon learning that they are not authorized to work in the United States.

The penalty for knowingly hiring, recruiting or referring an unauthorized foreign national, or for continuing employment of a foreign national who is or has become an unauthorized foreign national, ranges from \$275 to \$3,200 for each unauthorized foreign national for a first offense. For subsequent offenses, the penalty can range from \$2,200 to \$16,000.⁶⁴ Good faith compliance with the verification

⁶⁰ 8 C.F.R. § 274a.2(b)(1)(v)(A).

⁶¹ 8 U.S.C. § 1324a(b)(1); 8 C.F.R. §§ 274a.2(b)(1)(v)(B)-(C).

⁶² 8 U.S.C. § 1324a(b)(2).

⁶³ 8 C.F.R. § 274a.2(b)(2)(i)(A).

procedures is an affirmative defense to a charge of hiring, recruiting or retaining an unauthorized foreign national.⁶⁵ The penalty for a paperwork violation which results in a failure to comply with the verification procedures or a failure to retain the verification forms for the required period ranges from \$110 to \$1,100 for each individual with respect to whom such violation occurred after September 29, 1999.⁶⁶ Criminal penalties, including fines and imprisonment, may be imposed for pattern or practice violations with respect to knowingly recruiting, retaining, hiring, or firing of unauthorized foreign nationals.⁶⁷

Beginning September 8, 2009, federal contractors and subcontractors are required to confirm the employment eligibility of new hires and any current employees working on a covered federal contract through the use of the E-Verify system. E-Verify is a free electronic employment eligibility verification database system operated by the Department of Homeland Security (“DHS”) in partnership with the Social Security Administration (“SSA”) that compares information from the Employment Eligibility Verification Form I-9 against federal government databases to verify workers’ employment eligibility. Companies awarded a contract with the E-Verify clause are required to enroll in E-Verify within 30 days of the contract award date.⁶⁸ Additional information on E-Verify can be found on the U.S. Citizenship and Immigration Services website at www.uscis.gov.

(b) State Laws on Immigration

The regulation of immigration in the United States has historically been a matter for the federal government, in terms of legislation, administration and enforcement. The federal government has fallen short however, at least in the eyes of many individuals and organizations. In April 2010, Arizona enacted the “Support Our Law Enforcement and Safe Neighborhoods Act,” the most sweeping effort at the state level to actively regulate immigration. While much of the law has been enjoined by the courts, including in 2012 when the U.S. Supreme Court ruled that multiple provisions of the law are pre-empted by federal law, its passage inspired legislators in other states to pass similar legislation.⁶⁹ Since Arizona’s broad law was enacted, 36 other states have attempted to pass substantive immigration-control laws. Many of those efforts have failed or stalled at the state level. However, five states – Utah, Indiana, South Carolina, Georgia, and Alabama – have passed laws that mirror or go beyond the Arizona law. Companies hiring employees or otherwise doing business in these states must now consider whether state laws on immigration will require changes in hiring or other business practices. For example, some states mandate the use of E-Verify (discussed above in this Section 1.3) by all employers or those employers doing business with the state. The topic of state efforts to regulate immigration and related employment is a fast-moving one, requiring continuous monitoring.

In 2011, Utah passed the Utah Immigration Accountability and Enforcement Act (the “UIAEA”). Under the UIAEA, employers who employ 15 or more employees are subject to various restrictions, including: (1) such employers may not hire any new employees unless the employee is legally within the United States, or in the case of an unauthorized alien, such employers verify via the E-Verify or U-Verify systems that the prospective employee holds a valid guest worker permit; and (2) they must terminate all employees who are not authorized to work in the United States and who do not hold a valid guest-worker permit.⁷⁰ Utah law also makes it a crime for employers to solicit, encourage, induce, or harbor any illegal alien to come to or remain in the state for commercial advantage or gain.⁷¹

⁶⁴ 8 U.S.C. § 1324a(e)(4); 8 C.F.R. § 274a.10(b)(1).

⁶⁵ 8 U.S.C. § 1324a(a)(3).

⁶⁶ 8 C.F.R. § 274a.10(b)(2).

⁶⁷ 8 U.S.C. § 1324a(f).

⁶⁸ 8 U.S.C. § 1324a.

⁶⁹ *Arizona v. United States*, 132 S. Ct. 2492 (2012).

⁷⁰ Utah Code Ann. § 63G-12-101 *et seq.*

⁷¹ Utah Code Ann. § 76-10-2901.

(c) Anti-Discrimination Provisions of IRCA

The IRCA also prohibits discrimination against any individual (other than an unauthorized foreign national) with respect to hiring, recruiting or referring for a fee, or discharging such an individual from employment because of the individual's national origin or citizenship status.⁷² This provision was added to the Act to avoid creating a situation in which employers might refuse, as a matter of practice, to consider the applications of individuals of different national origin or citizenship (regardless of their eligibility to work) in order to eliminate any risk of an IRCA violation. Thus, the IRCA seeks to deny employment to unauthorized foreign nationals without adversely affecting the employment opportunities of authorized foreign nationals or citizens of various national origins. It is not a violation of IRCA, however, to prefer a U.S. citizen or national for employment over a protected individual, if the two individuals are equally qualified.⁷³

The Immigration Act of 1990 prohibits: (1) intimidation and retaliation against individuals who allege discrimination under the Act; and (2) abuse of the documentation process, which includes requesting "more or different documents" than those required under the IRCA or failing to honor documents that "on their face reasonably appear to be genuine."⁷⁴ The 1996 IIRIRA provided some relief to employers who ask for "more or different" documents than that required by the IRCA. The statute now requires a showing that the request was made with the intent to discriminate before an employer will be liable under this provision of the law.⁷⁵

Complaints of discrimination are to be heard by an administrative law judge, who may order the employer to hire the individual directly affected (with or without back pay), impose a civil penalty as high as \$10,000 for each individual subject to discrimination, and award attorneys' fees.⁷⁶

(d) Immigration Based on Employment

There are several types of visas that a U.S. employer may consider if interested in hiring a foreign national for employment in the United States. Non-immigrant employment-based visas allow a foreign national to work in the United States for a particular U.S. employer for a temporary period of time. Non-immigrant visas are identified by various letters of the alphabet and numbers which signify the types of activities in which individuals may engage while in the U.S., *e.g.*, B-1 (visitor for business, no U.S. employment allowed), B-2 (visitor for tourism, no employment or business activities allowed).⁷⁷ Immigrant employment-based status results in lawful permanent resident status (the ability to live and work in the U.S. permanently) and is identified through alpha-numerical "preferences." The preferences refer to the minimum qualifications required as well as the number of immigrant visas available in each preference category during any one fiscal year.

(i) Non-Immigrant Employment-Based Status

The most common non-immigrant employment-based status for which U.S. employers file petitions include:

- **H-1B:**⁷⁸ This status is available for foreign nationals coming to the United States to work temporarily for a specific U.S. employer in a "specialty occupation" (an occupation requiring theoretical and practical application of a body of highly specialized knowledge *and* attainment

⁷² 8 U.S.C. § 1324b(a)(1).

⁷³ 8 U.S.C. § 1324b(a)(4).

⁷⁴ 8 U.S.C. §§ 1324b(a)(5)-(6).

⁷⁵ 8 U.S.C. § 1324b(a)(6).

⁷⁶ 8 U.S.C. §§ 1324b(e)-(h).

⁷⁷ *See* 8 U.S.C. § 1101(a)(15); 8 C.F.R. pt. 214.

⁷⁸ 8 U.S.C. § 1101(a)(15)(H); 8 C.F.R. § 214.1; 8 C.F.R. §§ 214.2(h)-(i).

of a bachelor's or higher degree in the specific specialty, or its equivalent in work experience as a minimum for entry into the job).⁷⁹ A foreign national hired for such a position must have the requisite U.S. bachelor's degree, its equivalent from a foreign school, or its equivalent in work experience (generally, three years of progressive work experience is considered equivalent to one year of college instruction). If the position requires a license or other certification to practice in the field, the foreign national must have that license or certificate before he or she can obtain H-1B status.

The petitioning process for an H-1B worker requires the employer to file a Labor Condition Application ("LCA") (form ETA 9035) (attesting that the hiring of a foreign worker will not adversely impact the wages and working conditions of U.S. employees) with the DOL.⁸⁰ Following receipt of the approved LCA, the employer may file its petition for the H-1B worker with the USCIS Service Center having jurisdiction over the intended place of employment. Approval times can vary considerably between USCIS Service Centers and may take from a few days to several months. Expedited processing is available through the Premium Processing Program whereby payment of an additional filing fee guarantees a USCIS response within 15 days of receipt of the application by the USCIS. However, a Request for Evidence by the USCIS tolls the 15-day deadline. Upon approval, USCIS forwards its approval of the petition to the consulate where the foreign national will obtain his or her visa (visa-exempt Canadian nationals may use the approval notice to apply for entry to the U.S.) or, if the foreign national is already in the U.S. in valid status, USCIS will issue an approval notice to the employer with an I-94 card (a card indicating the foreign national's status in the U.S.) for the foreign national employee.

H-1B status is granted in three-year increments or less. A foreign national may remain in the U.S. in H-1B status for a maximum of six consecutive years after which he or she must leave the country for at least one year prior to changing status or returning in H or L (another temporary working visa) status. Extensions beyond the six-year cap are available in some circumstances. (Please see below.)

The American Competitiveness in the Twenty-First Century Act ("AC21"), signed by President Clinton on October 17, 2000, made numerous changes to the H-1B visa program. Of most immediate benefit to employers and H-1B visa holders are provisions making H-1B visas more portable. Section 105 of AC21 allows a non-immigrant foreign national who has not worked without authorization and was previously issued an H-1B status or otherwise accorded H-1B status to begin working for a new H-1B employer upon the filing of a "non-frivolous" petition by the new employer. AC21 also contains provisions allowing for extensions of H-1B status beyond the six-year maximum for certain non-immigrants awaiting processing applications for permanent residence ("green card processing").

- **L-1:**⁸¹ This status is available for employees of international companies who are coming to the U.S. to work temporarily for a "parent, branch, affiliate, or subsidiary" of the company in an executive, managerial or "specialized knowledge" capacity. To qualify for this visa, the international company involved must have a qualifying relationship (parent/subsidiary, affiliate, or branch office) with a U.S. company. The foreign national must have worked for the foreign employer for at least one year (full-time equivalent) of the three years immediately preceding the application in an executive, managerial, or specialized capacity and be entering the United States to work in one of these capacities.

Blanket L visas are available for large multi-national corporations that meet certain basic requirements in terms of size, income, and business activities.⁸² Blanket L visas simplify procedures for large international companies that regularly transfer highly placed personnel

⁷⁹ 8 U.S.C. § 1101(a)(15)(H); 8 C.F.R. § 214.2(h)(4).

⁸⁰ 20 C.F.R. §§ 655.700 *et seq.*

⁸¹ 8 U.S.C. § 1101(a)(15)(L); 8 C.F.R. § 214.2(l).

within the corporate structure. Employees of companies with a Blanket L may apply directly to the U.S. consulate for a visa. Individuals in the United States seeking a change of status to L-1 may apply directly to the USCIS Service Center which adjudicated the company's blanket petition.

The petitioning process for most L-1 workers involves filing the L-1 petition with the USCIS Service Center having jurisdiction over the intended place of employment. The USCIS forwards its approval of the petition to the consulate where the foreign national will obtain his or her corresponding L-1 visa or, if the foreign national is already in the U.S. in valid status, will issue an approval notice to the employer with an I-94 card for the foreign national employee. It is important to note that Canadian citizens are not required to file their petition with the USCIS Service Center. Rather, they are able to simply apply for L-1 status at a U.S. port of entry.

Initial L-1 status is generally granted for up to three years unless the foreign national is coming to open a new office.⁸³ Extensions of status are generally granted in increments of up to two years. A foreign national in L-1A⁸⁴ status who is an executive or manager may remain in the U.S. for seven consecutive years after which he or she must leave the country for one year prior to changing status or returning in H or L status. A foreign national in L-1 status who is working in a specialized knowledge capacity may remain in the U.S. five consecutive years after which he or she must leave the country for one year prior to changing status or returning in H or L status. Note that L-1 beneficiaries that are categorized as executive or managerial (rather than specialized knowledge) may have a considerable advantage in the event they wish to later apply for permanent residency. They are exempt from the labor certification process, the first step in the costly and time-consuming process of becoming a permanent resident.

Spouses of L-1 status holders: Spouses of L (and E) status holders can obtain employment authorization as spouses of such visa holders, even without having independent employment status. These individual must apply for a formal employment authorization document ("EAD") prior to starting work. Spouses of L and E status holders should file a I-765 form, along with evidence of the spousal relationship. Only spouses, and not other family members, are eligible for employment authorization under this law.⁸⁵

Blanket L: Organizations seeking to qualify for their own Blanket L program must meet the following requirements:⁸⁶

- the petitioning organization and each related entity (parent, subsidiary, branch office, etc.) to be included in the Blanket L must be engaged in commercial trade or services;
- the petitioning organization must have an office in the United States that has been doing business for at least one year;
- the petitioning organization must have three or more domestic and foreign branches, subsidiaries or affiliates; and
- the petitioning organization and other qualifying organizations must have obtained approval of petitions for at least 10 "L" managers, executives or specialized knowledge professionals during the previous 12 months; or have U.S. subsidiaries or affiliates with

⁸² See Immigration and Nationality Act ("INA") § 214(c)(2)(A); 8 U.S.C. § 1184(c)(2)(A). Note that H.R. 2504: L-1 Nonimmigrant Reform Act was referred to the Subcommittee on Immigration, Citizenship, Refugees, Border Security and International Law on June 25, 2007. If passed, the Act would eliminate L-1 blanket visa authority.

⁸³ In a new office situation, the foreign national will be granted no more than one year for the initial entry. 8 C.F.R. § 214.2.

⁸⁴ The L-1 visa has two subcategories: L-1A for executives and managers, and L-1B for workers with specialized knowledge.

⁸⁵ INA § 214(c)(2)(E).

⁸⁶ 8 C.F.R. § 214.2.

combined annual sales of at least \$25 million; or have a U.S. workforce of at least 1,000 employees.

- **TN Professionals:**⁸⁷ This status is grounded in the NAFTA and is only available to citizens of Canada and Mexico. The Trade NAFTA (“TN”) status allows a citizen of Canada or Mexico to enter the U.S. to temporarily engage in business activities at a professional level. Self-employment is not allowed. A U.S. entity or individual may be the employer, or in some cases, the individual may continue to be employed by a Canadian or Mexican company (*i.e.*, as a management consultant). TN status is only available for certain professions listed in Appendix 1603.D.1 of NAFTA, (*i.e.*, management consultants, economists, engineers, scientific technicians/technologists, etc.), and such professionals must meet certain minimum qualifications.⁸⁸

TN status is granted in three-year increments. There is no limit on the number of consecutive years the foreign national may remain in TN status; however, the purpose of the stay must remain temporary.

- **Other:** There are numerous other business/employment non-immigrant status which may apply in certain instances but which are less often used. These include B-1 (business visitor);⁸⁹ E-1/E-2 (treaty traders/treaty investors);⁹⁰ H-1B (fashion models);⁹¹ H-3 (trainees);⁹² J-1 (exchange visitors);⁹³ O-1 (foreign nationals of extraordinary ability in the sciences, arts, education, business, athletics or in the motion picture or television industry);⁹⁴ P (foreign nationals coming to the U.S. temporarily to perform services as an athlete, as a member of an internationally recognized entertainment group, as an artist or entertainer under a reciprocal exchange program, or coming to perform, teach or coach under a culturally unique program);⁹⁵ Q (foreign nationals temporarily participating in an international cultural exchange program);⁹⁶ and R (religious workers coming to perform temporary services for religious organizations).⁹⁷

(ii) Immigrant Employment-Based Status

Foreign nationals working or doing business in the U.S. may have the option of becoming lawful permanent residents of the U.S. based on employment.⁹⁸ Many, but not all, employment-based preferences require a permanent labor certification from the DOL before an immigrant petition can be filed with the USCIS. This is an involved process which takes several months to complete. In addition, some of the preference categories for employment-based immigrant visas are becoming backlogged, resulting in delays of months to years before an immigrant visa is available. Consequently, if permanent residency is a

⁸⁷ 8 C.F.R. § 214.6.

⁸⁸ Appendix 1603.D.1 is reprinted at 8 C.F.R. § 214.6(c).

⁸⁹ 8 C.F.R. § 214.2(b).

⁹⁰ Regulations at 8 C.F.R. § 214.2(e) and Foreign Affairs Manual 41.51.

⁹¹ 8 C.F.R. § 214.2(h).

⁹² *Id.*

⁹³ 8 C.F.R. § 214.2(j).

⁹⁴ 8 C.F.R. § 214.2(o).

⁹⁵ 8 C.F.R. § 214.2(p).

⁹⁶ 8 C.F.R. § 214.2(q).

⁹⁷ 8 C.F.R. § 214.2(r). Employers often employ foreign students in “practical training” programs or as otherwise authorized under the terms of their student status. 8 C.F.R. §§ 214.2(f), 214.2(m).

⁹⁸ Family-based permanent residency petitions should not be overlooked. Often, foreign national workers in the U.S. have close family members who are U.S. citizens or lawful permanent residents. Those family members may be able to petition for immigration benefits on behalf of the foreign national worker. In some cases, the family-sponsored petition will result in permanent residency more quickly than an employment-based petition.

desirable long-term goal, it is in the company and individual's interest to begin the process several years before the foreign national's current status expires.

If a permanent labor certification is not required, processing time and costs are significantly reduced, requiring only the filing of an immigrant petition either prior to or concurrently with an application for permanent residency. If the individual is not present in the U.S. or eligible to adjust status, he or she must obtain an immigrant visa from a U.S. consulate abroad, usually in the individual's country of citizenship or last permanent residence.

The five employment-based preferences are:

1) First Employment-Based Preference⁹⁹

No labor certification is required for workers in this category, and these employees are also called "Priority Workers." Included are: (1) managers and executives subject to international transfer to the U.S.; (2) outstanding professors and researchers with universities or private employers with established research departments; and (3) foreign nationals of extraordinary ability in the sciences, arts, education, business, and athletics. Foreign nationals of extraordinary ability do not need an offer of employment and can self-petition for permanent residency.

2) Second Employment-Based Preference¹⁰⁰

This classification includes: (1) foreign nationals of "exceptional ability" in the sciences, arts or business; and (2) advanced degree professionals. Advanced degree means any U.S. academic or professional degree or a foreign equivalent degree above a bachelor's degree. An "advanced degree" by "at least five years of progressive experience in the specialty [is] considered the equivalent of a master's degree."¹⁰¹ A labor certification is generally required for second preference petitions unless the position comes within the DOL's pre-certified occupation list (Schedule A) or documentation can be provided showing that the foreign national qualifies for one of the shortage occupations in the DOL's Labor Market Information Pilot Program.¹⁰² Foreign nationals of exceptional ability in the sciences, arts, or business may have the job offer waived and, consequently, the labor certification, if the exemption would be in the national interest.

3) Third Employment-Based Preference¹⁰³

This classification includes: (1) professionals with bachelor's degrees; (2) skilled workers holding positions requiring at least two years of training and experience; and (3) other workers (essentially, unskilled workers). Only a small number of visas are available each year for "other workers." Both a job offer and labor certification (unless position comes within Schedule A or foreign national qualifies for a DOL shortage occupation) are required for this group.

4) Fourth Employment-Based Preference¹⁰⁴

This classification applies to special immigrant religious workers, special employees of the U.S. government abroad, and some other restricted groups.

⁹⁹ 8 C.F.R. § 204.5(k).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² 20 C.F.R. § 656.

¹⁰³ 8 C.F.R. § 204.5(l); *see also* 20 C.F.R. § 656 (DOL regulations governing the permanent labor certification process).

¹⁰⁴ 8 C.F.R. § 204.5(m).

5) Fifth Employment-Based Preference¹⁰⁵

This classification provides immigration benefits to foreign national entrepreneurs who establish a new commercial enterprise in which the foreign national has invested or is actively in the process of investing capital of at least \$1,000,000. If the entrepreneur establishes the new business in a targeted employment area, the required capital investment is \$500,000. The new business must create at least 10 full-time jobs; however, these new jobs may be created indirectly. This category has been the subject of much litigation.

SECTION 1.5 EMPLOYEE VS. INDEPENDENT CONTRACTOR STATUS

In some circumstances there may be advantages for businesses to hire independent contractors rather than employees, including avoidance of taxes under the Federal Insurance Contributions Act (“FICA”) and Federal Unemployment Tax Act (“FUTA”), ADEA¹⁰⁶ and ADA¹⁰⁷ compliance,¹⁰⁸ contributions to pension plans, unemployment insurance, health insurance, employee “headcount,” and workers’ compensation insurance. It may reduce expenses associated with employees by relieving the employer of the duty to comply with certain record keeping statutes.

Given the complexity of determining employment status in any particular case, and the potential risk of retroactive liability, employers should consult with legal counsel before assuming that an individual will qualify as an independent contractor for all purposes. If an audit by the U.S. Internal Revenue Service (“IRS”) discovers that an employer has misclassified workers, not only may the employer be required to pay the back taxes that should have been withheld from the employee’s wages, but a penalty may be charged as well. Employees also challenge independent contractor status under stock-based retirement and compensation plans, as illustrated by the multi-million dollar settlement in *Vizcaino v. Microsoft Corp.*¹⁰⁹ As preventive analysis and planning will help avoid costly liability, it is important to resolve at the outset the issue of whether an individual’s services for the employer will be considered those of an employee or independent contractor.

Different criteria exist to determine whether an individual is an employee or independent contractor. Some agencies, for example, employ the “common law” test, while others use an “economic realities” test. Thus, it is important to note that a worker might be an independent contractor under one test, but an employee under another.¹¹⁰

Under the common law test, the principal criterion considered is whether, and to what extent, the employer has the right to control the manner and means by which the work is performed. The IRS uses a 21-factor test, which is an outgrowth of the common law test that focuses on: (1) behavior control, (2) financial control, and (3) type of relationship.¹¹¹

¹⁰⁵ 8 C.F.R. §§ 204.6, 216.6.

¹⁰⁶ See ADEA, 29 U.S.C. § 630(b) (exempting organizations with fewer than 20 employees).

¹⁰⁷ See ADA, 42 U.S.C. § 12111(5)(A) (exempting organizations with fewer than 15 employees).

¹⁰⁸ See *Fichman v. Media Ctr.*, 512 F.3d 1157, 1158 (9th Cir. 2008) (holding that neither directors of a non-profit organization, nor volunteers constitute “employees” as defined by the ADA).

¹⁰⁹ 184 F.3d 1070 (9th Cir. 1999), *cert. denied*, 528 U.S. 1105 (2000).

¹¹⁰ See, e.g., *W. Ports Transp., Inc. v. Emp’t Sec.*, 110 Wn. App. 440 (2002) (liberally applying the unemployment compensation law to cover truckers who would be considered independent contractors under federal transportation laws or common law principles). If you want the IRS to determine whether or not a worker is an employee, file Form SS-8, Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding, with the IRS.

¹¹¹ Rev. Ruling 87-41, 1987-1, Cum. Bull. 296, 298-99; 26 C.F.R. § 31.3121(d)-1(c); see, e.g., *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992) (adopting common law test in an ERISA context); *Murray v. Principal Fin. Group*, 613 F.3d 943 (9th Cir. 2010) (common law test applies to Title VII actions).

(a) Behavioral Control¹¹²

Facts that show whether the business has a right to direct and control how the worker does the task for which the worker is hired include the type and degree of instructions the business gives the worker and training that the business gives to the worker.

The following are examples of business instructions:

- when and where to do the work;
- what tools or equipment to use;
- which workers to hire or get to assist with the work;
- where to purchase supplies and services;
- what work must be performed by a specific individual; and
- what order or sequence to follow.

The amount of instruction needed varies among different jobs. Even if no instructions are given, sufficient behavioral control may exist if the employer has the right to control how the work results are achieved. A business may lack the knowledge to instruct some highly specialized professionals; in other cases, the task may require little or no instruction. The key consideration is whether the business has retained the right to control the details of a worker's performance or instead has given up that right.

The training an employer provides to a worker may also be indicative of employee or independent contractor relationship. An employee may be trained by an employer to perform services in a particular manner. Independent contractors ordinarily use their own methods.

(b) Financial Control¹¹³

In determining whether a worker is an employee or an independent contractor, courts look to whether the company has a right to control the business aspects of the worker's job. The following factors weigh into this determination:

The extent to which the worker has unreimbursed business expenses:

Independent contractors are more likely to have unreimbursed expenses than are employees. While employees may also incur unreimbursed expenses in connection with the services they perform for the company, it is the extent of these expenses that is significant. Fixed ongoing costs that are incurred regardless of whether work is currently being performed weigh strongly in favor of an independent contractor determination.

The extent of the worker's investment: An independent contractor often has a significant investment in the facilities he or she uses in performing services for someone else. However, a significant investment is not necessary for independent contractor status.

The extent to which the worker makes his or her services available to the relevant market: An independent contractor is generally free to seek out business opportunities beyond the company for which it is performing work. Independent contractors often advertise, maintain a visible business location, and are available to work in the relevant market.¹¹⁴

¹¹² Internal Revenue Service, Employer's Supplemental Tax Guide, Publication 15-A, p. 6 (2012) at <http://www.irs.gov/pub/irs-pdf/p15a.pdf>.

¹¹³ *Id.* at 6-7.

¹¹⁴ *NLRB v. Friendly Cab Co., Inc.*, 512 F.3d 1090 (9th Cir. 2008) (taxi drivers were "employees" not "independent contractors," where employer exerted considerable control over means and manner of drivers' performance, and did not provide them with opportunity to pursue entrepreneurial opportunities).

How company pays the worker: An employee is generally guaranteed a regular wage amount for an hourly, weekly, or other period of time. This usually indicates that a worker is an employee, even when the wage or salary is supplemented by a commission. An independent contractor is usually paid by a flat fee for the job. However, it is common in some professions, such as law, to pay independent contractors on an hourly basis.

The extent to which the worker can realize a profit or loss: An independent contractor can make a profit or loss. The company incurs the profit or loss if the worker is an employee.

(c) Type of Relationship¹¹⁵

Courts also look to the type of relationship between the company and the worker in determining whether a worker is an employee or an independent contractor. Facts that show the parties' type of relationship include the following:

Written contracts: Written contracts describing the relationship of the parties may be evidence that the parties intended to create an employee or independent contractor relationship.

Benefits: If the company provides the worker with employee-type benefits, such as insurance, a pension plan, vacation pay, or sick pay, it is likely that the relationship is employer-employee.

The permanency of the relationship: If a company engages a worker with the expectation that the relationship will continue indefinitely, rather than for a specific project or period, this is generally considered evidence that the intent was to create an employer-employee relationship.

The extent to which services performed by the worker are a key aspect of company's regular business: If a worker provides services that are a key aspect of a company's regular business activity, it is more likely that the company will have the right to direct and control the worker's activities. For example, if a law firm hires an attorney, it is likely that it will present the attorney's work as its own and would have the right to control or direct that work. This would indicate an employer-employee relationship.¹¹⁶

While the above factors are generally considered by courts in determining an independent contractor or employer-employee relationship, other criteria may be controlling under specific laws. For purposes of the Fair Labor Standards Act ("FLSA"), which governs the payment of minimum wages and overtime, the following criteria are controlling:

- the degree of control that the employer exercises over the manner in which the work is performed;
- opportunities for profit or loss;
- the worker's investment in the business;
- the permanency of the relationship; and
- the skill required to perform the job.¹¹⁷

¹¹⁵ Internal Revenue Service, Employer's Supplemental Tax Guide, Publication 15-A, p. 6 (2012) at <http://www.irs.gov/pub/irs-pdf/p15a.pdf>.

¹¹⁶ *NLRB v. Friendly Cab Co., Inc.*, 512 F.3d 1090 (9th Cir. 2008) (taxi drivers were "employees" not "independent contractors," where employer exerted considerable control over means and manner of drivers' performance, and did not provide them with opportunity to pursue entrepreneurial opportunities).

¹¹⁷ *Dole v. Snell*, 875 F.2d 802, 805 (10th Cir. 1989).

Under the FLSA, the focal point is whether the worker is “economically dependent on the business to which he renders service” or is, in fact, in business for himself.¹¹⁸ Similarly, Washington applies the “economic-dependence” test for classifying workers as employees or independent contractors under the Washington Minimum Wage Act.¹¹⁹ Given the complexity of determining employment status in any particular case, and the potential risk of retroactive liability, employers should consult with legal counsel before assuming that an individual will qualify as an independent contractor for all purposes.

Generally, none of these factors standing alone will determine the status of the employment relationship. Each situation will be determined on its own facts.¹²⁰ As a general proposition, the most important factor is whether the individual is subject to the will and control of the employer as to the tasks the individual performs.

The IRS has provided several examples of scenarios in different industries to help employers properly classify workers.¹²¹ While these examples are not controlling in an individual employer’s specific situation, they provide helpful guidance on interpreting the IRS factors.

Building and Construction Industry

- Jerry Jones has an agreement with Wilma White to supervise the remodeling of her house. She did not advance funds to help him carry on the work. She makes direct payments to the suppliers for all necessary materials. She carries liability and workers’ compensation insurance covering Jerry and others he engaged to assist him. She pays them an hourly rate and exercises almost constant supervision over the work. Jerry is not free to transfer his assistants to other jobs. He may not work on other jobs while working for Wilma. He assumes no responsibility to complete the work and will incur no contractual liability if he fails to do so. He and his assistants perform personal services for hourly wages. Jerry Jones and his assistants are employees of Wilma White.
- Milton Manning, an experienced tilesetter, orally agreed with a corporation to perform full-time services at construction sites. He uses his own tools and performs services in the order designated by the corporation and according to its specifications. The corporation supplies all materials, makes frequent inspections of his work, pays him on a piecework basis, and carries workers’ compensation insurance on him. He does not have a place of business or hold himself out to perform similar services for others. Either party can end the services at any time. Milton Manning is an employee of the corporation.
- Wallace Black agreed with the Sawdust Co. to supply the construction labor for a group of houses. The company agreed to pay all construction costs. However, he supplies all the tools and equipment. He performs personal services as a carpenter and mechanic for an hourly wage. He also acts as superintendent and foreman and engages other individuals to assist him. The company has the right to select, approve, or discharge any helper. A company representative makes frequent inspections of the construction site. When a house is finished, Wallace is paid a certain percentage of its costs. He is not responsible for faults, defects of construction, or wasteful operation. At the end of each week, he presents the company with a statement of the amount he has spent, including the payroll. The company gives him a check for that amount from which he pays the assistants, although he is not personally liable for their wages. Wallace Black and his assistants are employees of the Sawdust Co.
- Bill Plum contracted with Elm Corporation to complete the roofing on a housing complex. A signed contract established a flat amount for the services rendered by Bill Plum. Bill is a

¹¹⁸ *Id.* at 804-05.

¹¹⁹ *Anfinson v. FedEx Ground Package Sys.*, 172 Wn.2d 851 (2012).

¹²⁰ Note, for example, that while the Internal Revenue Service, the Minnesota Department of Revenue, and the Minnesota Department of Economic Security purport to use this same test to determine whether an individual is an employee or an independent contractor, each agency may assign different weights to the various factors. *See* Minn. R. § 3315.0555.

¹²¹ IRS Pub. No. 15-A, pp. 7-9 (2012) at <http://www.irs.gov/pub/irs-pdf/p15a.pdf>.

licensed roofer and carries workers' compensation and liability insurance under the business name, Plum Roofing. He hires his own roofers who are treated as employees for federal employment tax purposes. If there is a problem with the roofing work, Plum Roofing is responsible for paying for any repairs. Bill Plum, doing business as Plum Roofing, is an independent contractor.

- Vera Elm, an electrician, submitted a job estimate to a housing complex for electrical work at \$16 per hour for 400 hours. She is to receive \$1,280 every two weeks for the next 10 weeks. This is not considered payment by the hour. Even if she works more or less than 400 hours to complete the work, Vera Elm will receive \$6,400. She also performs additional electrical installations under contracts with other companies, which she obtained through advertisements. Vera is an independent contractor.

Trucking Industry

- Rose Trucking contracts to deliver material for Forest Inc. at \$140 per ton. Rose Trucking is not paid for any articles that are not delivered. At times, Jan Rose, who operates as Rose Trucking, may also lease another truck and engage a driver to complete the contract. All operating expenses, including insurance coverage, are paid by Jan Rose. All equipment is owned or rented by Jan, and she is responsible for all maintenance. None of the drivers are provided by Forest Inc. Jan Rose, operating as Rose Trucking, is an independent contractor.

Computer Industry

- Steve Smith, a computer programmer, is laid off when Megabyte Inc. downsizes. Megabyte agrees to pay Steve a flat amount to complete a one-time project to create a certain product. It is not clear how long it will take to complete the project, and Steve is not guaranteed any minimum payment for the hours spent on the program. Megabyte provides Steve with no instructions beyond the specifications for the product itself. Steve and Megabyte have a written contract, which proves that Steve is considered to be an independent contractor, is required to pay federal and state taxes, and receives no benefits from Megabyte. Megabyte will file a Form 1099-MISC. Steve does the work on a new high-end computer which cost him \$7,000. Steve works at home and is not expected or allowed to attend meetings of the software development group. Steve is an independent contractor.

Automobile Industry

- Donna Lee is a salesperson employed on a full-time basis by Bob Blue, an auto dealer. She works six days a week and is on duty in Bob's showroom on certain assigned days and times. She appraises trade-ins, but her appraisals are subject to the sales manager's approval. Lists of prospective customers belong to the dealer. She has to develop leads and report results to the sales manager. Because of her experience, she requires only minimal assistance in closing and financing sales and in other phases of her work. She is paid a commission and is eligible for prizes and bonuses offered by Bob. Bob also pays the cost of health insurance and group-term life insurance for Donna. Donna is an employee of Bob Blue.
- Sam Sparks performs auto repair services in the repair department of an auto sales company. He works regular hours and is paid on a percentage basis. He has no investment in the repair department. The sales company supplies all facilities, repair parts, and supplies; issues instructions on the amounts to be charged, parts to be used, and the time for completion of each job; and checks all estimates and repair orders. Sam is an employee of the sale company.
- An auto sales agency furnishes space for Helen Bach to perform auto repair services. She provides her own tools, equipment, and supplies. She seeks out business from insurance adjusters and other individuals and does all the body and paint work that comes to the agency. She hires and discharges her own helpers, determines her own and her helpers' working hours, quotes prices for required work, makes all necessary adjustments, assumes all losses from uncollectible accounts, and receives, as compensation for her services, a large percentage of the gross collections from the auto repair shop. Helen is an independent contractor and the helpers are her employees.

Attorney

- Donna Yuma is a sole practitioner who rents office space and pays for the following items: telephone, computer on-line legal research linkup, fax machine, and photocopier. Donna buys office supplies and pays bar dues and membership dues for three other professional organizations. Donna has a part-time receptionist who also does the bookkeeping. She pays the receptionist, withholds and pays federal and state employment taxes, and files a Form W-2 each year. For the past two years, Donna has had only three clients, corporations with which there have been longstanding relationships. Donna charges the corporations an hourly rate for her services, sending monthly bills detailing the work performed for the prior month. The bills include charges for long distance calls, on-line research time, fax charges, photocopies, postage, and travel, costs for which the corporations have agreed to reimburse her. Donna is an independent contractor.

Taxicab Driver

- Tom Spruce rents a cab from Taft Cab Co. for \$150 per day. He pays the costs of maintaining and operating the cab. Tom Spruce keeps all fares he receives from customers. Although he receives the benefit of Taft's two-way radio communication equipment, dispatcher, and advertising, these items benefit both Taft and Tom Spruce. Tom Spruce is an independent contractor.
- Friendly Cab Co. leases its cabs to drivers for \$450 – \$600 per week, and the driver maintains all fares collected during that week. Friendly driver's may not provide customers with their personal contact information. Rather, a customer must go through the company's dispatchers. Friendly's drivers are employees because the company prohibits the drivers from developing their own business.¹²²

Salesperson

To determine whether salespersons are employees under the usual common law rules, each individual case must be evaluated. If a salesperson does not meet the tests for a common law employee, federal income tax from his or her pay does not have to be withheld. However, even if a salesperson is not an employee under the usual common law rules, his or her pay may still be subject to Social Security, Medicare, and FUTA taxes.

To determine whether a salesperson is an employee for Social Security, Medicare, and FUTA tax purposes, the salesperson must meet *all* eight elements of the statutory employee test. A salesperson is an employee for Social Security, Medicare, and FUTA tax purposes if he or she:

- works full time for one person or company except, possibly, for sideline sales activities on behalf of some other person;
- sells on behalf of, and turns his or her orders over to, the person or company for which he or she works;
- sells to wholesalers, retailers, contractors, or operators of hotels, restaurants, or similar establishments;
- sells merchandise for resale, or supplies for use in the customer's business;
- agrees to do substantially all of this work personally;
- has no substantial investment in the facilities used to do the work, other than in facilities for transportation;
- maintains a continuing relationship with the person or company for which he or she works; and
- is *not* an employee under common law rules.¹²³

¹²² See *Friendly Cab*, 512 F.3d 1090.

¹²³ IRS Pub. No. 15-A, pp. 8-9 (2012) at <http://www.irs.gov/pub/irs-pdf/p15a.pdf>.

(d) California's Nine-Factor Test

California uses a nine-factor test to determine whether a worker qualifies as an employee or independent contractor.¹²⁴ The factors are:

- **Control.** If an employer can exercise control over the details of the work performed, the worker likely is an employee. This is the most significant test for establishing an employer-employee relationship.¹²⁵
- **Distinctness.** If the worker is engaged in a distinct occupation or business, the worker is more likely to be classified as an independent contractor.
- **Supervision.** If the worker must perform his or her job functions under the direction or supervision of the principal or an agent of the principal, the worker likely is an employee.
- **Required Skills.** Jobs requiring few skills or little expertise indicate that the worker may be an employee. However, this factor is not determinative since many employees are skilled workers.¹²⁶
- **Work Supplies.** If the principal or agent of the principal provides the instrumentalities, tools, and the place of work, the worker likely is an employee.
- **Length of Time.** The longer one works for the principal in question, the more likely he or she will be classified as an employee.
- **Payment Method.** Paying the worker on set dates and in regular amounts indicates an employer-employee relationship. Conversely, if the person is paid on a “per job” basis, he or she may be an independent contractor.
- **Integration.** If a worker performs tasks that are part of the employer’s regular business, the worker may be an employee.
- **Intent.** If the parties believe they are creating a master-servant relationship, then the worker likely is an employee. This, however, is only relevant to indicate whether or not there was an assumption of control by the principal.¹²⁷

These factors are intertwined; their analysis depends upon particular combinations and the specific facts of each case.¹²⁸ The most important factor generally is whether the individual is subject to the will and control of the employer. However, this factor is sometimes outweighed by other factors.¹²⁹ The secondary factors merely provide a framework for determining whether an employer has exercised sufficient control over the worker to constitute an employer-employee relationship.¹³⁰

¹²⁴ *S.G. Borello & Sons, Inc. v. Dep’t of Indus. Relations*, 48 Cal. 3d 341, 351 (1989). The California independent contractor test may apply to workers in California even if the workers signed a contract stating that a different state’s law governs the agreement. *See, e.g., Narayan v. EGL, Inc.*, 616 F.3d 895 (9th Cir. 2010) (California law should apply to determine whether workers were independent contractors or employees, despite an agreement with a Texas choice of law provision, when California workers filed claims arising under California’s Labor Code and a court must determine the boundaries of the employer’s liability under the California statutes); *Ruiz v. Affinity Logistics Corp.*, 667 F.3d 1318 (9th Cir.), *on remand to*, No. 05-2125, 2012 WL 3672561 (S.D. Cal. Aug. 27, 2012) (California law applies to determine independent contractor status despite Georgia choice of law provision in contract).

¹²⁵ *Id.* at 350.

¹²⁶ *Isenberg v. Cal. Emp’t Stabilization Bd.*, 30 Cal. 2d 34, 39 (1947). *See also* Cal. Lab. Code §§ 2750.5, 3357 (stating that any person who must obtain a license to perform his or her job function or who must render services for another is presumed to be an employee).

¹²⁷ *Santa Cruz Transp., Inc. v. Unemployment Ins. App. Bd.*, 235 Cal. App. 3d 1363, 1372 (1991) (noting that “[a] belief that one will not be rehired if he fails to follow instructions is relevant to show submission to control.”). *See also Isenberg v. Cal. Emp’t Stabilization Bd.*, 30 Cal. 2d 34, 40 (1947).

¹²⁸ *Borello*, 48 Cal. 3d at 351.

¹²⁹ *See, e.g., JKH Enters., Inc. v. Dep’t of Indus. Relations*, 142 Cal. App. 4th 1046 (2006) (finding that hourly pay and performance of a job essential to the business purpose outweighed right to control in making finding that employees were wrongly classified as independent contractors).

¹³⁰ *See, supra*, note 103, at 1371.

The company and worker's label of the relationship is not dispositive and will be ignored if their actual conduct establishes a different relationship.¹³¹ In *Estrada v. FedEx Ground Package Sys., Inc.*, the court ruled that the plaintiff delivery drivers were employees, despite their description as independent contractors in an operating agreement they signed with their employer.¹³² In *Estrada*, the drivers were required to lease a scanner, purchase or lease a truck meeting the company's specifications, mark the truck with the company logo, and pay all costs for the truck. The drivers also were subject to strict oversight, were expected to wear a company uniform, were trained and supervised by company managers, worked full-time under hours set by the company, and were forbidden to refuse a delivery. The court stated that the company's "control over every exquisite detail of the drivers' performance, including the color of their socks and the style of their hair, supports the trial court's conclusion that the drivers are employees, not independent contractors."

In 2011, California passed a law regarding the willful misclassification of employees as independent contractors.¹³³ The law provides increased penalties of between \$5,000 to \$25,000 for the "willful misclassification" of independent contractors. Willful misclassification is defined as "avoiding employee status for an individual by voluntarily and knowingly misclassifying that individual as an independent contractor."¹³⁴

(e) Utah's Worker's Compensation Act

For purposes of the Utah Workers' Compensation Act,¹³⁵ Utah courts employ the following analysis when determining whether someone is an employee or an independent contractor. The primary inquiry is whether an employer has "the right to control the worker's manner or method of executing or carrying out the work."¹³⁶ Although Utah courts look at whether an employer exercises actual control over the person, the principal inquiry is whether the employer had the right to exercise actual control.¹³⁷ "[A]n employee is one who is hired and paid a salary, a wage, or at a fixed rate, to perform the employer's work as directed by the employer and who is subject to a comparatively high degree of control in performing those duties."¹³⁸ By contrast, "an independent contractor is one who is engaged to do some particular project or piece of work, usually for a set total sum, who may do the job in his [or her] own way, subject to only minimal restriction or controls and is responsible only for its satisfactory completion."¹³⁹ Factors that Utah courts consider include: (1) the right to control, (2) the right to hire and fire employees working on a project, (3) the method of payment, and (4) the party providing the equipment.¹⁴⁰ If there is a close case, Utah courts "resolve [the] doubt as to whether a worker was an employee in favor of the [worker being an] employee."¹⁴¹

SECTION 1.6 INDIVIDUAL EMPLOYMENT CONTRACTS

Generally speaking, written employment contracts are not common except where employees are involved in research or technical development, have access to confidential proprietary information, or are in

¹³¹ See *Narayan*, 616 F.3d at 903.

¹³² *Estrada v. FedEx Ground Package Sys., Inc.*, 154 Cal. App. 4th 1 (2007) (court found that the drivers were employees and imposed judgment totaling \$17.3 million).

¹³³ Cal. Lab. Code § 226.8.

¹³⁴ *Id.* at § 226.8(i)(4).

¹³⁵ Utah Code Ann. § 34A-2-101 *et seq.*

¹³⁶ *Utah Home Fire Ins. Co. v. Manning*, 985 P.2d 243, 246 (Utah 1999).

¹³⁷ *Id.* at 246-47.

¹³⁸ *Id.* at 246.

¹³⁹ *Id.* at 246-47.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 249.

managerial or executive posts. Written employment contracts often define an employer's right to terminate the employee or to limit claims or damages in the event of termination. Even an engagement or offer letter, as distinguished from a formal employment agreement, may create legally binding duties upon an employer, and should always be carefully drafted. For example, such a letter should confirm that there are no representations regarding employment for any specific duration and that the employment may be terminated at the option of either party for any lawful reason (*i.e.*, at-will employment).¹⁴²

Provisions often included in written employment contracts are those dealing with covenants not to compete¹⁴³ and compulsory arbitration of employment disputes.¹⁴⁴ Even a forum selection clause has been upheld as valid and binding.¹⁴⁵ In addition, it is important that an employer not inadvertently enter into a contract with an employee due to a poorly drafted employee handbook or written policy. These topics are covered separately in this Guide.

California enacted a law in 2011 requiring employers to provide non-exempt employees, at the time of hire, a notice that specifies: (1) the rate of pay and the basis, whether hourly, salary, piece commission or otherwise, including any overtime rate; (2) allowances, if any, claimed as part of the minimum wage, including meal and lodging allowances; (3) the regular pay day designated by the employers as required under the Labor Code; (4) the name of the employer, including any "doing business as" names; (5) the physical address of the employer's main office or principal place of business and any mailing address, if different; (6) the telephone number of the employer; and (7) the name, address, and telephone number of the employer's workers' compensation carrier. The law also requires the employer to provide notice of any other information the Labor Commissioner deems material and necessary. The Labor Commission provides a template that complies with the requirements of this new law, including any exemptions under the law. Importantly, the notice must be written in language the employer normally uses to communicate employment-related information.¹⁴⁶

If there is any change to the information in the notice, the employer must notify each employee, in writing, within seven calendar days of the changes, unless such changes are elsewhere reflected on a timely wage statement or other writing required by law.¹⁴⁷

SECTION 1.7 SALES REPRESENTATIVE AND COMMISSION AGREEMENTS

(a) Washington Law

Washington law provides certain protections to commissioned sales representatives that solicit *wholesale orders* within Washington.¹⁴⁸ Commissioned sales representatives must be provided with a written contract setting forth the method by which their commissions are computed and paid.¹⁴⁹ The amount of commission is set by the agreement between the parties.¹⁵⁰ During the course of the contract, commissions

¹⁴² The California Supreme Court held that an employment contract providing for termination "at any time," without more, did not convert at-will employment to "for cause" employment. *See Dore v. Arnold Worldwide, Inc.*, 39 Cal. 4th 384, 391-92 (2006).

¹⁴³ *See* Chapter IV.

¹⁴⁴ *See* Chapter XIV.

¹⁴⁵ *See Olinick v. BMG Entm't*, 138 Cal. App. 4th 1286, 1300-01 (2006).

¹⁴⁶ Cal. Lab. Code § 2810.5.

¹⁴⁷ *Id.*

¹⁴⁸ RCW 49.48.150-.190.

¹⁴⁹ RCW 49.48.160(1).

¹⁵⁰ *Thayer v. Damiano*, 9 Wn. App. 207, 210 (1973); *but see Poggi v. Tool Research of Eng'g Corp.*, 75 Wn.2d 356, 367 (1969) (if no termination of post-separation commissions in agreement between employer and employee, the procuring cause rule applies).

owing to a sales representative must be paid no later than 30 days after the principal receives payment for the products or goods sold by the sales representative.¹⁵¹

After termination of the contract, the sales representative may still be entitled to payment of commissions for sales made during the course of the contract. Under the “procuring cause doctrine,” an employer cannot terminate an employee’s right to compensation if the employee “caused” the sale, absent a written contract expressly providing how commissions will be awarded at termination of employment.¹⁵² Post-termination commissions must also be paid within 30 days after the principal receives payment for the products or goods sold.¹⁵³

However, a sales representative forfeits his or her right to post-termination commissions if a written contract expressly provides that commissions are not payable after termination.¹⁵⁴ For example, in *Willis v. Champlain*, plaintiff Willis was a commissioned sales agent whose job was to find buyers for the company’s product, Kapton wire. Willis attempted to convince Boeing to use Kapton in its airplanes. The company terminated Willis, at the time having reason to believe that Boeing would use Kapton. Ultimately, Boeing made its first major purchase of Kapton just under two years after Willis was terminated. Willis claimed a right of commissions on all the company’s sales of Kapton to Boeing, and argued that the company terminated him in bad faith in order to avoid paying him commissions. The trial court held that Willis’ efforts may have influenced Boeing’s decision to purchase Kapton and the company knew the commissions were about to accrue before Willis was terminated. However, the express terms of Willis’ contract with the company provided for commission payments to Willis only on orders accepted “up to and including the termination date.”¹⁵⁵ Accordingly, the court found that Willis was not entitled to post-termination commissions, even though he was the procuring cause of the sale and regardless of the company’s alleged bad faith.¹⁵⁶

Commission agreements are covered by Washington’s wage and hour laws. Commissioned sales representatives who prove a violation of the foregoing law may be entitled to double damages and attorneys’ fees.¹⁵⁷ Consequently, employers with commissioned employees should carefully consider the wage and hour implications of the arrangement.¹⁵⁸

(b) California Law

California law defines commission wages as “compensation paid to any person for services rendered in the sale of such employer’s property or services and based proportionately on the amount or value thereof.”¹⁵⁹ The Division of Labor Standards Enforcement requires that all commissions be paid on the next regular payday after they have been earned and are “reasonably calculable.”

Starting January 1, 2013, California employers who have commission pay arrangements with employees will be required to put those agreements into a signed written contract. The written contract must set forth the method by which the commissions will be computed and paid. The contract terms are presumed to remain in effect if the contract expires and work continues, unless superseded by a new contract or the employment relationship is terminated. “Commissions” does not include: (1) short-term productivity

¹⁵¹ RCW 49.48.160(3).

¹⁵² *Syputa v. Druck Inc.*, 90 Wn. App. 638 (1998); *see also Poggi*, 75 Wn.2d at 367.

¹⁵³ *Id.*

¹⁵⁴ *Willis v. Champlain Cable Corp.*, 109 Wn.2d 747 (1988).

¹⁵⁵ *Id.* at 750.

¹⁵⁶ *Id.* at 755.

¹⁵⁷ RCW 49.52.070.

¹⁵⁸ *See* Chapter V.

¹⁵⁹ Cal. Lab. Code § 204.1.

bonuses, (2) temporary, variable incentive payments that increase, but do not decrease payment under the written contract, and (3) certain bonus and profit-sharing plans.¹⁶⁰

California employees who are discharged or who resign with 72-hours notice are entitled to all wages due at termination. Even commissions earned on or before the date of termination must be paid at the time of termination. If the employee fails to give proper notice, the employer has 72 hours to make payment.

Like Washington, California courts have enforced contract provisions whereby an employee forfeits his or her right to commissions where payment for the sale is received after termination of employment. However, it is possible that courts would pay an employee for work completed before termination on a *pro rata* basis.

(c) Minnesota Law

Minnesota law prohibits a manufacturer, wholesaler, assembler, or importer within Minnesota from terminating, or failing to renew, a sales representative agreement without “good cause.”¹⁶¹ The law applies only to independent contractors (not employees) who contract with a principal to solicit wholesale orders and who are paid at least in part by commission. The law applies to agreements between a principal and an independent contractor and/or a sales representative, but not between a sales representative and the representative’s subagent.¹⁶²

In addition to good cause, the law also generally requires that a principal give at least 90 days’ written notice of an intention to terminate or not to renew a fixed term agreement, and give the sales representative 60 days to correct any deficiency.¹⁶³ An indefinite term agreement may be terminated 180 days after the giving of written notice of intention not to continue the agreement.¹⁶⁴ All commissions owing to a sales representative from sales made prior to the date of termination, regardless of whether the goods have actually been shipped, must be paid to the sales representative in accord with the sales agreement or, if not specified in the agreement, in accord with Minnesota law.¹⁶⁵ Minnesota law requires payment on demand within either three or six working days after the last day of employment, depending on the circumstances of the termination.¹⁶⁶

The remedies under the statute for a commissioned sales representative include binding arbitration or the right to bring a civil action for damages, as well as costs and attorneys’ fees.¹⁶⁷ The sole remedy for a manufacturer, wholesaler, assembler, or importer who alleges a violation of the statute is to submit the matter to arbitration. Although the statute provides that judicial review of the arbitration decision is not available, the Minnesota state courts have found this specific provision unconstitutional and have ruled that judicial review is available.¹⁶⁸

(d) Utah Law

In Utah, the rules that apply to wages generally also apply to commissioned personnel. Utah law provides that upon an employer’s termination of an employee, all of the employee’s wages become immediately due and payable, and the employer must tender payment within 24 hours of the termination.¹⁶⁹ If an employee

¹⁶⁰ Cal. Lab. Code § 2751.

¹⁶¹ Minn. Stat. § 325E.37, subd. 2.

¹⁶² *Whitehouse v. Dachtera*, 609 N.W.2d 248, 251 (Minn. Ct. App. 2000).

¹⁶³ Minn. Stat. § 325E.37, subd. 2.

¹⁶⁴ Minn. Stat. § 325E.37, subd. 3.

¹⁶⁵ See Minn. Stat. § 325E.37, subd. 4.

¹⁶⁶ Minn. Stat. § 181.145.

¹⁶⁷ Minn. Stat. § 325E.37, subd. 5.

¹⁶⁸ Minn. Stat. § 325E.37, subd. 5; *New Creative Enters., Inc. v. Dick Hume & Assoc., Inc.*, 494 N.W.2d 508, 512-13 (Minn. Ct. App. 1993).

terminates the employment, all wages and other property held by the employer becomes due and payable upon the next regular payday.¹⁷⁰ The rules mentioned above do not apply, however, to employees paid on a commissioned basis who have “custody of accounts, money, or goods” of the employer and if the amount due to the employee can only be determined after an audit of the sales, accounts, funds, or stocks.¹⁷¹

SECTION 1.8 NEW HIRE REPORTING

Federal, Washington, Minnesota, California, and Utah law require employers to report certain information on all newly hired or rehired employees.¹⁷² The purpose of reporting requirements is to: (1) collect child support efficiently, (2) reduce dependence on public assistance programs, and (3) detect unemployment insurance and labor and industries claims fraud.

A Washington employer must report new or rehired employees to the Division of Child Support (“DCS”) within 20 days of hiring¹⁷³ via one of the following methods:

- Internet web site at www.dshs.wa.gov/newhire/;
- telephone (800) 562-0479 (select Option #3);
- fax to (800) 782-0624;
- mail to New Hire Program, P.O. Box 9162, Olympia, WA 98507-9162; or
- magnetic media.

The reports must include the following information:

- employee name;
- employee address;
- employee social security number;
- employee date of birth;
- company name;
- company address; and
- Federal Employer Identification Number (“FEIN”).

An employer who fails to report as required is subject to a civil penalty of \$25 per month per employee; or \$500 if the failure to report is a result of a conspiracy between the employer and the employee not to supply the required information or to supply a false report.¹⁷⁴

A California employer must report new or rehired employees to the Employment Development Department (“EDD”) within 20 days of their start-of-work date¹⁷⁵ via one of the following methods:

- file through the Internet (“iNer”) by accessing EDD’s Online Tax Services web site at <https://eddservices.edd.ca.gov/>;

¹⁶⁹ Utah Code Ann. § 34-28-5.

¹⁷⁰ Utah Code Ann. § 34-28-5.

¹⁷¹ Utah Code Ann. § 34-28-5(4).

¹⁷² See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193 (1996); RCW 26.23.040; Cal. New Employee Registry at: http://www.edd.ca.gov/Payroll_Taxes/New_Hire_Reporting.htm; Minn. Stat. § 256.998; Utah Code Ann. § 35A-7-101 *et seq.*

¹⁷³ RCW 26.23.040. Indian tribes, tribally-owned businesses, and Indian-owned businesses located on reservations are exempt from the new hire reporting requirements.

¹⁷⁴ RCW 26.23.040(5).

¹⁷⁵ See http://www.edd.ca.gov/Payroll_Taxes/New_Hire_Reporting.htm#ReportingFormats.

- file a Report of Employees (“DE 34”). The Report can be downloaded at http://www.edd.ca.gov/pdf_pub_ctr/de34.pdf or ordered by calling (888) 745-3886 or by visiting an Employment Tax Office;
- file a copy of employee’s W-4 form (must include EDD employer account number and employee’s start-of-work date); or
- file on magnetic media.

Reports should be sent to:

- Employment Development Department, Document Management Group, MIC 96, P.O. Box 997016, West Sacramento, CA 95799-7016; or
- faxed to (916) 319-4400.

The reports must include the following information:

- employee name (first, middle initial and last name);
- employee home address;
- employee social security number;
- employee start-of-work date;
- company name;
- company address and telephone number;
- California EDD employer account number; and
- FEIN.

California employers also are obligated to report independent contractor information within 20 days of either paying or contracting for \$600 or more in service, whichever is earlier, if the following statements apply:¹⁷⁶

- the employer is required to file a Form 1099-MISC for the services performed by the independent contractor; and
- the independent contractor is an individual or sole proprietorship.

Business and government entities may elect any of the following methods to report information to EDD:

- file a Report of Independent Contractor(s) (“DE 542”) downloaded at http://www.edd.ca.gov/pdf_pub_ctr/de542.pdf;
- file on magnetic media; or
- file through the Internet (“iICR”) by accessing EDD’s Online Tax Services website at <https://eddservices.edd.ca.gov/index.html>;
- reports should be sent to Employment Development Department, Document Management Group, MIC 96, P.O. Box 997350, West Sacramento, CA 95899-7350; or
- faxed to (916) 319-4410.

A Utah employer must report new or rehired employees to the Department of Workforce Services (“DWS”) within 20 days of their start-of-work date or, if approved by DWS, on a semi-monthly basis of between 12 and 16 days apart, via one of the following methods:

- file through the Internet by accessing DWS’s online web site at <https://jobs.utah.gov/ui/employer/login.aspx>;

¹⁷⁶ See http://www.edd.ca.gov/payroll_taxes/independent_contractor_reporting.htm.

- file a Utah New Hire Registry Reporting Form (“Form 6”). Form 6 can be downloaded at <https://jobs.utah.gov/UI/Employer/Public/Forms/Form%206%20two%20page.pdf>;
- file a copy of employee’s W-4 form;
- file a computer printout or other printed information that provides all six of the mandatory data elements required by Utah Code Ann. § 35A-7-104(1) (which are listed below); or
- file on magnetic media according to the specifications approved by DWS.¹⁷⁷

Reports should be sent to:

- Utah New Hire Registry, P.O. Box 45247, Salt Lake City, UT 84145-0247;
- faxed to (801)526-4391; or
- submitted online at <https://jobs.utah.gov/ui/employer/login.aspx>.

The reports must include the following information pursuant to Utah Code Ann. § 35A-7-104(1):

- employee’s name;
- employee’s home address;
- employee’s Social Security number;
- employer’s name;
- employer’s address; and
- employer’s federal tax identification number.¹⁷⁸

An employer who fails to timely report the hiring or rehiring of an employee is subject to a civil penalty of \$25 for each failure or \$500 “if the failure to report is intentional and is the result of any agreement between the employer and the employee to not supply the required information, or to supply false or incomplete information.”¹⁷⁹

¹⁷⁷ Utah Admin. Code r. 944-315-103.

¹⁷⁸ Utah Code Ann. § 35A-7-104(1).

¹⁷⁹ Utah Code Ann. § 35A-7-106.

CHAPTER II

TERMS AND CONDITIONS OF EMPLOYMENT

SECTION 2.1 AUDITING YOUR EMPLOYEE HANDBOOK

Employee handbooks are an effective way to communicate workplace rules and policies to employees. However, such employee handbooks or personnel manuals may create an enforceable contract or alter an employee's at-will status.¹⁸⁰ Therefore, employers who use an employee handbook should take certain steps, discussed below, to reduce potential legal liability.

(a) Include a Clear Disclaimer

It is important to avoid creating an employment contract with employees by distributing a handbook.¹⁸¹ To that end, every handbook should include a section that disclaims any intent to enter into a contract and confirms the at-will status of the employment relationship.¹⁸² The disclaimer should be prominently featured in bold print or large type at the beginning of the handbook. Here is an example:

The policies and procedures set out in this Guide are not intended to create, and should not be construed as creating, an employment contract. All employees are employed on an at-will basis. At-will employment means that either the Company or the employee can terminate the employment relationship at any time, with or without prior notice, for any reason not otherwise prohibited by law. Any representation to the contrary is not binding on the Company unless it is in writing and is signed by an authorized representative of the Company.

(b) Include Required Policies

Several laws, including the Family and Medical Leave Act ("FMLA"), require that all employee handbooks contain provisions notifying employees of their statutory rights.¹⁸³ In addition to the disclaimer and employment at-will policy, other policies should be included in the handbook as well, including the following:

- Equal Employment Opportunity Policy;
- Sexual Harassment/Non-Retaliation Policy, including a complaint procedure;
- Drug Testing Policy, if applicable;

¹⁸⁰ See *Pine River State Bank v. Mettillie*, 333 N.W.2d 622, 626-30 (Minn. 1983); *Cabaness v. Thomas*, 232 P.3d 486, 502 (Utah 2010). But see *Bulman v. Safeway*, 144 Wn.2d 335 (2001) (employee handbook did not form an implied contract preventing the employee's dismissal because the employee was not aware, while an employee, of the handbook provision he claimed was breached).

¹⁸¹ An employee bringing a breach-of-contract action based on an employee handbook must be able to prove the following factors: (1) that a statement (or statements) in an employee manual or handbook or similar document amounts to a promise of specific treatment in specific situations; (2) that the employee justifiably relied on the promise; and (3) that the promise was breached. *Korslund v. DynCorp Tri-Cities Servs., Inc.*, 156 Wn.2d 168, 184 (2005).

¹⁸² *Johnson v. Morton Thiokol, Inc.*, 818 P.2d 997, 1003 (Utah 1991) (explaining that while the terms of employee manuals may raise triable issues concerning the existence of an implied-in-fact contract, the manual at issue contained clear and conspicuous language disclaiming any contractual liability). But see *Cabaness*, 232 P.3d at 503 (finding that disclaimer did not contain broad and conspicuous language disclaiming any contractual liability and only disclaimed contractual liability for a few specifically identified items, therefore, it created an implied-in-fact contract).

¹⁸³ 29 C.F.R. § 825.301.

- Electronic Data and Communications Policy; and
- Absenteeism and Leave of Absence Policy.

The content of many of these policies is discussed separately in other sections.

Because most handbook litigation involves the subjects of compensation, promotion, transfer, performance evaluations, discipline, and termination, employers should use special care in drafting such handbook sections. In particular, employers should consider excluding certain items from the handbook, such as a progressive discipline procedure, a “probationary” period policy, or other promises that could give rise to liability if not honored.

(c) Obtain a Written Acknowledgment

In litigation, employees often attempt to avoid the legal consequences of a disclaimer by claiming that they never saw it. Employers should require each new employee to sign an acknowledgment that the employee has read and understands the handbook’s rules and policies and that the employment is at-will. Doing so will help ensure that the employee is bound by the terms of the handbook, and make it harder for the employee to claim ignorance of company policies.

(d) Reserve the Right to Modify or Rescind

To retain some flexibility to respond to changing conditions in the workplace, an employer should include a section that expressly reserves the right to amend or modify its handbook. If a question about handbook modification arises in litigation, courts require the employer to show that it expressly and formally revoked any prior handbooks and relevant provisions by clear and convincing evidence. Thus, employers should issue any modifications to its handbook in a writing that clearly states which handbook provisions are revoked, and ensure that this writing is distributed to all its employees.

(e) Annual Review

All handbooks and manuals should be reviewed periodically, but no less than annually, to ensure that the provisions conform to current company policy and state and federal laws. If company policies have changed, the handbook should be modified and the previous policy formally revoked.

SECTION 2.2 PERFORMANCE EVALUATIONS

A fair and reasonable performance review process is a critical element in making sound employment decisions. Such a process improves employee morale, aids in employee development, and frequently provides the basis for compensation, decisions, promotions, and terminations.¹⁸⁴

In litigation involving claims of unlawful termination, the procedure for and substance of performance reviews will have a significant impact on the outcome. For instance, an employer will have more difficulty convincing a court or jury that an employee was terminated for poor performance if the personnel file contains years of “good” performance reviews, “merit” salary increases, and awards, commendations, or letters of recognition.¹⁸⁵ Following procedures that are unclear or non-uniform often results in a lack of specific detail about the employee’s performance deficiencies. When there is insufficient information about how an employee can improve, a court ultimately may believe that the employer did not deal “fairly” or in “good faith” with an employee. This opens the door to the suggestion that the employer had other improper motives for its action, such as unlawful discrimination.

¹⁸⁴ See *Sanchez v. City of Santa Ana*, 915 F.2d 424, 431 (9th Cir. 1990) (unfounded negative evaluation that led to denial of merit pay in evaluation constituted constructive discharge). *But see Kortan v. California Youth Auth.*, 217 F.3d 1104 (9th Cir. 2000) (sub-average performance rating in three of five categories not discriminatory or retaliatory).

¹⁸⁵ Compare *Ziegler v. Beverly Enterprise-Minnesota, Inc.*, 133 F.3d 671 (8th Cir. 1998), with *Bevan v. Honeywell, Inc.*, 118 F.3d 603 (8th Cir. 1997).

Given the wide variety of possible procedures and objectives within the general concept of performance appraisals, it is difficult to provide specific suggestions that apply to every evaluation program without exception. Each employer should tailor its evaluation system to its own circumstances. The following, however, are some basic principles that should enhance the value of any performance review system.

(a) Clear Message from Top Management

Top management should make clear to evaluators that the evaluation process is an essential part of the employer's overall management and compensation systems. Evaluators should be given thorough training about the objectives and procedures of the evaluation system. They should know that the system must record the truth about job performance. The job performance evaluations of evaluators should be based, in part, upon how effectively they administer the evaluation program.

(b) Orient Employees to the Evaluation System

Employees should be aware of and understand the performance review system. Orientation for new employees should include a description of and procedures for the evaluation process.

(c) Select Evaluators Carefully

Employers should be careful to select appropriate individuals to perform evaluations and make sure that appropriate training is available. The evaluator should be competent to make judgments on the basis of personal knowledge of the employee and direct information regarding the employee's performance. The evaluator should be given specific instructions regarding appropriate procedures and the completion of appropriate forms.

(d) Documentation

If an employee is exhibiting any sort of performance problems, the employee's supervisor should talk to the employee about those problems and then document both the problem and the supervisor's communication with the employee. Similarly, if an employee performs especially well, the supervisor may wish to communicate this to the employee, perhaps even documenting this as well. When the time comes to prepare a performance evaluation, reference to these notes will make it possible to include specific information. Additionally, the contemporaneous documentation of performance problems and communications with an employee about such problems greatly enhance the strength of the employer's position if any employment litigation later arises.

(e) Candid, Truthful Appraisal

Evaluators should be as truthful as possible with employees, including both the "good" and the "bad" news. When evaluators are too uncomfortable to give employees "negative" evaluations, the information on the evaluation forms does not represent an accurate picture of performance. For the system to be meaningful, the evaluators must deliver specific, complete, and candid comments. Most comments should be objective (*e.g.*, "Your production was below the following company standard") rather than subjective or conclusory ("You are lazy"). Still, subjective comments about things like attitude, professionalism, ability to work well with colleagues, are legitimate factors to include in an evaluation. Aspects of performance are legitimate factors for evaluation and may be included, such as attitude, professionalism, ability to work well with colleagues, and the like. The comments also should be constructive in nature, clearly indicating how improvement can be made.

(f) Elements of the Job as Basis for Review

The appraisal should be tied to job performance and should not be personal in nature. Generally, the more the evaluation is based upon specific functions of the job classification, the better. Employers should have a clearly articulated statement of the functions of a job. Unfortunately, in cases where there is disagreement on the job content, some employees may claim they are subjected to unfairly stringent requirements. This is yet another reason why an employer should have a clearly articulated statement of the functions of a job.

(g) Communicate the Evaluation Directly to the Employee

The performance appraisal should be presented to the employee in person. The evaluation process should be explained in detail along with all of the facts relating to performance. The substance of the appraisal should be recorded on an appropriate form with a copy provided to the employee. It is advisable to have another person, such as a representative of the human resources department, sit in on the evaluation to be able to corroborate what was communicated to the employee or provide other information and assistance in the meeting.

(h) Opportunity for Employee Input

The evaluation form should contain a space for employee comments and an employee signature line. Providing an opportunity for employee comments can be very important. If the employee chooses not to disagree in writing with any aspect of the evaluation, it will be more difficult for the employee to argue later that a negative evaluation was incorrect. On the other hand, if the employee writes comments opposing the performance appraisal, those comments will provide the employer with an opportunity to review the entire subject and take whatever action is appropriate.

The evaluation process presents an important opportunity for the employer to obtain significant feedback from employees regarding their jobs and related circumstances, and to identify problem areas and take corrective action. For example, if an employee believes other employees are receiving preferential treatment, that fact then can be investigated. The employee should be informed that the evaluation process affords an opportunity to raise questions and/or concerns about any aspect of his or her work performance.

(i) Timing of Evaluations

Performance evaluations should be conducted for each employee on a regular basis. Evaluations should be conducted at least once every year. All employees in the same job grouping should be evaluated at the same time. This ensures consistent and uniform application of performance criteria to all employees and facilitates comparisons or rankings. The appropriate time of year for evaluations depends upon the particularities of each business, such as its own fiscal year or business plan. Employers may choose a time other than the end of the calendar year, to avoid conveying disturbing news during the holiday season.

SECTION 2.3 PROGRESSIVE DISCIPLINE

The essence of progressive discipline is to provide notice to an employee of poor performance or misconduct and – in most cases – an opportunity to correct the deficiency. Such a process can enhance an employer's argument that the evaluation process was fair and reasonable, which can be critically important if any claims later arise. It is very important that employers include a section in their employee handbook that specifically reserves the right to deviate from the progressive discipline policy. While a progressive system of warnings and escalating penalties is appropriate and helpful in most instances, it is often not appropriate in instances of very serious misconduct.

(a) General Elements of a Progressive Discipline System

- The policy should include a disclaimer clearly stating that the employer retains the right to deviate from the policy at its unfettered discretion. It is extremely important to avoid creating an employment contract by implementing a progressive discipline system;
- the policy should clearly state and communicate the work rules, standards, and expectations for employees. Employees should be warned of possible consequences of their failure to comply with each work rule or standard;
- work rules and standards should be reasonably related to the efficient and safe operation of the business and proper performance of the employees' jobs;
- work rules and standards should be applied consistently;

- internal procedures regarding investigation, discipline and discharge should be followed consistently;
- employees should be given prompt and adequate notice of deficiencies in their work performance and the consequences of failure to correct them. Such communication should always be documented;
- good faith efforts should be made to investigate whether an employee violated a work rule or standard before any disciplinary action is taken;
- reasonable grounds and sufficient evidence to believe a work rule violation actually occurred should exist before discipline is issued;
- the employee should be given notice of any specific rule violation. A final notice, at least, should be in writing and include an explicit warning that failure to improve may lead to further disciplinary action, including termination. It is advisable that two representatives of the employer be present when the notice is given, to be able to confirm later what was communicated to the employee, or to provide other information or assistance in the meeting. This usually means the presence of the supervisor issuing the discipline and a representative of the human resources department;
- the employee should sign the written notice, acknowledging receipt. If the employee refuses to sign, the person presenting the discipline as well as another witness should sign the warning indicating that the employee was presented with a copy and refused to sign; and
- the severity of the discipline should coincide with the seriousness of the employee misconduct or performance. The discipline should be consistent with action taken against other employees in similar circumstances.

(b) System for Consistent Application of Standards

In employment discrimination lawsuits and other claims, employees often allege they were treated more harshly than other employees in similar circumstances, presenting serious problems for employers. In *Costa v. Desert Palace*,¹⁸⁶ the employee was the only woman in a male-dominated environment. Her work was consistently characterized as “excellent” and “good.” She complained that she was treated differently from her male co-workers, and claimed that she received harsher discipline than her male co-workers. She filed a claim against the employer for sex discrimination based on the employer’s inconsistent application of its evaluation and discipline policies.

To help avoid such claims, an employer should have a consistent system for disciplinary action. By standardizing disciplinary actions, the employer will maximize the likelihood of consistent application of the work rules and standards. The employer’s system should enable the employer to access relevant comparative data. This data can be referenced before discipline decisions are finalized to determine the appropriateness of the proposed discipline and can be very helpful later if a claim arises challenging the discipline.

(c) Complaint Review Procedure

At a minimum, an employer must have a system for addressing complaints of unlawful discrimination or harassment. Some employers find it helpful to have a formal policy which permits employees to file “complaints” about any aspect of their employment relationship.¹⁸⁷ Under such policies, procedures vary as to how complaints are ultimately resolved. The policy may be the functional equivalent of a grievance procedure in a union setting, but need not be so rigid or formal.

¹⁸⁶ *Costa v. Desert Palace, Inc.*, 268 F.3d 882 (9th Cir. 2001).

¹⁸⁷ The most formal dispute resolution mechanisms require use of mandatory, binding arbitration. Arbitration policies are discussed in other chapters. *See* Index.

The employer should be sure that their employees are aware that they may submit written questions or complaints about any aspect of their employment. This can be accomplished by posting a written copy of the procedure in a prominent place or including it in an employee handbook or policy manual. An employer's prompt investigation of issues raised by employee complaints is necessary and can help avoid future problems.

(d) Employee Representation at Discipline Meeting

Employees may seek to have someone present on their behalf during a discipline meeting. An employee in a unionized workplace is entitled to representation in investigative interviews that the employee reasonably believes could result in discipline.¹⁸⁸ This right (generally referred to as a *Weingarten* right)¹⁸⁹ is limited to making the request and does not require the employer to inform the employee of the right or to make an offer to the employee for co-worker presence. An employer may respond to such a request by: (1) granting the request; (2) discontinuing the investigative interview; or (3) offering the employee a choice between an interview without a representative and no interview at all. Employers should therefore carefully consider employee requests for co-worker presence at investigatory and disciplinary meetings. Violations of employee rights in this area may result in an unfair labor practice charge before the National Labor Relations Board.¹⁹⁰

SECTION 2.4 INTRODUCTION TO DISABILITY LAW AND DRUG AND ALCOHOL USE

(a) Drug and Alcohol-Related Disability

An employer may not discriminate against an individual solely because that person is an alcoholic or a former drug addict. The Americans with Disabilities Act ("ADA") protects individuals who are participating in, or have successfully completed, a supervised drug rehabilitation program and are no longer engaged in the illegal use of drugs.¹⁹¹ The ADA, however, does not protect individuals who are engaged in the current illegal use of drugs.¹⁹² The ADA is silent with regard to protection for recovering alcoholics. However, employers may prohibit an employee from working under the influence of alcohol, and may hold such employees to the same standards of behavior and performance as other employees.¹⁹³

Other federal statutes, such as the Rehabilitation Act,¹⁹⁴ are generally consistent with the ADA. For example, the Rehabilitation Act requires federal contractors with contracts in excess of \$10,000 to take affirmative action to employ and advance "qualified individuals with disabilities."¹⁹⁵ The term "individual with a disability" does not include a person currently engaging in the illegal use of drugs or a person who is an alcoholic and whose current use of alcohol prevents him or her from performing the job. Like the ADA, the Rehabilitation Act does not protect persons currently abusing alcohol or drugs but does protect those who have participated in, or who have successfully completed, a supervised drug rehabilitation program.¹⁹⁶

¹⁸⁸ *IBM Corp.*, 341 N.L.R.B. No. 148, 2004 WL 1335742 (June 9, 2004) (holding that employees in non-unionized workplaces, unlike employees in unionized workplaces, do not have the right to representation at disciplinary meetings).

¹⁸⁹ *N.L.R.B. v. Weingarten*, 420 U.S. 251 (1975).

¹⁹⁰ See Chapter III: Union-Management Relations.

¹⁹¹ 42 U.S.C. § 12114(b).

¹⁹² 42 U.S.C. § 12114(a).

¹⁹³ 42 U.S.C. § 12114(c).

¹⁹⁴ 29 U.S.C. §§ 701 *et seq.*

¹⁹⁵ 29 U.S.C. § 793(a).

¹⁹⁶ 29 U.S.C. § 705(20)(C).

The Minnesota Human Rights Act (“MHRA”) does not protect employees who suffer from alcoholism or drug addiction from employment discrimination if their condition prevents them from performing essential job functions or constitutes a direct threat to property or the safety of others.¹⁹⁷

Similarly, the Washington Law Against Discrimination (“WLAD”) and the California Alcohol and Drug Rehabilitation Act allow employers to take action against employees who suffer from alcoholism or drug addiction if their condition: (1) prevents them from performing their essential job functions; or (2) constitutes a direct threat to property or the safety of others.¹⁹⁸

The Utah Antidiscrimination Act (“UADA”) defines disability as a physical or mental disability as defined and covered by the ADA.¹⁹⁹ Similar to the ADA, Utah law prohibits an employee who is currently using drugs or alcohol from qualifying as a person with a disability.²⁰⁰

Disciplining or terminating an employee based on legitimate performance or behavior problems is not disability discrimination even if the root of the problem is chemical dependency. In making employment decisions, an employer may consider the employee’s prior work record, including a past history of absenteeism, poor work performance, disruptive behavior, or dangerous conduct.

Despite an employer’s ability to take action against an employee who suffers from drug or alcohol addiction when the employee constitutes a threat to others or is unable to perform his or her job, the ADA, the MHRA, the WLAD, and the UADA also require employers to reasonably accommodate disabled employees.²⁰¹ Reasonable accommodation in this context may require the employer to permit a leave of absence to obtain substance abuse treatment, although it would not require the employer to pay for the treatment. Employers must be consistent in their actions; providing treatment for one employee may require the employer to provide similar treatment for other employees.

(b) Federal Drug and Alcohol Testing

(i) Americans with Disabilities Act

The ADA treats alcohol and drug testing differently, because alcohol use is legal and drug use is not.

Under the ADA, employers are only allowed to test a job applicant for alcohol use after a conditional offer of employment has been made, and only if all applicants are tested.²⁰² Post-hire alcohol testing is permitted only if the test is job-related or consistent with business necessity.²⁰³ An employer’s reasonable suspicion that an employee is drinking or drunk at work would justify alcohol testing of that employee.

In contrast, the ADA does not regulate, prohibit, or require the drug testing of job applicants or employees, at least with respect to illegal drugs.²⁰⁴ Thus, pre-employment testing for illegal drugs can be conducted without a conditional offer of employment, and at any time during employment.²⁰⁵ Such testing,

¹⁹⁷ Minn. Stat. § 363A.03, subd. 36.

¹⁹⁸ See RCW 49.60.180(1); Cal. Lab. Code § 1025. Drug and alcohol addiction may also qualify as a disability under California’s Fair Employment and Housing Act (“FEHA”). For more on California disability law, see Chapter IX.

¹⁹⁹ Utah Code Ann. § 34A-5-102(1)(e).

²⁰⁰ Utah Code Ann. § 34-38-14.

²⁰¹ 42 U.S.C. § 12113(a); 29 C.F.R. § 1630.14(b)(3); RCW 49.60.180; Minn. Stat. § 363A.08, subd. 6; Utah Code Ann. § 34A-5-106; *Goodman v. Boeing Co.*, 127 Wn.2d 401 (1995) (notice of disabling condition triggers employer’s burden to take “positive steps” to accommodate the employee’s limitations).

²⁰² 42 U.S.C. § 12112(d)(3).

²⁰³ 42 U.S.C. § 12114(d)(2).

²⁰⁴ 42 U.S.C. § 12112(d)(4)(A).

²⁰⁵ Compare ADA requirement that all non-medical stages of the hiring process be completed before a medical exam can take place. See *Leonel v. Am. Airlines, Inc.*, 400 F.3d 702 (9th Cir. 2005) (to have a “real” offer of employment under ADA, employee must have either completed all non-medical components of its application process or show it could not reasonably have done so).

however, may lead to violation of privacy claims.²⁰⁶ It is therefore recommended that illegal drug testing be conducted pursuant to a publicized policy, or only on a reasonable suspicion basis.

An employer's adverse employment action based on drug testing results is more likely to be legal if it is made pursuant to a general workplace policy. In *Raytheon Co. v. Hernandez*,²⁰⁷ an employee quit in lieu of discharge for failing a random drug test, admitting that his conduct violated the company's workplace rules. After undergoing treatment and maintaining his sobriety, the employee applied for reinstatement. The employer claimed that it refused to reinstate the employee based upon an unwritten policy of not rehiring former employees who were terminated for workplace misconduct or who resigned in lieu of termination. The employee filed a charge of discrimination under the ADA, claiming that he was "disabled." The Supreme Court held that a policy barring the rehiring of employees who were terminated could constitute a "legitimate, non-discriminatory reason" for rejecting the employee's application for rehire.²⁰⁸

Although a growing number of states allow medical use of marijuana, employers are generally not required to accommodate medical marijuana users, and may terminate an employee who tests positive on a drug screen for marijuana even though the employee has medical authorization for marijuana use under state law.²⁰⁹

Employers must use a drug or alcohol testing method that tends to yield accurate results. Test results are confidential and must be kept in separate medical files.²¹⁰ A job applicant or employee who erroneously tests positive for alcohol or drugs is considered "disabled" under the ADA, and is therefore protected from adverse employment action based on the erroneous perception that he or she is an alcoholic or illegal drug user.

(ii) Federal Contractors

An employer who wishes to be eligible to obtain any federal contract of \$100,000 or more must certify that it will provide a drug-free workplace.²¹¹ The employer must certify to the contracting federal agency that it has published and distributed to its employees working on the contract a "Drug-Free Workplace Policy Statement." The policy statement must notify employees that they may not unlawfully manufacture, distribute, dispense, possess, or use any controlled substance in the workplace, and that employees violating the policy will be subject to specified discipline.²¹² In addition, the policy statement must notify employees that as a condition of their continued employment, they must abide by the terms of the policy statement and advise the employer of any criminal drug conviction involving conduct occurring in the workplace.²¹³

²⁰⁶ See, e.g., *Luck v. S. Pac. Transp. Co.*, 218 Cal. App. 3d 1, 15 (1990) (California's constitutional privacy provision applies to both private and public employers). Compare *Roe v. Quality Transp. Servs.*, 67 Wn. App. 604 (1992) (Washington's constitutional privacy provision applies only to public employers, and does not apply to private employers).

²⁰⁷ 540 U.S. 44 (2003), *on remand to Hernandez v. Hughes Missile Sys.*, 362 F.3d 564 (9th Cir. 2004) (denying the defendant's motion for summary judgment for two reasons: because a question of fact existed as to whether the defendant refused to hire the ex-employee pursuant to the non-discriminatory policy or whether the defendant was motivated by the plaintiff's past record of addiction; and because a question of fact existed as to whether Raytheon actually ever had such an unwritten policy that was evenhandedly applied).

²⁰⁸ *Raytheon*. 540 U.S. at 55.

²⁰⁹ See *Roe v. TeleTech Customer Care Mgmt. (Colo.), LLC*, 152 Wn. App. 388 (2009), *review granted*, 168 Wn.2d 1025 (2010) (holding that the Washington State Medical Use of Marijuana Act ("MUMA") did not create an implied cause of action against employers who terminate, or fail to hire, a person based solely on her medical use of medical marijuana); *Ross v. RagingWire Telecomms., Inc.*, 42 Cal. 4th 920 (2008) (holding that the California Fair Employment and Housing Act did not require employer to accommodate employee who used medicinal marijuana).

²¹⁰ 42 U.S.C. § 12112(d)(3)(B).

²¹¹ 41 U.S.C. § 8102(a)(1).

²¹² 41 U.S.C. § 8102(a)(1)(A).

²¹³ 41 U.S.C. § 8102(a)(1)(D).

In addition to publishing and distributing the policy statement, an employer must establish a drug-free awareness program to inform employees of the dangers of drug abuse in the workplace and the content of the employer's policy statement, including the penalties that may be imposed for violating the policy statement. The awareness program must further advise employees of any available drug counseling, rehabilitation, or employee assistance programs that the employer makes available to them.²¹⁴

If an employer fails to adhere to these requirements, the contracting federal agency may suspend its payments under the contract, terminate the contract, or bar the employer from future contracts for up to five years.²¹⁵

(iii) Department of Transportation (“DOT”) Regulations

The United States Department of Transportation has issued regulations mandating drug and alcohol testing of workers who perform safety-sensitive duties in certain transportation industries.²¹⁶

The DOT regulations require covered employers to conduct controlled substance and alcohol testing of all drivers and contract drivers (under contract for 90 days or more in any 365-day period) who operate a commercial motor vehicle under a commercial driver's license. Commercial motor vehicles include vehicles that weigh 26,001 pounds or more, or hold 16 passengers or more, including the driver. The regulations prohibit employees from using alcohol when performing safety sensitive duties or from reporting for duty with an alcohol concentration level of .04 or greater or when using any controlled substance, except pursuant to a doctor's instructions.

(c) Drug and Alcohol Testing in Minnesota

The Minnesota Drug and Alcohol Testing in the Workplace Act (“DATWA”) comprehensively regulates the testing of job applicants and employees for drug or alcohol use. The Act applies to any person or entity located in or doing business in Minnesota with one or more employees.²¹⁷ An employer is not obligated to, but may, test its applicants and employees for drug and alcohol use under the conditions set forth in the statute.²¹⁸ The ADA does not regulate, prohibit, or require the drug testing of job applicants or employees, at least with respect to illegal drugs.²¹⁹ Note that federal and Minnesota law require certain categories of employers to test applicants and employees.²²⁰

(i) Written Policy and Notice

DATWA *prohibits* an employer from requesting or requiring job applicants or employees to undergo drug and alcohol testing as a condition of employment *unless* the employer has a written drug and/or alcohol testing policy that contains certain minimum information required by the statute and the testing is done by a laboratory permitted by the statute.²²¹ Employers must give notice to any affected applicant or employee of its drug and alcohol testing policy, including any employee who transfers into an affected position.²²² Before requesting a test, the employer must give the applicant or employee a form on which to

²¹⁴ 41 U.S.C. § 8102(a)(1)(B).

²¹⁵ 41 U.S.C. §§ 8102(b)(1)-(3).

²¹⁶ 49 C.F.R. pt. 40. Effective October 1, 2010, the DOT amended its regulations to conform its testing to new rules put in place by the Department of Health and Human Services. The revisions to the DOT regulations can be found at <http://edocket.access.gpo.gov/2010/pdf/2010-24038.pdf>. In 2005, the Washington legislature amended RCW 46.25.123 to require employers who employ drivers of commercial motor vehicles and who are required to have a testing program under 49 C.F.R. pt. 40 to report drivers' positive results to the Washington Department of Licensing.

²¹⁷ Minn. Stat. § 181.950, subd. 7.

²¹⁸ Minn. Stat. § 181.951.

²¹⁹ 42 U.S.C. § 12114(d).

²²⁰ *See, supra*, Section 2.4(b).

²²¹ Minn. Stat. § 181.951, subd. 1.

²²² Minn. Stat. § 181.952, subd. 2.

acknowledge having reviewed the employer's drug and alcohol testing policy.²²³ Employers also must post the policy in a conspicuous place and make the policy available for inspection.²²⁴

The written policy must contain the following information:

- a description of the employees or job applicants covered by the policy;
- a description of the circumstances under which drug or alcohol testing may be required;
- a recitation of the right of an applicant or employee to refuse to undergo a test and the consequences of that refusal;
- a list of any disciplinary or other adverse personnel action that the employer may take based on a confirmatory test verifying a positive test result on an initial screening test;
- a statement of the right of an employee or job applicant to explain a positive test result on a confirmatory retest or right to request and pay for a confirmatory retest; and
- a statement of any available appeals procedure.²²⁵

(ii) Testing Circumstances

DATWA permits an employer to test its applicants and employees only pursuant to a written drug and alcohol testing policy that conforms to statutory requirements and that has been reviewed by the individual being tested. Such a policy may permit testing under the following five circumstances:

- **Testing of Job Applicants:** An employer may require a job applicant to take a drug and/or alcohol test, provided that a contingent job offer has been made and that the same testing is required of all job applicants conditionally offered employment for that position.²²⁶
- **Routine Physical Examination Testing of Employees:** An employer may require an employee to undergo drug and/or alcohol testing as part of a routine physical examination, provided that the testing is required no more than once annually and the employee is given at least two weeks' written notice that a test may be requested or required as part of the physical exam.²²⁷
- **Random Testing of Employees:** An employer may *not* require employees, other than employees in "safety-sensitive" positions, to undergo drug and/or alcohol testing on a random selection basis.²²⁸ A "safety-sensitive" position is a job, including any supervisory or management position, in which impairment caused by drug or alcohol use would threaten the health and safety of any person.²²⁹ Employers are advised to be cautious in the selection of safety-sensitive positions for random testing as the term likely will be narrowly defined. Under the random selection testing mechanism adopted by the employer, employees must have an equal probability of being tested. Moreover, an employer does not have the discretion to waive the selection of any employee.²³⁰
- **Reasonable Suspicion Testing of Employees:** An employer may require an employee to undergo drug and/or alcohol testing if the employer has a reasonable suspicion that the employee: (a) is under the influence of drugs or alcohol; (b) has violated the employer's written rules on drugs or alcohol while working on the employer's premises, or while

²²³ Minn. Stat. § 181.953, subd. 6(a).

²²⁴ Minn. Stat. § 181.952, subd. 2.

²²⁵ Minn. Stat. § 181.952, subd. 1.

²²⁶ Minn. Stat. § 181.951, subd. 2.

²²⁷ Minn. Stat. § 181.951, subd. 3.

²²⁸ Minn. Stat. § 181.951, subd. 4.

²²⁹ Minn. Stat. § 181.950, subd. 13.

²³⁰ Minn. Stat. § 181.950, subd. 11.

operating employer's vehicle, machinery, or equipment, and those rules are contained in the employer's written testing policy; (c) has been injured in the course of employment or has caused another employee to be so injured; or (d) has caused a work-related accident or was operating machinery, equipment, or vehicles involved in a work-related accident.²³¹

- **Treatment Program Testing of Employees:** An employer may require an employee to undergo drug and/or alcohol testing if the employee has been referred by the employer for chemical dependency treatment or evaluation or is participating in a chemical dependency treatment program under an employee benefit plan. In this case, the employee may be required to take a drug or alcohol test without prior notice during the evaluation or treatment period and for up to two years following the completion of the program.²³²

(iii) Testing Laboratory Safeguards

The Act requires that the employer use a testing laboratory that complies with specific certification or licensing criteria for the analysis of any drug or alcohol tests.²³³ It also requires employers to establish their own reliable chain-of-custody procedures for handling the testing samples.²³⁴

(iv) Limitations on Employer's Responses to Test Results

In addition to the above obligations, DATWA limits the actions that an employer may take in response to positive test results. No adverse action may be taken against an applicant or employee based on a positive test result from an initial screening test *until* that result has been verified by a confirmatory test.²³⁵ This means that an employer cannot withdraw a conditional job offer from a job applicant and cannot discharge, discipline, discriminate against, or request or require rehabilitation of a current employee without a confirmatory test.²³⁶ If the applicant or employee requests a confirmatory retest and such retest does not confirm the original positive test result, the employer may not take any adverse action against the applicant or employee.²³⁷

In addition, an employer may not discharge an employee based on a positive confirmatory test when it is the first such result for the employee in question unless the following conditions are met:

- The employer gives the employee an opportunity to participate in a drug or alcohol counseling or rehabilitation program at the employee's own expense or under an employee benefit plan; and
- The employee either refuses to participate or fails to complete the program successfully (as evidenced by withdrawal from the program or by a positive test result on a confirmatory test after the completion of the program).²³⁸

Note that under Minnesota law, an employer may not refuse to hire a job applicant or discipline or discharge an employee for lawful off-duty use of alcohol. In addition, an employer cannot restrict an employee's lawful off-duty alcohol use except under certain circumstances, such as when it relates to a *bona fide* occupational requirement and is reasonably related to employment activities or responsibilities.²³⁹

²³¹ Minn. Stat. § 181.951, subd. 5.

²³² Minn. Stat. § 181.951, subd. 6.

²³³ Minn. Stat. § 181.953, subd. 1.

²³⁴ Minn. Stat. § 181.953, subd. 5.

²³⁵ Minn. Stat. § 181.953, subds. 10-11.

²³⁶ Minn. Stat. § 181.953, subds. 10(a), 11.

²³⁷ Minn. Stat. § 181.953, subd. 9.

²³⁸ Minn. Stat. § 181.953, subd. 10(b).

²³⁹ Minn. Stat. § 181.938.

An employer may not retaliate against an employee for asserting his or her rights under DATWA.²⁴⁰

SECTION 2.5 POSTING REQUIREMENTS

Both federal and state statutes impose posting requirements on employers regarding various information, including anti-discrimination laws, drug testing, and labor laws. These statutes include, among others, Title VII, the Americans with Disabilities Act (“ADA”), the Equal Pay Act (“EPA”), the Family and Medical Leave Act (“FMLA”), the California Fair Employment and Housing Act (“FEHA”), the Washington Law Against Discrimination (“WLAD”), and the Minnesota Human Rights Act (“MHR A”). Minnesota statutes require that information be posted regarding drug and alcohol testing, minimum wage and overtime, occupational safety and health, parental leave, workers’ compensation, and unemployment compensation. Utah law requires that information be posted regarding worker’s compensation, occupational safety and health, and unemployment insurance.²⁴¹ Every employer should have a prominent place to display such information and periodically review the postings to ensure that they are complete and up to date.²⁴² A consolidated EEO poster is available from the EEOC, which will satisfy many of these requirements. The Minnesota Department of Labor and Industry also requires posters to satisfy some of these requirements,²⁴³ as does the U.S. Department of Labor.²⁴⁴

Each of the above-referenced statutes specifies the penalty, if any, for failing to comply with its posting requirement. Penalties range from \$100 to \$1,000.

SECTION 2.6 ERGONOMIC STANDARDS

(a) Federal Law

Currently, no federal law regulating ergonomic standards exists. Ergonomic regulations issued by the Occupational Safety and Health Administration (“OSHA”) became effective January 16, 2001, and gave companies until October 2001 to comply. However, on June 18, 2001, the U.S. Senate voted to repeal the regulations.

(b) Washington Law

In 2003, Washington voters repealed the ergonomics regulations adopted by the Department of Labor & Industries in 2000. The repealed ergonomics regulations required employers whose employees had jobs involving highly repetitive motions or heavy, frequent or awkward lifting to provide ergonomics awareness education and work to reduce hazards. The state is prohibited by law from adopting any new or amended ergonomics rules until and to the extent such rules are required by federal law.

(c) California Law

The Cal-OSHA Repetitive Motion Injuries Standard is the most aggressive occupational health and safety law in the country.²⁴⁵ All private and public California employers are subject to the standard, which seeks to address any injury caused by repetitive motion. Employers are required to design a program to minimize repetitive motion injuries after two or more employees are diagnosed as having such injuries. Although not required, a written ergonomics program is highly recommended.

²⁴⁰ Minn. Stat. § 181.956, subd. 5.

²⁴¹ Utah Code Ann. § 34A-2-204, Utah Admin. Code r. 614-1-7(B)(1), Utah Code Ann. § 35A-4-406(1)(b).

²⁴² For example, in 2012 California added new posting and publication requirements related to human trafficking. *See* Cal. Code Regs. tit. 8, §§ 9810 *et seq.*; *see also* Utah Code Ann. § 34A-2-204, Utah Admin. Code r. 614-1-7(B)(1), and Utah Code Ann. § 35A-4-406(1)(b).

²⁴³ *See* <http://www.dli.mn.gov/LS/Posters.asp>, or call (651) 284-5042.

²⁴⁴ *See* <http://www.dol.gov/claws/posters.htm>.

²⁴⁵ Cal. Lab. Code § 6357.

SECTION 2.7 WORKPLACE SAFETY

OSHA now requires employers to pay for the personal protective equipment of employees in certain industries.²⁴⁶ The rule requires an employer to pay only for equipment that is already required by OSHA standards, and allows several exceptions to the pay requirement.²⁴⁷

SECTION 2.8 EMPLOYEE REFERENCES

Traditionally, employers have been willing to furnish letters of reference on behalf of good employees seeking other employment. Today providing references for former employees presents employers with many legal issues. Employers may be subject to defamation claims by former employees for furnishing negative information.²⁴⁸ Employers may be subject to discrimination or retaliation claims by former employees upset by negative references or no references.²⁴⁹ Employers also may face litigation from future employers who hire ex-employees with insufficient information about misconduct, or from third parties who are injured due to incomplete information given in the reference.²⁵⁰

Under Washington law, an employer may be liable to a present or former employee by recklessly or knowingly providing false or misleading information about the employee.²⁵¹ Washington's law presumes that an employer is acting in good faith if the information disclosed about a former or current employee relates to the following: (1) the employee's ability to perform his or her job; (2) the diligence, skill, or reliability with which the employee carried out the duties of his or her job; or (3) any illegal or wrongful act committed by the employee when related to the duties of his or her job.²⁵² The employer should retain a written record of the identity of the person or entity to which information is disclosed for at least two years from the date of disclosure. The employee or former employee has a right to inspect this record upon request, and employers should keep a copy in the employee's personnel file.²⁵³

Similarly, under Utah law, an employer may be liable to a present or former employee if it knowingly or with reckless disregard for the truth discloses false information about the employee.²⁵⁴ Utah law presumes that an employer acts in good faith when it provides information about the job performance, professional conduct, or evaluation of a former or current employee to a prospective employer of such employee, at the request of the prospective employer.²⁵⁵

Minnesota law provides that an employer generally can disclose the following information about an employee or former employee in response to a reference request, without being subject to legal action:

²⁴⁶ Industries include general industry, shipyard employment, marine terminals, longshoring, and construction.

²⁴⁷ 72 Fed. Reg. 64, 341-430.

²⁴⁸ See *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252 (Minn. 1980). But cf. *Klontz v. Puget Sound Power & Light Co.*, 90 Wn. App. 186 (1998) (employee could not recover for defamation where statement was true, there was no evidence of unprivileged communications, no evidence of fault on employer's part, and no proof of damages).

²⁴⁹ *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997).

²⁵⁰ *Randi W. v. Muroc Joint Unified Sch. Dist.*, 14 Cal. 4th 1066 (1997) (individual sued sexual harasser's former employer for failing to warn subsequent employer about prior sexual misconduct); *Richland Sch. Dist. v. Mabton Sch. Dist.*, 111 Wn. App. 377 (2002) (negligent misrepresentation suit brought against a former employer for failing to disclose allegations of child molestation in its letter of recommendation).

²⁵¹ RCW 4.24.730.

²⁵² RCW 4.24.730(1). The presumption of good faith may only be rebutted upon a showing of clear and convincing evidence that the information disclosed by the employer was knowingly false, deliberately misleading, or acted with reckless disregard for the truth. RCW 4.24.730(3).

²⁵³ RCW 4.24.730(2).

²⁵⁴ Utah Code Ann. § 34-42-1.

²⁵⁵ Utah Code Ann. § 34-42-1(2).

- dates the employee worked;
- the employee's compensation and wages while working there;
- the employee's job description and duties;
- the employer's training and education programs; and
- a written disclosure (with a copy sent contemporaneously to the employee) of "acts of violence, theft, harassment, or illegal conduct documented in the personnel record that resulted in disciplinary action or resignation and the employee's written response, if any, contained in the employee's personnel record."²⁵⁶

With written authorization from the current or former employee, and provided that the individual is provided with the name of the party to whom the materials are being provided along with a copy of the materials contemporaneously with the disclosure, the scope of permissible disclosures may also include:

- written employee evaluations conducted before the employee's separation from the employer, and the employee's written response, if any, contained in the employee's personnel record;
- written disciplinary warnings and actions in the five years before the date of the authorization, and the employee's written response, if any, contained in the employee's personnel record; and
- written reasons for separation from employment.²⁵⁷

Different regulations apply to public employers or school district employers.²⁵⁸

The employer is subject to legal action for such disclosures only if: (1) the information provided by the employer was "false and defamatory"; (2) the employer "knew or should have known the information was false"; and (3) the employer "acted with malicious intent to injure the employee."²⁵⁹

With respect to "acts of violence, theft, harassment, or illegal conduct," some cases (decided before this legislation was enacted) suggest that an employer may even have a duty to report such negative information if the employer provides any information about an employee's character or job performance, to avoid misleading the other person. Otherwise, such misrepresentations or omissions may subject the employer to liability where the misrepresentation or omission would present a substantial, foreseeable risk of injury to third persons.²⁶⁰

This law, however, does not preclude an employee from asserting other claims against an employer under common law, does not affect collective bargaining agreement rights, and does not apply in an action alleging a violation of the MHRA.²⁶¹

As a matter of general policy, an employer should limit the information it provides to objective historical data, such as dates of employment and positions held. The following statement may be included in such a written reference:

It is the company's policy to provide only this limited information for reference checks concerning any current or former employee. No inferences should be drawn from our uniform application of this policy.

This policy will minimize the employer's risk of defamation actions. All supervisors should be advised of the company's policy and be directed not to give job references or recommendations. Instead, all reference

²⁵⁶ Minn. Stat. § 181.967, subd. 3(a) (providing that a disclosure under the "acts of violence," etc., provision must be in writing, and that a copy must be sent contemporaneously to the employee).

²⁵⁷ Minn. Stat. § 181.967, subd. 3(b).

²⁵⁸ See Minn. Stat. § 181.967, subds. 4-5.

²⁵⁹ Minn. Stat. § 181.967, subd. 2.

²⁶⁰ See *Grozdanich v. Leisure Hills Health Ctr., Inc.*, 25 F. Supp. 2d 953, 982-83 (D. Minn. 1998), *reconsid. denied*, 48 F. Supp. 885 (D. Minn. 1999).

²⁶¹ Minn. Stat. § 181.967, subd. 6.

requests should be handled on a centralized basis, and responses provided only in writing. Such a policy must be applied consistently for both excellent employees and deficient employees to avoid any claim of disparate treatment or negligent misrepresentation. This is particularly true when preparing a reference for an employee who was terminated for sexual harassment or violent behavior. Some cases suggest that if an employer provides some information about a former employee's character or job performance, the employer has a duty to supply the listener with complete information, including negative information, to avoid being misleading. Otherwise, such misrepresentations or omissions may subject the employer to liability where the misrepresentation or omission would present a substantial, foreseeable risk of injury to third persons.²⁶² One alternative is to request that all employees sign a written authorization to provide detailed reference information, and a waiver of any claims based on the statements then issued.

SECTION 2.9 MONITORING EMPLOYEE ELECTRONIC DATA AND COMMUNICATIONS

The law as it relates to monitoring and accessing e-mail, voice mail, electronic files, the Internet, and other electronic communications is complex and still emerging. Currently, the law regulating the monitoring of electronic communications is governed by the common law and by federal and state statutes.

(a) Common Law Restrictions on Employers

(i) Public Employers

Public employers are subject to constitutional restrictions on searches and seizures, and can be sued for infringing on employees' "legitimate expectations of privacy."²⁶³ In *City of Ontario v. Quon*, the U.S. Supreme Court held that the City of Ontario's review of transcripts of a police officer's text messages sent and received on a City-issued pager were reasonable and did not violate the employee's Fourth Amendment rights against unreasonable searches and seizures.²⁶⁴ In *Quon*, the City advised the officers that their pager text messages would be treated like e-mails that were subject to the City's computer, Internet and e-mail policy and could be audited. After officers exceeded the allotted number of texts paid for under the City's plan, the officers were initially allowed to pay any overage charges directly to the City. After several months, the City police chief decided to review some of the text messages to determine why the officers were exceeding their limits. The City disciplined Quon after they found that a large majority of Quon's texts sent during working hours were not work-related, and that many of the messages were sexually explicit. Quon and others sued the City for violations of their constitutional rights. The Supreme Court was very careful to decide the case on narrow grounds, stating that "[a] broad holding concerning employees' privacy expectations vis-à-vis employer-provided technological equipment might have implications for future cases that cannot be predicted."²⁶⁵ Instead of deciding whether the City violated Quon's expectations of privacy, the Court assumed, *arguendo*, that Quon had a reasonable expectation of privacy in the text messages but that the City's search was nonetheless reasonable. Although *Quon* involved a public employer, the Court related the scenario to private employers as well by stating: "[f]or these same reasons – that the employer had a legitimate reason for the search, and that the search was not excessively intrusive in light of that justification – the Court also concludes that the search would be 'regarded as reasonable and normal in the private-employer context.'"²⁶⁶

²⁶² See *Tarasoff v. Regents of the Univ. of Cal.*, 17 Cal. 3d 425 (1976) (special relationship may support an affirmative duty for the benefit of third persons).

²⁶³ See *Ortega v. O'Connor*, 146 F.3d 1149 (9th Cir. 1998).

²⁶⁴ *City of Ont. v. Quon*, 130 S. Ct. 2619 (2010).

²⁶⁵ *Id.* at 2630.

²⁶⁶ *Id.* at 2633.

(ii) Private Employers

Private employers are subject to common law actions for invasions of privacy.²⁶⁷ An employer may be liable for invasion of an employee's privacy for publicizing a matter that would be highly offensive to a reasonable person, and is not of legitimate concern to the public.²⁶⁸ An employer may also be liable for invasion of privacy for intentionally intruding upon an employee's private affairs, concerns, or seclusion.²⁶⁹ To be actionable, the employer's interference with the employee's privacy must be a substantial interference that would be highly offensive and objectionable to an ordinary person.²⁷⁰ The intrusion may be a physical invasion of the employee's personal space or intrusion into the employee's private affairs.²⁷¹ The intentional intrusion into an employee's privacy must be one that is an intrusion into something that the general public would not be free to view.²⁷² Employees who win in these lawsuits may recover regular damages, mental distress damages, and special damages.

At this time, it does not appear that an employer may be liable for inappropriate communications sent by an employee on the employer's computer system.²⁷³

(b) Federal Law

No federal statute explicitly addresses the various e-mail, computer, or Internet privacy issues. The Electronic Communications Privacy Act of 1986, an amendment to the Federal Wiretap Act, provides the framework for federal restrictions on the monitoring of electronic workplace communications.²⁷⁴ The statute restricts interception of electronic communications and accessing of stored information.

(i) Intercepting Communications

The "interception" restriction prohibits the intentional and non-consensual interception of oral, wire, or electronic communications by means of an electrical or mechanical device.²⁷⁵ This may include the monitoring of employees' use of voice mail, e-mail, or computer and Internet usage. Although it is not clear what constitutes an "interception" with regard to electronic communications, an employer's review of messages stored on the company's own internal e-mail or voicemail system does not appear to constitute an "interception."²⁷⁶

In the employment context, there are two exceptions to the interception restriction: prior consent and business use, discussed below.

1) Prior Consent Exception

The prior consent exception allows employers to intercept a message if *either* the sender or recipient expressly consents to its interception. An employee's consent is implied if the employer initially informs the employee that his or her messages may be intercepted. Although to date most cases involve telephone

²⁶⁷ *Reid v. Pierce Cnty.*, 136 Wn.2d 195 (1998); *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231, 235 (Minn. 1998).

²⁶⁸ *Id.*; accord Restatement (Second) of Torts § 652H.

²⁶⁹ *Eastwood v. Cascade Broad. Co.*, 106 Wn.2d 466 (1986); *Mark v. Seattle Times*, 96 Wn.2d 473 (1981).

²⁷⁰ *Mark*, 96 Wn.2d 473.

²⁷¹ Restatement (Second) of Torts § 652B.

²⁷² *Mark*, 96 Wn.2d 473.

²⁷³ See, e.g., *Michelangelo Delfino v. Agilent Technologies, Inc.*, 145 Cal. App. 4th 790 (2006) (finding employer immune from suit under the Communications Decency Act of 1996).

²⁷⁴ 18 U.S.C. §§ 2510 *et seq.* (amendment to the Omnibus Crime Control and Safe Streets Act of 1968); 18 U.S.C. §§ 2701 *et seq.*

²⁷⁵ 18 U.S.C. § 2511.

²⁷⁶ *Steve Jackson Games, Inc. v. U.S. Secret Serv.*, 36 F.3d 457 (5th Cir. 1994) (no "interception" of stored e-mails); see also *Epps v. St. Mary's Hosp. of Athens*, 802 F.2d 412, 414, *reh'g denied*, 807 F.2d 999 (11th Cir. 1986) (lawful telephone extension); *Payne v. Norwest Corp.*, 911 F. Supp. 1299, 1303 (D. Mont. 1995) (lawful to record messages left on voicemail), *rev'd in part on other grounds*, 113 F.3d 1079 (1997).

monitoring, this exception likely applies to e-mail and voice-mail monitoring as well. Thus, employees who are notified in advance that their electronic communications may be monitored should have no cause of action for interception of electronic communications under the statute.²⁷⁷

A recent court decision from New York is instructive. In *Scott v. Beth Israel Med. Ctr. Inc.*, the court held that an employee's e-mail communications with his personal attorney were not covered by the attorney-client privilege because the e-mails were sent via the employer's computer system in violation of a "no personal use" policy.²⁷⁸ The "no personal use" policy restricted use of the company's e-mail system to "business purposes only," and warned that documents sent over the system were the property of the company, employees had no personal privacy rights in such material, and the company reserved the right to access and disclose such material at any time without prior notice. Despite this policy, the employee sent the e-mails from his company e-mail address and over the company's e-mail server. The court held that "[a] 'no personal use' policy combined with a policy allowing for employer monitoring and the employee's knowledge of these two policies diminishes any expectation of confidentiality."²⁷⁹

Similarly, in *Holmes v. Petrovich Dev. Co., LLC*, a California Court of Appeal held that e-mails sent by an employee to her attorney regarding possible legal action against her employer were not covered by the attorney-client privilege when the employee used the employer's computer to send the e-mails despite the employee: (1) being told of the company's policy that its computers were to be used only for company business and that employees were prohibited from using them to send or receive personal e-mail; (2) being warned that the company would monitor its computers for compliance with this company policy and thus might "inspect all files and messages . . . at any time"; and (3) being explicitly advised that employees using company computers to create or maintain personal information or messages "have no right of privacy with respect to that information or message."²⁸⁰

2) Telephone Extension/Business Use Exception

Employers may intercept, use, or disclose messages that are sent and received through their telephone systems in the normal course of business, provided the employer has a legitimate business purpose for monitoring communications.²⁸¹ Many experts believe that this exception also allows employers to monitor e-mail and computer usage under certain conditions, such as to determine breaches of security, violations of firm policy, or other system misuse. The scope of the employer's interception, however, must not exceed the employer's legitimate business purpose.

The Ninth Circuit held in early 2007 that an employee has a reasonable expectation of privacy in his office and computer, such that any search by a public employer must fall within one of the narrow exceptions to the Fourth Amendment of the Constitution.²⁸² Accordingly, once it is determined that a message is personal and not in violation of any policy, the interception must cease.

²⁷⁷ *Griggs-Ryan v. Smith*, 904 F.2d 112, 117 (1st Cir. 1990) (consent based on notice that incoming calls monitored); *James v. Newspaper Agency Corp.*, 591 F.2d 579, 581 (10th Cir. 1979) (advance written notice of telephone monitoring).

²⁷⁸ *Scott v. Beth Israel Med. Ctr. Inc.*, 847 N.Y.S.2d 436 (2007).

²⁷⁹ See also *In re Asia Global Crossing*, 322 B.R. 247 (S.D.N.Y. 2006) (the attorney-client privilege and work product doctrine did not apply to e-mails exchanged over an employer's e-mail system, where the employer had a formal policy against personal use of the system). Compare with *People v. Jiang*, 131 Cal. App. 4th 1027 (2005) (client's communications intended for his attorney were privileged even though they were stored on a company laptop computer where the documents were not transmitted over the employer's e-mail system, and the company had no stated policy prohibiting personal use of that system); see also *Stengart v. Loving Care Agency, Inc.*, 201 N.J. 300 (2010) (attorney-client privilege applied to employee e-mails to attorney sent with employer laptop using a personal, password-protected, non-company e-mail account, and employer's electronic communications policy did not address the use of personal web-based e-mail accounts accessed through employer equipment).

²⁸⁰ *Holmes v. Petrovich Dev. Co., LLC*, 191 Cal. App. 4th 1047 (2011).

²⁸¹ 18 U.S.C. §§ 2510(5)(a), 2511(2)(a)(i); *Deal v. Spears*, 980 F.2d 1153 (8th Cir. 1992) (no business exception); *Briggs v. Am. Air Filter Co., Inc.*, 630 F.2d 414 (5th Cir. 1980) (extension phone exception); *Epps*, 802 F.2d at 414 (lawful telephone extension).

²⁸² See *U.S. v. Ziegler*, 474 F.3d 1184 (2007).

(ii) Accessing Stored Information

The Electronic Communications Privacy Act also prohibits unlawful access to stored communications.²⁸³ An exception, however, seems to allow employers free access to communications that have been exchanged and stored by an employee in the employer's internal electronic communication system.²⁸⁴ This would allow an employer access to an employee's stored communications, such as saved files, if such communications were saved on the employer's equipment in violation of a company policy.

In *Konop v. Hawaiian Airlines*, an employee maintained a website where he posted bulletins critical of his employer and union.²⁸⁵ The employee controlled access to the website by issuing names and passwords to certain co-workers. Access to the website was unavailable to management, but a co-worker shared the code with a company executive who viewed the website. The employee claimed that the company's act of viewing the website was a violation of the Wiretap Act and Stored Communications Act because the viewing was under false premises. The court held that the Wiretap Act was not violated, but that the viewing could violate the Stored Communications Act and Railway Labor Act.

(c) Washington Law

Washington's Privacy Act prohibits anyone, including employers, from recording or intercepting any private communication "transmitted by telephone or other device," without the consent of *all* parties in the communication.²⁸⁶ Consent is obtained whenever one party has announced to all other parties that the communication is about to be recorded or transmitted and the communication proceeds.²⁸⁷ Employers may make such an announcement in an employee manual. If communication is to be recorded, the announcement regarding the same must also be recorded.²⁸⁸

An exception permits recording or interception with the consent of only one party where the communication conveys "threats of extortion, blackmail, bodily harm, or other unlawful requests or demands[.]"²⁸⁹ Washington courts have not determined whether conversations involving unlawful harassment fall within this exception.

The Privacy Act applies only to "private" communications. In deciding whether a particular communication is private, courts consider both the subjective intent of the parties and any factors bearing on the parties' reasonable expectations and intent.²⁹⁰ Such factors include the duration and subject matter of the conversation, the location of the conversation, and the presence or potential presence of a third party.²⁹¹ For example, the Act would probably not prohibit the recording of conversations in a public area by use of an obviously apparent recording device.²⁹²

Further, the Act applies only to "communications." Thus, while the Act prohibits audio recordings, it does not prohibit photographs or soundless videotaping of persons' images.²⁹³

²⁸³ 18 U.S.C. § 2701.

²⁸⁴ 18 U.S.C. § 2701(c)(1); *Bobach v. City of Reno*, 932 F. Supp. 1232 (D. Nev. 1996).

²⁸⁵ *Konop v. Hawaiian Airlines*, 302 F.3d 868 (9th Cir. 2002).

²⁸⁶ RCW 9.73.030(1)(a).

²⁸⁷ RCW 9.73.030(3).

²⁸⁸ *Id.*

²⁸⁹ RCW 9.73.030(2)(b).

²⁹⁰ *State v. Clark*, 129 Wn.2d 211 (1996).

²⁹¹ *Id.*

²⁹² *See Fordyce v. City of Seattle*, 907 F. Supp. 1446 (W.D. Wash. 1995).

²⁹³ *Clark*, 129 Wn.2d at 224-25, 232; *State v. Glas*, 147 Wn.2d 410 (2002) (state voyeurism statute does not cover intrusions of privacy in public places).

Employees who claim they are injured by violations of the Act may sue for actual damages, including mental pain and suffering, or liquidated damages of \$100 a day for each day of violation, up to \$1,000, and may recover their attorneys' fees.²⁹⁴

(d) California Law

California's Privacy Act²⁹⁵ prohibits recording or eavesdropping on confidential communications without the consent of all parties.²⁹⁶ A conversation is confidential within the meaning of the California Privacy Act if a party to that conversation has an objectively reasonable expectation that the conversation is not being recorded or overheard.²⁹⁷ In the context of employee monitoring, employers can usually avoid liability by providing the same notice required under federal law. After receiving adequate notice, an employee will usually not have a reasonable expectation that conversations are not being recorded or overheard.

Employers should assume that California's Privacy Act applies to e-mail and other electronic communications as well as more traditional communications.²⁹⁸ Furthermore, a business outside of California may violate California law by recording a phone call with a California-based person.²⁹⁹

Also, in 2006, California outlawed the use of state-owned or state-leased computers to access pornographic material. The law does not apply to accessing, viewing, downloading or otherwise obtaining obscene material for use consistent with legitimate law enforcement or other such legitimate purposes as defined by the statute.³⁰⁰

(e) Minnesota Law

The Minnesota Wiretapping Statute – the Privacy of Communications Act – closely parallels the Federal Act.³⁰¹ Minnesota law, however, is arguably broader than federal law, protecting not only electronic communications originating from an external system, but also electronic communications sent internally.³⁰² Minnesota law, like federal law, appears to allow employers to intercept or access communications with the consent of the sender or recipient or for a legitimate business purpose.³⁰³ It also appears to allow employers access to stored information, regardless of consent, if the information is stored on the employer's own internal electronic communication system.³⁰⁴

(f) Utah Law

The Utah Interception of Communications Act also closely parallels the Federal Act.³⁰⁵ Utah allows employers to intercept and access a communication with the consent of either the sender or the recipient.³⁰⁶

²⁹⁴ RCW 9.73.060.

²⁹⁵ Cal. Penal Code §§ 630-637.9.

²⁹⁶ Cal. Penal Code § 632. When the eavesdropping is being done by law enforcement officials, only one party needs to consent. See *People v. Canard*, 257 Cal. App. 2d 444, 464 (1967).

²⁹⁷ *Flanagan v. Flanagan*, 27 Cal. 4th 766, 768 (2002).

²⁹⁸ See *People v. Gibbons*, 215 Cal. App. 3d 1204, 1210 (1989) (“[C]ommunication’ as used in the Privacy Act is not limited to conversations or oral communications but rather encompasses any communication, regardless of its form, where any party to the communication desires it to be confined to the parties thereto”).

²⁹⁹ See *Kearney v. Salomon Smith Barney*, 39 Cal. 4th 95 (2006).

³⁰⁰ See Cal. Gov't Code § 8314.5.

³⁰¹ See Minn. Stat. §§ 626A.01 *et seq.*

³⁰² Minn. Stat. § 626A.01, subds. 3, 14.

³⁰³ Minn. Stat. § 626A.02, subds. 2(a)-(d).

³⁰⁴ Minn. Stat. § 626A.26, subd. 3(l).

³⁰⁵ Utah Code Ann. § 77-23a-1 *et seq.*

³⁰⁶ Utah Code Ann. § 77-23a-4(7)(b).

(g) Laws of Other States

Many other states have laws on this subject as well. Some states allow the interception of or access to communications if one of the parties to the communication consents, while other states require the consent of all parties. Employers with operations in other states should review the relevant laws.

In the following states, the consent of all parties to a communication is required before recording is permitted:

Connecticut	Conn. Gen. Stat. Ann. § 52-570d
Delaware	Del. Code Ann. tit. 11, § 1335(a)(4)
Florida	Fla. Stat. Ann. § 934.03(2)(d)
Illinois	720 Ill. Comp. Stat. Ann. 5/14-2(a)(1)
Maryland	Md. Code Ann. Cts. & Jud. Proc. § 10-402(c)(3)
Massachusetts	Mass. Gen. Laws ch. 272, § 99(B)(4)
Michigan	Mich. Comp. Laws Ann. § 750.539c
Montana	Mont. Code Ann. § 45-8-213(1)(c)
Nevada	Nev. Rev. Stat. Ann. § 200.620
New Hampshire	N.H. Rev. Stat. Ann. § 570-A:2, I(a)
Pennsylvania	18 Pa. Cons. Stat. Ann. §§ 5703, 5704(4)
Washington	RCW 9.73.030(1)

In the following states, only one party to the conversation need give consent for lawful recording:

Alabama	Ala. Code § 13A-11-30
Alaska	Alaska Stat. §§ 42.20.300, 42.20.310(a)(1)
Arizona	Ariz. Rev. Stat. Ann. § 13-3005(A)(1)
Arkansas	Ark. Code Ann. § 5-60-120(a)
Colorado	Colo. Rev. Stat. Ann. §§ 18-9-303(1), 18-9-304(1)
District of Columbia	D.C. Code Ann. § 23-542(b)(3)
Georgia	Ga. Code Ann. §§ 16-11-62, 16-11-66
Hawaii	Haw. Rev. Stat. § 803-42(b)(3)
Idaho	Idaho Code § 18-6702(2)(d)
Indiana	Ind. Code Ann. § 35-31.5-2-176
Iowa	Iowa Code Ann. § 727.8
Kansas	Kan. Stat. Ann. § 21-6101
Kentucky	Ky. Rev. Stat. Ann. § 526.010
Louisiana	La. Rev. Stat. Ann. § 15:1303(C)(4)
Maine	Me. Rev. Stat. Ann. tit. 15, § 709(4)
Mississippi	Miss. Code Ann. § 41-29-531(e)
Missouri	Mo. Ann. Stat. § 542.402(2)
Nebraska	Neb. Rev. Stat. § 86-290(2)
New Jersey	N.J. Stat. Ann. §§ 2A:156A-3, 2A:156A-4(d)
New Mexico	N.M. Stat. Ann. § 30-12-1
New York	N.Y. Penal Law § 250.00
North Carolina	N.C. Gen. Stat. § 14-155
North Dakota	N.D. Cent. Code § 12.1-15-02(3)(c)
Ohio	Ohio Rev. Code Ann. § 2933.52(B)(4)
Oklahoma	Okla. Stat. Ann. tit. 13, § 176.4(5)
Oregon	Or. Rev. Stat. §§ 165.540, 165.543
Rhode Island	R.I. Gen. Laws § 11-35-21
South Carolina	S.C. Code Ann. § 17-30-30
South Dakota	S.D. Codified Laws § 23A-35A-20
Tennessee	Tenn. Code Ann. § 39-13-601(b)(5)
Texas	Tex. Penal Code Ann. § 16.02(c)(4)
Utah	Utah Code Ann. § 77-23a-4(7)(b)
Virginia	Va. Code Ann. § 19.2-62(B)(2)
West Virginia	W. Va. Code §§ 61-3-24c, 62-ID-3(c)(2)

Wisconsin
Wyoming

Wis. Stat. Ann. §§ 885.365, 968.31(2)(c)
Wyo. Stat. Ann. § 7-3-702(b)(iv)

Vermont does not have a statute on this subject.

(h) Social Networking

The rise in employee use of social networking sites (*e.g.*, Facebook, Twitter, MySpace, blogs) raises a number of issues for employers. Employers should remind employees that their postings on social networking sites could have an impact on the workplace and could violate employer policies, including policies protecting confidential and trade secret information, policies against discrimination and harassment, and policies against the infringement of trademarks and copyrights. Employees also should know that an employee who posts information about the employer company's products may have to identify him or herself as an employee of the company pursuant to Federal Trade Commission rules.³⁰⁷ Laws relating to advertising, insider trading, and privacy also may apply.

When taking action in response to an employee's posting on the Internet, employers should consider whether the posting violates any company policy, whether the employee is engaging in protected speech (*e.g.*, concerted activity protected by the National Labor Relations Act),³⁰⁸ and whether the employee is engaging in lawful activities protected by state law (in Minnesota, employers generally may not discriminate or take other employment action against employees because of their off-duty use of lawful products;³⁰⁹ in some other states, the protection extends to any lawful activity outside the workplace). As with other disciplinary procedures, employers should act consistently in imposing any disciplinary measures to minimize the risk of discrimination or retaliation claims.

(i) Institute a Monitoring Policy

Employers can reduce their risk of liability by taking measures to ensure that employees have a reduced expectation of privacy for communications they make in the workplace. Employers should establish a written electronic communications monitoring policy to:

- remind employees that computers and communications systems are company property;
- reserve the right to access and monitor the use of the company's systems and the contents of files and communications created, stored, sent, or received on the systems;
- inform employees that they should have no expectation of privacy in anything they create, store, send, or receive through the company's systems or via access to the Internet through the company; and
- restrict employees' use of e-mail, voice mail, and the Internet to business purposes.

Employers should require employees to sign a written consent to the monitoring policy, or, at a minimum, a written acknowledgment of receipt of such policy to be kept in employee's personnel files.

³⁰⁷ Federal Trade Commission Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. pt. 255 (released Oct. 5, 2009; effective Dec. 1, 2009).

³⁰⁸ The National Labor Relations Board ("NLRB") has recently filed complaints and obtained settlements against employers who, in the NLRB's judgment, wrongfully terminated employees who engaged in protected concerted activity on the employees' Facebook pages. See *Karl Knauer Motors*, 358 N.L.R.B. No. 164, 2012 WL 4482841 (Sept. 28, 2012); *Am. Med. Response of Conn.*, NLRB Reg. 34, No. 34-CA-12576 (*complaint issued* Oct. 27, 2010); *Costco Wholesale Corp.*, 358 N.L.R.B. No. 106, 2012 WL 3903806 (Sept. 7, 2012).

³⁰⁹ Minn. Stat. § 181.938.

SECTION 2.10 PROTECTING PERSONAL INFORMATION

In 2002, the Washington State Legislature passed a law governing the disposal of personal information.³¹⁰ Under the law, custodians of personal information must take reasonable steps to destroy personal information when disposing of records they no longer need. The requirement applies to both public and private employers, including non-profit organizations, but not the federal government.

SECTION 2.11 WORKPLACE SMOKING

(a) Washington Law

Washington's Clean Indoor Air Act³¹¹ provides that "no person may smoke in a public place or any place of employment."³¹² It also provides that occupying owners and tenants must post conspicuous signs prohibiting smoking.³¹³ Smoking is prohibited within 25 feet from entrances, exits, windows that open, and ventilation intakes. Owners or other persons who control a public place or place of employment can seek to modify the 25-foot limit by applying to the director of the local health department or district in which the public place or place of employment is located.³¹⁴ Civil fines are imposed for violations of the law.³¹⁵

(b) California Law

California also prohibits smoking in the workplace. In 2006, the California Legislature clarified that the prohibition on knowingly permitting smoking in enclosed spaces in places of employment includes lobbies, lounges, waiting areas, stairwells, elevators and restrooms. Smoking inside public buildings, except in covered parking lots, is also prohibited.³¹⁶

(c) Minnesota Law

The "Freedom to Breathe" amendment to the Minnesota Clean Indoor Air Act,³¹⁷ which became effective October 1, 2007, prohibits smoking in any public indoor areas, including places of employment.³¹⁸ The amendment removed a provision from the prior Clean Indoor Air Act, which permitted smoking in designated indoor smoking areas. Accordingly, smoking in any indoor area in any place of employment or in a "public" area is strictly prohibited.

Under the amendment, an employer has an affirmative duty both to prohibit smoking in all indoor areas and to take measures to prevent employees and visitors from smoking in all indoor areas (including removing any ashtrays, etc.).³¹⁹ An employer that knowingly fails to comply with the statute may be guilty of a petty misdemeanor.³²⁰ Any employee or visitor who smokes in an area where smoking is prohibited also may be found guilty of a petty misdemeanor. Employees and visitors may still smoke outside, however, and there are no restrictions on how close individuals may smoke to a window or door.

³¹⁰ RCW 19.215.005-.030.

³¹¹ RCW 70.160 *et seq.*

³¹² RCW 70.160.030.

³¹³ RCW 70.160.050.

³¹⁴ RCW 70.160.075.

³¹⁵ RCW 70.160.070.

³¹⁶ *See* Cal. Lab. Code § 6404.5.

³¹⁷ Minn. Stat. §§ 144.411 *et seq.*

³¹⁸ Minn. Stat. §§ 144.413, 144.414.

³¹⁹ Minn. Stat. §§ 144.414, 144.416.

³²⁰ Minn. Stat. § 144.417, subd. 2.

More important for employers, there is a new non-retaliation provision in the Act, which provides: “No person or employer shall discharge, refuse to hire, penalize, discriminate against, or in any manner retaliate against any employee, applicant for employment, or customer because the employee, applicant, or customer exercises any right to a smoke-free environment provided by [the Act].”³²¹ An employer likewise may not retaliate against an employee who reports a violation of the Minnesota Clean Indoor Air Act.³²²

Under the law, employers should take the following steps:

- inform all employees that the employer prohibits smoking in all indoor areas as required by the Minnesota Clean Indoor Air Act;
- inform employees that violation of the non-smoking policy may result in discipline, up to and including termination, as well as potential criminal penalties;
- inform employees and educate supervisors that retaliation against those exercising rights under the Minnesota Clean Indoor Air Act is strictly prohibited;
- remove any ashtrays or other smoking-related items from the premises; and
- post “no-smoking” signs.

Employers should bear in mind that local law (*e.g.*, city or county ordinances) also may regulate smoking in public places.

(d) Utah Law

The Utah Indoor Clean Air Act prohibits smoking in all enclosed indoor places of public access and publicly owned buildings and offices.³²³ The prohibition extends to all workplaces except for areas not commonly open to the public of owner-operated businesses having no employees other than the owner-operator.³²⁴ Employers must post no smoking signs on all entrances or in a position clearly visible upon entry.³²⁵

³²¹ Minn. Stat. § 144.417, subd. 2(d).

³²² Minn. Stat. § 144.417, subd. 2(c).

³²³ Utah Code Ann. § 26-38-3.

³²⁴ Utah Code Ann. § 26-38-3(2)(a).

³²⁵ Utah Admin. Code r. 392-510-12.

CHAPTER III

UNION-MANAGEMENT RELATIONS

SECTION 3.1 UNION ORGANIZING AND LABOR RELATIONS

(a) Introduction

This Chapter discusses union organizing and organized labor relations issues. While union presence in the private sector is on a long-term decline, many employers have collective bargaining agreements with organized labor. Moreover, unions continue to devote substantial resources toward organizing non-union workplaces, particularly in the high-technology sector. Legal issues relating to labor relations are largely governed by federal law under the National Labor Relations Act (“NLRA” or “the Act”), which is administered by the National Labor Relations Board (“NLRB”).³²⁶ These laws apply even in the absence of a union. Employers who are subject to union organizing efforts should seek specialized legal counsel.

(b) National Labor Relations Act

The NLRA grants certain rights to “employees.” Supervisors are excluded from the definition of “employee” and therefore are not covered by the Act.³²⁷ Whether an individual is a supervisor for purposes of the Act depends on not merely a title, but on that individual’s authority over employees. To determine whether an individual is a supervisor, an employer should look to several factors:³²⁸

- If the employee has the authority to
 - cause another employee to be hired, transferred, suspended, laid off, recalled, promoted, discharged, assigned, rewarded, or disciplined, either by taking such action or by recommending it to a superior; or
 - direct other employees or adjust their grievances; and
- if the exercise of that authority requires “the use of independent judgment” and is not of a merely routine or clerical nature; and
- if the employee holds that authority “in the interest of the employer.”

If a person meets these requirements, he or she is deemed a supervisor rather than an “employee.”

For example, a foreman who determined which employees would be laid off after being directed by the job superintendent to lay off four employees would be considered a supervisor and would not be covered by the Act. On the other hand, a “straw boss” who, after someone else determined which employees would be laid off, merely informed the employees of the layoff and who neither directed other employees nor adjusted their grievances, would not be considered a supervisor and would be covered by the Act.³²⁹

“Managerial” employees also are excluded from the coverage of the Act. A managerial employee is one who represents management interests by taking or recommending actions that effectively control or implement employer policy.

³²⁶ The NLRB usually consists of five members, although they may delegate their powers to a three-member panel. In 2010, the U.S. Supreme Court held that the NLRB may not properly exercise this delegated authority if the NLRB membership falls below three. *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010).

³²⁷ 29 U.S.C. § 152(3).

³²⁸ 29 U.S.C. § 152(11).

³²⁹ National Labor Relations Board, Basic Guide to the National Labor Relations Act, 1997, at: <https://www.nlr.gov/sites/default/files/documents/224/basicguide.pdf>.

(c) Protected and Concerted Activity

A fundamental goal of the NLRA is to protect the rights of both unionized and non-unionized employees to engage in protected and concerted activity. Accordingly, all employers, including those without a union, must adhere to the NLRA rules (Section 7) protecting employees from coercion or restraint in exercising their rights to organize on behalf of either the employer or the union.³³⁰ The protection afforded by Section 7 is not limited to an employee's right to participate in, or refrain from participating in, labor organizations. The protection includes concerted activities, meaning activities engaged in for "mutual aid or protection." Specifically, Section 7 states that employees have the following rights:³³¹

- to self-organization;
- to form, join, or assist labor organizations;
- to bargain collectively through representatives of their own choosing;
- to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; and,
- to refrain from any or all such activities (except to the extent an agreement requires membership in a labor organization as a condition of employment).

Regarding concerted activity, the NLRB ruled that it is a violation of federal labor law to require employees to sign arbitration agreements that prevent them from joining together to pursue employment-related legal claims in any forum, whether in arbitration or in court. The ruling examined one agreement used by D.R. Horton, Inc. under which employees waived their right to a judicial forum and agreed to bring all claims to an arbitrator on an individual basis and additionally prohibited the arbitrator from consolidating claims, fashioning a class or collective action, or awarding relief to a group or class of employees. The NLRB found that the agreement unlawfully barred employees from engaging in concerted activity protected by the NLRA. According to the ruling, class arbitration is not required as long as the agreement leaves open a judicial forum for group claims.³³²

The scope of concerted activities may be moving into the social media realm. On October 27, 2010, an NLRB regional office issued a complaint against an employer for terminating an employee who criticized her supervisor on her Facebook page.³³³ The NLRB alleges that after the employee requested and was denied union representation at an investigatory interview regarding the employee's performance, the employee posted a negative remark about her supervisor on her Facebook page. The employee's remark allegedly drew supportive responses from her co-workers and led to further negative comments about the supervisor from the employee. The employee was terminated for her postings because such postings violated the company's Internet policies. The NLRB alleges that the employee's Facebook postings constitute protected concerted activity, and that the company's blogging and Internet posting policy contained "unlawful provisions, including one that prohibited employees from making disparaging remarks when discussing the company or supervisors and another that prohibited employees from depicting the company in any way over the Internet without company permission."³³⁴ The NLRB further stated that "[s]uch provisions constitute interference with employees in the exercise of their right to engage in protected concerted activity."³³⁵ This case settled in February 2011. According to the NLRB, among other things, the company agreed to revise its rules "to ensure that they do not improperly restrict

³³⁰ The NLRB recently proposed a rule that would require employers subject to the NLRA to post a notification to employees of their rights under the NLRA. *Proposed Rules Governing Notification of Employee Rights under the National Labor Relations Act*, 75 Fed. Reg. 80410 (Dec. 22, 2010).

³³¹ 29 U.S.C. § 157; NLRA, § 7.

³³² *D.R. Horton, Inc. and Michael Cuda*, 357 N.L.R.B. No. 184, 2012 WL 36274 (Jan. 3, 2012).

³³³ *Am. Med. Response of Conn.*, NLRB Reg. 34, No. 34-CA-12576 (*complaint issued* Oct. 27, 2010).

³³⁴ See Press Release, NLRB, *Complaint Alleges Connecticut Company Illegally Fired Employee over Facebook Comments* (Nov. 2, 2010) (available at <http://www.nlr.gov/news-outreach/news-releases>).

³³⁵ *Id.*

employees from discussing their wages, hours and working conditions with co-workers and others while not at work, and that they would not discipline or discharge employees for engaging in such discussions.”³³⁶ It may give employers some comfort that this complaint may be inconsistent with a memorandum issued by an NLRB Associate General Counsel in late 2009 in which they found that an employer’s social media policy could not reasonably be construed as an unlawful limitation on Section 7 activity under the NLRA where the policy prohibited “[d]isparagement of company’s . . . executive leadership, employees, strategy, and business prospects” by employees on social media.³³⁷ The policy also prohibited, among other things, employees from making explicit sexual references and references to illegal drugs with their use of social media. The Associate General Counsel reasoned that the social media policy as a whole drew a sufficient distinction between plainly egregious conduct and legitimately protected complaints so as to not chill the exercise of employees’ Section 7 rights.

Under Section 8(a)(1) of the NLRA, interference or coercion in the exercise of these additional rights is an unfair labor practice. Discrimination against employees participating in such concerted activity is considered an unfair labor practice and is in violation of Section 8(a)(3).³³⁸

The interpretation of protected employee activity under Section 7 of the NLRA is very broad.³³⁹ In order to be protected, the activity must be concerted, meaning the activities are undertaken jointly by two or more employees, or by one on behalf of the others.³⁴⁰ Courts interpret protected employee activity very broadly. A conversation occurring between only one speaker and one listener can constitute a concerted activity if the interaction pertains in some way to a group action or to the interests of other employees.³⁴¹ Although individual action on behalf of the interests of others is considered a concerted activity, an act taken by a single employee for that individual’s own personal benefit is not concerted activity.³⁴² Employer interference or coercion in the exercise of these rights, or discrimination against employees participating in such concerted activity, is considered an unfair labor practice.³⁴³

Below are examples of specific actions that are protected concerted activities.

(i) Work Stoppages

A strike is a concerted activity. However, depending on circumstances, the strike may not be protected. It is a violation under Section 8(a)(1) of the NLRA for employers to discipline or discharge the strikers or to refuse to reinstate them upon their unconditional application to return to work when positions are available and the strike is protected. On the other hand, when the strike is not protected, the discipline or discharge of the strikers does not violate Section 8(a)(1).³⁴⁴ Legally striking employees may enlist public support, however, “they may not elicit that support by force, trickery or guile, nor may they deliberately

³³⁶ See Press Release, NLRB, *Settlement Reached in Case Involving Discharge for Facebook Comments* (Feb. 8, 2011) (available at <http://www.nlrb.gov/news-outreach/news-releases>).

³³⁷ NLRB OGC Advice Memorandum, *Sears Holding (Roebuck)*, Case 18-CA-19081 (Dec. 4, 2009).

³³⁸ 29 U.S.C. § 158(a)(3); NLRA, § 8(a)(3).

³³⁹ See, e.g., *Karl Knauz Motors, Inc.*, 358 N.L.R.B. No. 164, 2012 WL 4482841 (Sept. 28, 2012) (rule in employee handbook stating: “No one should be disrespectful or use profanity or any other language which injures the image or reputation of the [employer]” encompasses Section 7 activity and thus violates Section 8(a)(1)); *Costco Wholesale Corp.*, 358 N.L.R.B. No. 106, 2012 WL 3903806 (Sept. 7, 2012) (rule prohibiting employees from electronically posting statements that “damage the company . . . or damage any person’s reputation” violate Section 8(a)(1)); *Banner Health Syst.*, 358 N.L.R.B. No. 93, 2012 WL 3095606 (Jul. 30, 2012) (violation of Section 8(a)(1) to maintain and apply a rule prohibiting employees from discussing ongoing investigations of employee misconduct).

³⁴⁰ *Esco Elevators*, 276 N.L.R.B. 1245 (1985), *enforced*, 794 F.2d 1078 (5th Cir. 1986).

³⁴¹ *Mushroom Transp. Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964). *Distinguish Briggs v. Nova Servs.*, 135 Wn. App. 955 (2006), *aff’d*, 166 Wn.2d 794 (2009) (non-union employees’ rights to engage in protected “concerted activities” did not include expressions of personal preferences and professional differences with management).

³⁴² *Krispy Kreme Doughnut Corp. v. NLRB*, 635 F.2d 304 (4th Cir. 1980).

³⁴³ Section 8(a)(3). See Patrick Hardin & John E. Higgins, Jr., *The Developing Labor Law* § 6 (4th ed. 2001).

³⁴⁴ 29 U.S.C. § 158.

inflict on the employer economic harm unnecessary to the legitimate concerted activities.”³⁴⁵ When strikers engage in inappropriate striking activity, they will forfeit the Act’s coverage of their otherwise protected activity.³⁴⁶

(ii) Honoring Picket Lines

Employees who refuse to cross another union’s lawful picket line are usually engaging in protected concerted activity, so long as there is no contract provision or other waiver prohibiting such actions. These employees may not be discharged unless it is “justified by legitimate business consideration of an overriding nature.”³⁴⁷ Union representatives can negotiate no-strike provisions in the employment contract or picket line clauses which would waive employees’ rights to cross picket lines. Waivers must be expressed in “clear and unmistakable” language.³⁴⁸ In concluding whether a union has agreed to a waiver, the NLRB can “consider extrinsic evidence bearing on the parties’ intent, including bargaining history and past practices under the contract.”³⁴⁹

(iii) Filing or Processing of Grievances

Organizing employees to file grievances that either bypass union representatives or that are numerous in number, is generally viewed as protected activity under Section 7.³⁵⁰ Employers will usually be held in violation of Section 8(a)(1) if they discharge or discipline employees for filing or processing grievances.³⁵¹

(iv) Employee Request for Union Representation During Investigation

Following two 1975 Supreme Court decisions, *NLRB v. J. Weingarten Inc.* and *Int’l Ladies’ Garment Workers Union v. Quality Mfg. Co.*, an employee’s request for union representation during an employer investigation that may result in disciplinary action or discharge is a protected concerted activity.³⁵² This right is limited to making the request and does not require the employer to inform the employee of the right or to make an offer to the employee for co-worker presence. An employer may respond to such a request by: (1) granting the request; (2) discontinuing the investigative interview; or (3) offering the employee a choice between an interview without a representative and no interview at all.

Supervisors should be adequately trained on how to handle employee requests for coworker presence at such meetings. Employers also should review all policies so as not to foreclose the possibility of coworker presence at such meetings. These policies could include corrective action policies, progressive discipline policies, harassment policies, and any other policies that describe investigation procedures.

Violations of employee rights in this regard may result in an unfair labor practice charge before the NLRB and reinstatement of a terminated employee with back pay.

The rights of employees to have union representation at investigatory interviews are known as *Weingarten* rights. In a 2004 holding, the NLRB stated that “*Weingarten* rights do not apply in a non-union setting.”³⁵³ As a result, an employee in a non-union workplace is *not* entitled to co-worker representation in

³⁴⁵ *Montefiore Hosp. & Med. Ctr. v. NLRB*, 621 F.2d 510, 517 (2d Cir. 1980).

³⁴⁶ *Id.*

³⁴⁷ *Cooper Thermometer*, 154 N.L.R.B. 502, 506 (1965).

³⁴⁸ *Gary Hobart Water Corp.*, 210 N.L.R.B. 742 (1974), *enforced*, 511 F.2d 284 (7th Cir.), *cert. denied*, 423 U.S. 925 (1975).

³⁴⁹ *Equitable Gas Co.*, 303 N.L.R.B. 925, 929 (1991), *enforced as modified*, 966 F.2d 861 (4th Cir. 1992).

³⁵⁰ *Gatliff Coal Co. v. NLRB*, 953 F.2d 247 (6th Cir. 1992); *W.F. Bolin Co. v. NLRB*, 70 F.3d 863 (6th Cir. 1995), *enforced*, 99 F.3d 1139 (6th Cir. 1996).

³⁵¹ *Prime Time Shuttle Int’l*, 314 N.L.R.B. 838, 841 (1994).

³⁵² 420 U.S. 251, *enforced*, 511 F.2d 1163 (5th Cir. 1975) and 420 U.S. 276 (1975).

³⁵³ *IBM Corp.*, 341 N.L.R.B. No. 148, 2004 WL 1335742 (June 9, 2004).

investigative interviews.³⁵⁴ Furthermore, discipline or discharge of an employee for refusing to utilize union representation is in violation of Section 8(a)(1).³⁵⁵

(v) Safety Related Protests

Safety strikes, employee complaints, refusals to accept job assignments due to unsafe working conditions, and the filing of complaints with the Occupational Safety and Health Administration (“OSHA”) are protected under Section 7 when they are concerted activities. For example, it would be a violation of Section 7 for an employer to discipline or discharge an employee for calling or threatening to call the OSHA. An employee’s claim may be unprotected if the danger lacked immediacy.³⁵⁶

(vi) Protests Relating to Employment Discrimination

Section 7 provides protection for concerted conduct in protest of alleged employment discrimination as defined by anti-discrimination legislation.³⁵⁷ However, protection may be denied when employees elect a union representative to act as the exclusive spokesperson for the group but hold separate employee protests.³⁵⁸ In addition, Section 7 does not protect concerted activity by a group of minority employees to bargain with their employer over issues of employment discrimination and employees cannot circumvent their elected bargaining representative to engage in such bargaining.³⁵⁹

(vii) Appeals to Agencies and Filing of Court Actions

Section 7 provides protection for employee appeals and complaints lodged with governmental agencies in regard to occupational safety, employment discrimination and labor standards.³⁶⁰ The NLRB also protects communications between employees and the funding agency of an employer where working conditions are involved.³⁶¹

SECTION 3.2 UNFAIR LABOR PRACTICES

Under the NLRA, certain conduct constitutes an unfair labor practice. Both employers and unions can commit unfair labor practices. Commission of an unfair labor practice can result in NLRB charges and damages against the offending party. In *Eastex, Inc. v. NLRB*, the U.S. Supreme Court extended the “mutual aid and protection” clause of Section 7 to protect the concerted activities of employees, “to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship.”³⁶² Employers purchasing the assets of another company should be cautious in that they could be held jointly and severally liable with the seller for any of the seller’s unfair labor practices.³⁶³

(a) Employer Unfair Labor Practices

It shall be an unfair labor practice for an employer:³⁶⁴

³⁵⁴ *Id.*

³⁵⁵ *Union Pressure in Disciplinary Meetings*, 41 U. Chi. L. Rev. 329 (1974).

³⁵⁶ *Pyro Mining Co.*, 230 N.L.R.B. 782 (1977).

³⁵⁷ *Franklin Iron & Metal Corp.*, 315 N.L.R.B. 819 (1984), *enforced*, 83 F.3d 156 (6th Cir. 1996); *Gatliff Coal Co. v. NLRB*, 953 F.2d 247, 251 (6th Cir. 1992).

³⁵⁸ *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50 (1975).

³⁵⁹ *See id.*

³⁶⁰ *Wolfkill Feed & Fertilizer Corp.*, 277 N.L.R.B. 635 (1985); *Franklin Iron & Metal*, 315 N.L.R.B. 819 (1984); *Williams Contracting*, 309 N.L.R.B. 433, 438 (1992).

³⁶¹ *Delta Health Ctr.*, 310 N.L.R.B. 26, 43, *aff’d*, 5 F.3d 1494 (5th Cir. 1993).

³⁶² 437 U.S. 556 (1978).

³⁶³ *See Big Sky Hospitalities, LLC*, 358 N.L.R.B. No. 83, 2012 WL 2903086 (Jul. 16, 2012).

- to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;
- to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it;
- to encourage or discourage membership in any labor organization by discrimination in regard to hire or tenure of employment or any term or condition of employment;
- to discharge or otherwise discriminate against an employee because he or she has filed charges or given testimony under this Act; and
- to refuse to bargain collectively with the representatives of its employees.

(b) Law Restricting Use of Government Funds to Influence Unionization Efforts

In 2008, the U.S. Supreme Court considered whether a California law, prohibiting employers that receive more than \$10,000 in state funds annually from using those funds to assist or deter employee unionization efforts, was pre-empted by the NLRA.³⁶⁵ The Supreme Court, reversing an *en banc* Ninth Circuit decision, held that the California statute was pre-empted by the NLRA, noting that federal labor policy favors unfettered employer speech regarding union organizing.

On January 30, 2009, President Obama issued Exec. Order No. 13,494, entitled “Economy in Government Contracting.” Exec. Order No. 13,494 prohibits federal contractors from expending federal funds to persuade their employees to exercise or not to exercise their right to organize and bargain through a representative of their own choosing.³⁶⁶ Some industry specialists think that the Order may be inconsistent with the NLRA, and that a legal challenge to the Order is likely in light of a Supreme Court decision in *Chamber of Commerce of U.S. v. Brown*.³⁶⁷

(c) Union Unfair Labor Practices

It shall be an unfair labor practice for a labor organization or its agents.³⁶⁸

- to restrain or coerce employees with respect to union membership or non-membership, and in the exercise of other rights guaranteed in Section 7;³⁶⁹
- to cause or attempt to cause an employer or agency to discriminate against an employee for exercising the rights granted by the Act. It is also an unfair labor practice to “discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership”;³⁷⁰

³⁶⁴ 29 U.S.C. § 158(a).

³⁶⁵ See *Chamber of Commerce of U.S. v. Brown*, 554 U.S. 60 (2008).

³⁶⁶ Exec. Order No. 13,494 (Jan. 30, 2009). On that same day, President Obama signed two other executive orders dealing with federal contractors: Exec. Order No. 13,496, entitled Notification of Employee Rights Under Federal Labor Laws, and Exec. Order No. 13,495, entitled Nondisplacement of Qualified Workers Under Service Contracts. Under Exec. Order No. 13,496, every federal contractor is required to post a notice informing employees that they have a right to join or not to join a union. Exec. Order No. 13,496 (Jan. 30, 2009). The implementing regulations for Exec. Order No. 13,496 can be found at 29. C.F.R. §§ 471.1-.23. Exec. Order No. 13,495 requires government contractors who take over a service contract from an existing provider to retain employees of the previous provider. Exec. Order No. 13,495 (Jan. 30, 2009).

³⁶⁷ 554 U.S. 60 (2008).

³⁶⁸ 29 U.S.C. § 158(b).

³⁶⁹ *But see Helix Elect. v. Labor Standards Enforcement Div.*, No. 05-2303, 2006 WL 464083 (E.D. Cal. Feb. 27, 2006) (denying a preliminary injunction to a non-union subcontractor against a labor management committee requesting copies of the subcontractor’s payroll records, including the addresses of its employees; the court held that the subcontractor had not demonstrated that the labor management committee’s purpose was to gain information to aid in union organization efforts).

³⁷⁰ 29 U.S.C. § 158(b)(2).

- “[T]o refuse to bargain collectively with an employer”;³⁷¹
- “[T]o engage in, or to induce or encourage any individual employed by any (i) person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce”;³⁷²
- to require of employees the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the NLRB finds excessive or discriminatory under all the circumstances. In making such a finding, the NLRB shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected;³⁷³
- “[T]o cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed”; and³⁷⁴
- “[T]o picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective-bargaining representative, unless such labor organization is currently certified as the representative of such employees.”³⁷⁵

In Washington, unions also are restricted in their ability to use non-union member agency fees. Washington State authorizes government employers and unions representing their employees to enter into “agency-shop” agreements that allow the union to charge agency fees to represented employees who choose not to become union members. A union “may not use agency shop fees paid by an individual who is not a member of the organization to make contributions to influence an election or to operate a political committee, unless affirmatively authorized by the individual.”³⁷⁶ Furthermore, a union “does not use agency shop fees when it uses its general treasury funds to make such contributions or expenditures if it has sufficient revenues from sources other than agency shop fees in its general treasury to fund such contributions or expenditures.”³⁷⁷ The Supreme Court upheld the constitutionality of this law in 2007.³⁷⁸

In Minnesota, unions and individuals are not allowed to seize or occupy property unlawfully during the existence of a labor dispute.³⁷⁹ It is also illegal for any person to picket or cause to be picketed a place of employment of which the person is not an employee while a strike is in progress affecting the place of employment, unless the majority of persons engaged in picketing are employees of the workplace being picketed.³⁸⁰ Minnesota also bars two or more people from blocking a single entrance, through picketing, to any place of employment where no strike is in progress at the time.³⁸¹ Additionally, under Minnesota law, a

³⁷¹ 29 U.S.C. § 158(b)(3).

³⁷² 29 U.S.C. § 158(b)(4).

³⁷³ 29 U.S.C. § 158(b)(5).

³⁷⁴ 29 U.S.C. § 158(b)(6).

³⁷⁵ 29 U.S.C. § 158(b)(7).

³⁷⁶ RCW 42.17.760(1).

³⁷⁷ RCW 42.17.760(2).

³⁷⁸ *Davenport v. Wash. Educ. Ass’n*, 550 U.S. 955 (2007).

³⁷⁹ Minn. Stat. § 179.11(3).

³⁸⁰ Minn. Stat. § 179.11(4).

³⁸¹ Minn. Stat. § 179.11(5).

person may not interfere with the operation of a vehicle or the operator of the vehicle when neither the owner nor the operator of the vehicle is a party to a strike at the time.³⁸² Minnesota requires that before a strike takes place, the strike has to be approved by a majority vote of the voting employees in a collective bargaining unit of the employees, and the vote shall occur with reasonable notice and with secret ballots.³⁸³ Minnesota also has a special protections that extend the employers who produce, transport, process, or market agricultural products, making it illegal for any person or labor organization to hinder or prevent the company's business by intimidation, force, coercion, or sabotage.³⁸⁴

In California, it has been found to be an unfair union labor practice for a union to fail to fairly represent a member of the bargaining unit. This duty to fairly represent members of a bargaining unit is breached when the exclusive representative's conduct toward a unit member is arbitrary, discriminatory, or in bad faith.³⁸⁵ Unions in California may also not act in bad faith when negotiating with their employer.³⁸⁶

In Utah, a majority of the collective bargaining unit employees must vote by secret ballot to initiate a strike.³⁸⁷ Utah also allows "sympathetic strikes" in support of those in similar occupations working for different employers in the same industry.³⁸⁸ During a strike, strikers may not hinder or prevent lawful work or employment or interfere with entrance or exit of any place of employment.³⁸⁹ Strikers may not interfere with the use of public streets or highways, railroads, airports, or other means of travel.³⁹⁰

SECTION 3.3 RIGHT TO ORGANIZE AND BARGAIN COLLECTIVELY

(a) Election Process

(i) Pre-Election

Fundamental to the NLRA is the right of employees to organize. The most common form of organization is union affiliation and representation. Historically, union campaigns ran in a very predictable manner, utilizing basic tactics and strategies. Although traditional tactics are still in use today, many have been modified as a result of technological advances. Employers should familiarize themselves with common organization strategies to better recognize and defend their companies from organization campaigns.

1) Showing of Interest

Organizing campaigns usually begin when a group of employees from a certain employer contact a particular union. The specific union is typically chosen because an employee has had previous interaction with the union through a past employment experience or other personal connection (*e.g.*, family or friend). Once a core group of employees identifies itself as interested in forming a labor organization, union representatives begin to form in-plant organizing committees. Union representatives and committee members hold regular off-site meetings to formulate campaign strategies and determine what issues will most likely garner support from other employees. In an effort to obtain maximum support, committee members are charged with passing out flyers, buttons and other pro-union materials during free times (*e.g.*,

³⁸² Minn. Stat. § 179.11(6).

³⁸³ Minn. Stat. § 179.11(8).

³⁸⁴ Minn. Stat. § 179.11(9).

³⁸⁵ *Rocklin Teachers Prof'l Ass'n (Romero)*, PERB Decision No. 124 (Cal. Mar. 26, 1980).

³⁸⁶ *San Diego Teachers Ass'n v. Superior Court*, 24 Cal. 3d 1, 8 (1979).

³⁸⁷ Utah Code Ann. § 34-20-8(2)(c).

³⁸⁸ Utah Code Ann. § 34-20-8(2)(e).

³⁸⁹ Utah Code Ann. § 34-20-8(2)(d).

³⁹⁰ *Id.*

lunch and coffee breaks). Committee members are responsible for convincing co-workers, who are resistant to organization, of the advantages of union representation.

2) Authorization Cards

The NLRB plays an instrumental role in union organization and election process. Union representatives must first demonstrate that employees who are interested in organizing share similar responsibilities, wages, hours and other working conditions. The union representatives must then obtain signed authorization cards from a majority of the interested group. A card signifies an employee's authorization for the union to act as his or her bargaining representatives. Although only thirty percent participation is needed to hold an NLRB election, unions usually wait to obtain cards from at least fifty percent of eligible employees before approaching the NLRB.

3) Petition for Election

Following the receipt of the authorization cards, the union representatives petition the NLRB to hold an election. As a stall tactic, employers often initiate a request to address grievances. Union organizers usually attempt to hold the election as soon as possible to capitalize on the momentum and support created during the card drive.

In conventional union-organizing campaigns, organizational activities are kept secret from the employer. Authorization cards are usually collected either off-site or during private break times. No public announcements are made concerning union activities. Secrecy is essential to a union's success, ensuring that the employer is unaware of employee concerns and therefore cannot defeat union organizing efforts. Furthermore, when the employer is notified of the impending election, he or she is unable to approach individuals as a majority of the employees have already demonstrated union support.

(ii) New Organizing Tactics

1) Professional Organizers

In addition to utilizing traditional forms of union organization, new strategies have been created. The most important development is the creation of full-time union organizers. In the past, union representatives had numerous responsibilities in addition to organizing. Full-time union organizers are able to devote all of their time to the organization effort. Not only do these professional organizers rely on traditional campaign literature to spread the word of organization, they are able to create elaborate videos and customized literature to target specific workforce groups. The diverse backgrounds of union organizers enable unions to reach different employee groups based on race, age and sex.

2) Salting

“Salting” is a common union tactic to encourage organization. One form of “salting” is when a full-time union organizer applies for a full-time position as an employee at the company. The professional organizer will plainly state that he or she is a full-time paid union representative seeking employment solely to organize the company's employees. If the full-time representative meets the basic requirements of the job, and is genuinely interested in the job, the employer is in a no-win situation. The employer must hire the applicant, as failure to hire would potentially result in the filing of discrimination charges with the NLRB. However, if the employer does hire the organizer, the representative will have full access to all employees. Furthermore, the organizer could create discipline issues, making it nearly impossible for the employer to manage its employees without creating unfair labor practice allegations. In 2007, the NLRB provided some relief for employers providing that a union representative is not protected from anti-union discrimination if the individual is not genuinely interested in the job.³⁹¹

³⁹¹ *Toering Elec. Co.*, 351 N.L.R.B. No. 18, 2007 WL 2899733 (Sept. 29, 2007).

Another common type of “salting” occurs when union representatives, not professional organizers, flood job sites and pass out applications stating that all applicants are union members interested in organizing the job site when hired. The employer is put in a difficult situation as it must hire all qualified candidates to avoid the appearance of discrimination against union members. In *Town & Country Elec., Inc.*, an employer received an influx of job applications from both paid and unpaid union organizers. The employer refused to interview the applicants and was charged with committing an unfair labor practice.³⁹² Several NLRB decisions have upheld the principle that anti-union animus is an unlawful reason not to hire applicants who self-identify as union organizers.³⁹³

3) Cellular Campaigning

Cellular campaigning also is a popular strategy unions use to gain support. In a cellular campaign, unions divide employees into small groups or cellular components, in an effort to win group support through cell by cell participation. Usually, the cells are comprised of small groups of employees from different departments. Normally, there is one lead person in each group with whom the union representative communicates. It is the responsibility of the group leader to develop a pro-union sentiment among the group. Secrecy is the greatest advantage of cellular organization. As a result, the identity of lead supporters will not be disclosed. Unions are able to garner more support from employees if the employees do not know who else is involved within the company. Once there is cooperation from enough separate groups, the union is able to present the support as a company unit and file the election petition. Furthermore, the likelihood of an employer foiling an organization campaign is diminished because the employer is unaware of the scope of the campaign.

(iii) Signs of Organization Efforts

The following are common indicators of employee organization:

- changes in the nature and frequency of employee complaints or questions about policies and benefits;
- congregation of small groups of employees in unusual places;
- increasing turnover;
- decrease in employer-employee communication;
- appearance of strangers lingering around company premises;
- increase in confrontational or argumentative attitudes among employees;
- blatant indications of unhappiness, such as comments made in exit interviews;
- anti-company graffiti;
- distribution of union authorization cards, handbills or leaflets; and
- visits by union representatives to employee homes.

During pre-election organization, employers must restrict their behavior and may not engage in the following activities:

- change the terms or conditions of employment;
- retaliate against employees for supporting the organization effort;
- interfere with Section 7 rights;
- threaten employees about union affiliation or participation;
- interrogate employees about their attitudes or activities concerning the union;

³⁹² *Town & Country Elec., Inc.*, 309 N.L.R.B. No. 181, 1992 WL 390106 (Dec. 16, 1992), *enforced by*, 106 F.3d 816 (8th Cir. 1997).

³⁹³ *E.g., Tim Foley Plumbing Serv., Inc.*, 337 N.L.R.B. 598 (2002), *enforced*, 68 F. App'x 206 (D.C. Cir. 2003); *Tejas Elec. Servs., Inc.*, 338 N.L.R.B. No. 39 (Oct. 11, 2002).

- promise employees increased salaries or benefits for not supporting the union;
- solicit grievances; or
- spy on employee union activity.

Rather than panicking at the signs of union organizing, employers should develop a plan, train supervisors, listen, and seek legal counseling.

(b) Campaign Period

The campaign period begins following the collection of authorization cards and filing of the petition for election.

(i) Campaign Tactics

1) Open Campaigning

Open campaigns are a prevalent form of election campaigns. In an open campaign, in-house committee members and all other union supporters are encouraged to publicly express their union support. Support is expressed in flyers, videotapes, stickers and other media forms. Unions will often send employers a list of their employee organizing committee and supporters.

There are many reasons unions employ the open campaign approach. Public employee demonstrations of union support have profound impacts on other employees, sometimes swaying the opinions of non-union supporters. Open campaigns also show a great deal of confidence in the union's power to protect employees from employer retaliation. Furthermore, open campaigning may deter a supporter from changing their position once they have made a public expression of support. Open campaigns also enable unions to file more unfair labor practice claims against employers. In order to be accused of discrimination, an employer must have known or should have known that the employee was a union supporter. By publicly announcing a pro-union allegiance, proving that an employer discriminated against an employee because of union participation is easier.

2) Corporate Campaign

A corporate campaign is one in which the union gains support by attacking the employer's public image. Unions focus on harming the sale of a company's services or products, in turn driving down stock prices. Unions usually attack a company's public image by creating red-herring issues. Although these are not really part of the union's agenda, they make for great pro-union publicity. Standard red-herring issues include:

- product quality;
- service quality;
- environmental concerns;
- allegations of discrimination;
- moral and ethical issues;
- safety and health issues; and
- treatment of consumers.

3) Debates

Union organizers often challenge employers or company officials to debates on issues presented by the organization effort. Campaign debates rarely benefit employers because, unlike employers, unions are free to make promises which may or may not be performed in the future. Employers are prohibited from making promises and are at a decided disadvantage. Although employers are often the perceived losers in such debates, a union will certainly capitalize on an employer's refusal to join a debate. Therefore, employers must carefully consider the advantages and disadvantages of participating in a debate.

4) Technology and Campaigning

Most major unions have professional videotapes starring well-known television personalities, who also are union members, espousing the advantages of membership. To further election efforts, unions produce customized videotapes targeting certain work groups and employers. Videos often feature employees explaining why they support the organization. The Internet is also a powerful tool in union organizing. The use of homepages, “virtual leaflets” and websites (*e.g.*, <http://www.aflcio.org>) increase a union’s power to communicate to prospective supporters.

(ii) Employment Issues that Cause Employees to Seek Union Representation

Unions often gain employee support by portraying the employer as the enemy. The following is a list of reasons why employees seek union representation:

- inconsistent supervision and favoritism;
- job insecurity;
- union promises and misrepresentations;
- ignorance about collective bargaining;
- peer pressure;
- perceived below-market wages and benefits;
- underestimation of the company; and
- sub-standard working conditions.

(iii) Ways to Avoid Union Organization Leading to an Election

Employers can take steps to avoid and respond to union organization drives. First, employers must know and listen to their employees to avoid organization. It is essential to maintain an open dialogue with all employees. Second, employees must feel as if they are treated fairly as opposed to being workers under tyrannical “power trip” employers.

Regardless of preventative measures taken by employers, union activity will occur. In such cases it is important for employers to run their own campaign utilizing some of the concepts outlined below.

Employers should:

- explain that a union is a business dependent on members’ dues and initiation fees for support. Supervisors can highlight that the union’s main motivation is increased organization membership;
- reiterate the company’s employment policy. Mention that the company is pro-employee, not anti-union;
- highlight all the benefits that employees of the company currently enjoy such as paid holidays, vacation time, bonuses and medical coverage. By pointing out current benefits, employees are more likely to see the advantages of a union-free company. Employers should not withhold benefit information, but should be sure not to promise any extra future benefits;³⁹⁴
- inform the employees that the NLRB allows unions to freely make promises. Employees should know that promises are made for the furtherance of the union, not necessarily for the betterment of the union members;
- tell employees that union membership is declining as a result of the union’s inability to satisfy member needs. Point out that union membership declines as the workforce grows;

³⁹⁴ *Beverly Enters., Inc. v. NLRB*, 139 F.3d 135 (2d Cir. 1998).

- mention that unions cannot provide job security as true job security can only come from a healthy company;
- inform employees about the negotiation process. Remind workers that if the union wins the election only the union will have the right to bargain. On the other hand, all the employer must do is bargain in “good faith.” The employer is under no obligation to honor any of the union’s requests;
- point out that union representation means that employees may be forced to strike. In the event of a strike, employees could lose wages, benefits and the right to receive unemployment insurance;
- assert that employees are currently receiving competitive compensation for their work;
- be aware of the election process, from authorization cards to the NLRB; and
- an employer should use his or her right to give a 25th-hour speech, meaning a speech summarizing the company’s position on campaign issues that must be completed 24 hours before the election begins. No “captive audience” group speeches are allowed in the final 24 hours.

(iv) Common Employer Mistakes Resulting in NLRB Charges

Similar to restrictions on employer behavior during the pre-campaign process, employers must observe some fundamental rules during the organizational campaign. Employers may not:

- prohibit employees from discussing salaries with other employees;
- discipline union activists or employee leaders for “having a bad attitude”;
- confiscate union organizing materials;
- improperly enforce the no solicitation rules; or
- unfairly enforce rules and/or grant privileges in favor of company supporters and against union supporters.

(v) Rules, Rights and Guidelines for Employers Engaged in a Union Organizing Drive

1) Solicitation Rules

Employers must evenly enforce workplace non-solicitation rules so that pro-union messages are not singled out for prohibition. An employer may ban non-employee union solicitors from entering its property provided all non-employee solicitors are treated the same, and the union has a reasonable alternative means of communicating.³⁹⁵ Regardless of the employer’s policy regarding non-employee union solicitors, employee union representatives are allowed to seek support during business hours on employer property. However, oral solicitation can be prohibited during work time. Union authorization cards are treated like solicitation and the distribution of written material must be allowed during non-working time and limited to non-working areas.

In December 2007, the NLRB established that an employer may prohibit use of its e-mail system for union solicitation while allowing use for certain other personal purposes, provided that the other personal purposes are not “communications of a similar character” to union solicitations.³⁹⁶ In *The Guard Publ’g Co.* case, the employer had an e-mail policy that barred “non-job-related solicitations.”³⁹⁷ In practice, the

³⁹⁵ *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992).

³⁹⁶ *Id.* at 11-12 (“an employer may draw the line between charitable solicitations and non-charitable solicitations . . . solicitations of a personal nature (*e.g.*, a car for sale) and solicitations for the commercial sale of a product (*e.g.*, Avon products) . . . invitations for an organization and invitations of a personal nature . . . solicitations and mere talk, and . . . business-related use and non-business-related use”).

employer “tolerated personal employee e-mail messages concerning social gatherings, jokes, baby announcements and occasional offers of sports tickets or other similar personal items,” while disciplining an employee’s use of the e-mail system for union solicitation purposes. The union filed a charge with the NLRB; the Board held that the employer could prohibit employee use of the e-mail system for union solicitation. Although the employer allowed use for certain personal purposes, there was no evidence that the employer permitted employees to use e-mail to solicit support for any group or organization. This decision is a departure from the previously widespread view that if an employer permitted employee use of its e-mail system for any personal purpose, the employer generally lost the right to prohibit any other type of personal usage.

On review, the D.C. Circuit reversed the NLRB in part, holding that the employer had discriminated in its *application* of such a policy by disciplining an employee for using company e-mail to solicit on behalf of an organization (the union) while permitting e-mail solicitations on behalf of individuals.³⁹⁸ Because the union did not seek review of the NLRB’s holding that a blanket prohibition on personal use of an employer’s e-mail system does not violate the NLRA, the court did not weigh in on this issue.³⁹⁹

Given the NLRB’s decision, employers are cautioned to apply rules prohibiting or limiting non-business use of electronic communications systems in a non-discriminatory manner.

A 2010 NLRB decision not involving union solicitation by e-mail may nonetheless be a step towards allowing such a practice. In *J & R Flooring, Inc.*, the NLRB held that respondents in NLRB cases should be required to distribute remedial notices electronically by e-mail or posting on an intranet or Internet site when that is a customary means of communicating with employees or members.⁴⁰⁰ Customarily, parties found to have committed an unfair labor practice have had to post notices to employees concerning the violations found by the NLRB, the remedies ordered, and the underlying rights of the employees. In *J. Picini Flooring*, the NLRB noted that electronic communication tools are overtaking bulletin boards (if they have not already) as the primary means of communicating a uniform message to employees and union members and the remedial notices must be adequately communicated to these parties with the tools customarily used to communicate. As more and more communication goes electronic, it remains to be seen what effect this will have on the rule announced in *The Guard Publ’g Co.* case.

2) Employer’s Rights

Employers have rights during organization drives and elections including the right to:

- campaign on behalf of the company;
- express their opinions;
- give their employees correct facts;
- listen to and answer employee questions;
- educate employees about the disadvantages of unions;
- advise employees that the company is legally barred from promising any improvements before the election;
- listen to anything an employee has to say about the union or union activity;
- tell employees about the current benefits they enjoy;
- enforce the company’s no solicitation policy;

³⁹⁷ *The Guard Publ’g Co.*, 351 N.L.R.B. No. 70, 2007 WL 4540458 (Dec. 16, 2007).

³⁹⁸ *Guard Publ’g Co. v. NLRB*, 571 F.3d 53, 59-60 (D.C. Cir. 2009).

³⁹⁹ *Id.* at 58.

⁴⁰⁰ 356 N.L.R.B. No. 9, 2010 WL 4318372 (Oct. 22, 2010).

- refute untrue statements by the union; and
- conduct business as usual.

(c) Election

(i) Hearing

The election procedure begins with the collection of authorization cards and the filing of an election petition with the NLRB. A NLRB hearing is generally scheduled within 10 to 14 days following the filing of the petition. The hearing determines:

- whether the Board has jurisdiction over the employer;
- whether the petitioning union is a labor organization;
- whether there is any current union contract covering the employees;
- whether there is any reason to delay the election;
- which individuals will not be able to participate in the voting process; and
- whether the requested voting group is appropriate.

(ii) Who Can Vote?

Typically, to be eligible to vote, an employee must work in the voting group on a regular basis, be hired before the payroll eligibility date, and be an active employee on the day of the election. Usually, the payroll eligibility date falls 30 to 45 days before the election. Supervisors are not allowed to vote in representation elections.

(iii) Determination of Bargaining Units

The NLRB is afforded great discretion in determining if a proposed bargaining unit is appropriate. However, there are three statutory limitations that influence its decisions.

- A unit may not include both professional and non-professional employees unless a majority of both professional and non-professional employees vote for inclusion in such a mixed unit;
- the Board is prohibited from establishing a unit that includes both guards and other employees; and
- the Board may not establish a bargaining unit solely on the basis of the extent to which the union has organized employees in the past.

The NLRB uses a “community of interest” test to determine the appropriateness of a bargaining unit. The Board considers numerous factors including:⁴⁰¹

- degree of functional integration within the unit;
- common supervision;
- nature of employees skills and functions;
- contact among employees;
- common work locations;

⁴⁰¹ In 2004, the NLRB overruled *M.B. Sturgis/Jeffboat Div.*, a 2000 case that allowed employees obtained from a labor supplier to be included in the same bargaining unit as the permanent employees of the employer to which they were assigned without the consent of either employer. *Oakwood Care Ctr.* reinstated the principle that involuntary combinations of temporary workers and regular employees - both of whom work solely for the user employer – constitute inappropriate bargaining units. See *Oakwood Care Ctr.*, 343 N.L.R.B. No. 76, 2004 WL 2681621 (Nov. 19, 2004), *overruling M.B. Sturgis/Jeffboat Div.*, 331 N.L.R.B. No. 173, 2000 WL 1274024 (Aug. 25, 2000).

- common working conditions; and
- benefits and similar hours and shifts.

After the hearing, both parties may file briefs. Following receipt of the briefs, the Regional Director of the NLRB will either dismiss the petition or direct an election. A directed election will be scheduled within 30 days of the Regional Director's decision. Once the election is directed, the Regional office will send the employer copies of the notice of election for posting. The notice provides employees with information concerning voter eligibility, as well as indicating the time and place of the election. Notices must be posted in obvious places and an affidavit of posting must be signed and returned to the Regional Director. Failure to post the notice three days prior to the election can result in overturning the election.

(iv) *Excelsior* List

The NLRB requires an employer to provide it with a list of the full names and home addresses of all eligible employees in the proposed voting unit.⁴⁰² Upon receipt, the NLRB gives the list to the union so they may contact employees. The employer must furnish copies of the list to the NLRB within seven days of either the decision and direction of election or the approval of a stipulation. Failure to submit the list on time or in its entirety can result in an overturned election if the employer prevails.

(v) Election Day

On election day, employees vote by secret ballot. The ballot asks, "do you wish to be represented by [the union] for purposes of collective bargaining?" A *yes* answer signifies a vote for union representation, a *no* signifies a vote against union representation. Employees have the option to vote for *neither* or *no union* if more than one union appears on the ballot.

The NLRB determines the location of the polling place. Usually, the voting takes place at the employer's facility. Both the union and the employer are allowed observers. Observers must be non-supervisory employees and do not need to be part of the voting unit.

When the election is over and the polls have been closed, representatives of the employer, the union and employees are allowed to witness the counting of the ballots.⁴⁰³ In order to win, the union must win the majority of valid votes, not a majority of eligible voters. In the case of a tie, employers are considered victorious. Any inconsistency in the times or location of voting (*e.g.*, closing the polls earlier than advertised or holding the voting at a different location) may result in the election being set aside.

(vi) Losing the Right to Hold an Election

Inappropriate conduct sufficient to set aside an election can be on the part of the union or the employer.

Under certain circumstances, employers can lose the right to an election or have an election overturned as a result of their behavior. Employers are not allowed to change, or make promises, regarding conditions of employment (*e.g.*, wages, hours or working conditions) during an election period.⁴⁰⁴ Offering new incentives, such as bonuses or extra vacation, may invalidate an election unless the employer can prove that the incentives were given for reasons other than influencing the upcoming election. Employers are not allowed to review authorization cards and they may not interrogate employees regarding their union views. Generally, employers may not photograph employees engaged in union activities. Finally, an election can be overruled if an employer engages in activities that contaminate the "laboratory conditions" of an election, meaning, conditions necessary for holding a fair election.⁴⁰⁵ Activities which may taint the conditions of an election include:

⁴⁰² *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236 (1966).

⁴⁰³ *Family Serv. Agency, San Francisco*, 331 N.L.R.B. No. 103, 2000 WL 1058929 (Jul. 24, 2000).

⁴⁰⁴ *See, e.g., E. Bay Auto. Council v. NLRB*, 483 F.3d 628 (9th Cir. 2007) (employer was properly ordered to bargain with a union after illegally providing unilateral pay increases and promotions to employees, thus tainting petition that resulted in the company's withdrawal of union recognition).

- supervisors attending union meetings or engaging in other forms of surveillance;
- supervisors making campaign visits to employee homes;
- threatening employees by telling them that unionization will lead to the company's demise; or
- asking employees to wear anti-union buttons, hats, stickers etc.

In addition, the NLRB will usually overturn an election if either party's campaign propaganda was clearly made to exacerbate or inflame racial tension. Unions and employers may not give election speeches within 24 hours of an election. Additionally, prolonged conversations in the voting area by either party may be grounds for setting aside an election.

SECTION 3.4 COLLECTIVE BARGAINING

(a) Duty to Bargain in Good Faith

If a union wins an election and becomes the certified bargaining representative, the employer must bargain in "good faith" to avoid committing an unfair labor practice.⁴⁰⁶

The main purpose of a union is to provide employees with representation for collective bargaining purposes. The NLRA constitutes the legal foundation of the federal collective bargaining system. Although there are very few definitive rules in the area of collective bargaining, the actions of both parties are regulated by a nebulous and flexible standard of "good faith." The NLRA imposes parallel duties on employers and unions to engage in good faith collective bargaining. The standard of good faith is ever changing and is highly dependent on the factual situation of a particular case. Section 8(d) of the NLRA states that to "bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment. . . ."⁴⁰⁷ This good faith duty extends to the creation and execution of written contracts that incorporate the agreements reached between the two parties. Although there is an obligation to bargain in good faith, neither party has a duty to agree to a proposal or make any unwanted concessions.⁴⁰⁸ However, the Board regularly looks at the willingness to make concessions as evidence of good faith negotiations.

The Board infers bad faith bargaining by considering the totality of the bargaining circumstances.⁴⁰⁹ Individual incidents may not constitute bad faith bargaining. However, a combination of multiple instances could amount to bad faith.⁴¹⁰ There are a limited number of examples of automatic violations, including: bargaining directly with employees (behind the union's back); refusing to sign a written agreement reached between the two parties through collective bargaining; refusing to meet at reasonable times; and surface bargaining, meaning merely going through the motions of negotiations without the intention of reaching an agreement.⁴¹¹

⁴⁰⁵ *Gen. Shoe Corp.*, 77 N.L.R.B. 124 (1948), *enforced*, 192 F.2d 504 (6th Cir. 1951), *cert. denied*, 343 U.S. 904 (1952) (court determined election should not take place in "an atmosphere calculated to prevent a free and untrammled choice by employees.").

⁴⁰⁶ In 2006, a California court held that an employer must recognize and bargain with a union that won an affiliation vote during the time the NLRB considered pending unfair labor practice complaints against the employer. *See Reichard v. Foster Poultry Farms*, 425 F. Supp. 2d 1090, 1105 (E.D. Cal. 2006).

⁴⁰⁷ 29 U.S.C. § 158(d).

⁴⁰⁸ *Id.*

⁴⁰⁹ *E. Maine Med. Ctr. v. NLRB*, 658 F.2d 1 (1st Cir. 1981).

⁴¹⁰ *NLRB v. Cable Vision, Inc.*, 660 F.2d 1 (1st Cir. 1981).

⁴¹¹ *Sparks Nugget, Inc. v. NLRB*, 968 F.2d 991 (9th Cir. 1992).

(b) Impasse

The Board recognizes that there are circumstances, following extensive good faith negotiations, under which the parties cannot reach an agreement.⁴¹² This situation is called an impasse. Under the NLRA, in situations of impasse, the management is free to advance its economic objectives by unilaterally implementing its final offer. Basically, an employer can unilaterally change company wages, hours and working conditions to reflect the final offer presented to the union during negotiations.

(c) Mandatory Bargaining Subjects

The NLRB defines three types of bargaining subjects: (1) illegal; (2) mandatory; and (3) permissive. Mandatory subjects of bargaining are the most important for employers. Mandatory subjects are those upon which either party can insist to the point of impasse. A unilateral change regarding matters of mandatory subjects of bargaining, without first reaching an impasse, constitutes an automatic unfair labor practice.⁴¹³

The Board is primarily responsible for determining what is considered a mandatory bargaining subject.⁴¹⁴ Section 9(a) and 8(d) of the NLRA lay out the general mandatory subjects of bargaining as, “rates of pay, wages, hours of employment, or other conditions of employment.”⁴¹⁵ Other mandatory subjects of bargaining include: mandatory drug and alcohol testing of current employees; plant rules concerning dress code; subcontracting; parking regulations; lunch breaks; absenteeism; job safety standards; retirement and pension provisions; seniority system; vacations and holidays; performance of union member work by persons not in the union; and, all other business operations impacting employees.⁴¹⁶ Business operations impacting employees have been held to include: hidden cameras in the work place;⁴¹⁷ plant relocation,⁴¹⁸ subcontracting;⁴¹⁹ the sale or transfer of stock;⁴²⁰ and, appointment of successor employees.⁴²¹ While entrepreneurial decisions such as sale of the company and relocation may not be mandatory subjects, an employer will likely be required to bargain over the effect these decisions have on employees. Regardless of the degree to which employers are impacted, all business operations which affect employees are mandatory bargaining subjects.

SECTION 3.5 TYPICAL CONTRACT PROVISIONS

(a) Management Rights Clauses

A “management rights” clause enumerates rights that the employer retains as fundamental to its ability to manage and operate the company. Common examples of such rights include: the right to direct the work force; the right to dictate company policy and workplace rules; and the right to control the method of production. Additionally, many management rights clauses grant the employer the right to determine employee duties, create new job classifications, decide to relocate or close the plant, and make other internal changes in operations (*e.g.*, modifications in technology). Generally, a management rights clause is contained in a single section of the contract. However, management rights may be interspersed throughout

⁴¹² *Fetzer Television, Inc. v. NLRB*, 317 F.2d 420 (6th Cir. 1963).

⁴¹³ *Stone Boat Yard v. NLRB*, 715 F.2d 441 (9th Cir. 1983).

⁴¹⁴ *Ford Motor Co. v. NLRB*, 441 U.S. 488 (1979).

⁴¹⁵ 29 U.S.C. §§ 158-59.

⁴¹⁶ *Johnson-Bateman Co.*, 295 N.L.R.B. 180 (1989).

⁴¹⁷ *Colgate Palmolive Co.*, 323 N.L.R.B. 515 (1997).

⁴¹⁸ *Dubuque Packing Co.*, 303 N.L.R.B. 386 (1991).

⁴¹⁹ *Town and Country Mfg. Co.*, 136 N.L.R.B. 1022 (1962), *enforced*, 316 F.2d 846 (5th Cir. 1963).

⁴²⁰ *Topinka's Country House, Inc.*, 235 N.L.R.B. 72 (1978), *enforced*, 624 F.2d 770 (6th Cir. 1980).

⁴²¹ *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987).

the contract. For example, the retention of a particular right regarding wage determinations should logically be included in the wage provision of the contract.

While employers are normally prohibited from unilaterally modifying the terms and conditions of employment, if a management rights clause expressly grants the employer the right to act in a certain area, then there is no longer any obligation to bargain.⁴²² The theory is that unions waive their right to bargain for certain contractual provisions by agreeing to management rights clauses as part of the bargained-for contract.

(b) Union Security Clauses

A “union security” clause is a common contract provision. It usually explains the form of union protection that the employees negotiated. Examples include:

- “closed shop” which requires the employer to hire only union members;
- “union shop” under which individuals do not have to be union members to be hired, but are required to join the union after a designated grace period;
- “agency shop” which does not mandate union membership, but requires all employees to pay a “representation fee” to cover their share of the costs of union representation; and
- “maintenance of membership” under which an employee cannot be required to join a union, but once the employee chooses to join, he or she must retain his or her membership for the duration of the agreement.

While it is lawful to require all employees covered by a union contract to be union members in good standing, employees have the right to object to their dues being spent on matters that do not go directly toward representing them (*e.g.*, political contributions).⁴²³ The *Marquez v. Screen Actors Guild, Inc.*⁴²⁴ opinion was a major victory for unions with regard to union security clauses. The Supreme Court interpreted the “membership” requirement to mean the payment of union dues and fees that go toward contract administration, not required participation in union activities.⁴²⁵

The legality of union security clauses is subject to applicable state laws. A number of states have enacted “right to work” legislation which prohibit union security clauses and grant all employees the legal right to accept or reject union membership. Conversely, state laws cannot expand federal law.⁴²⁶ Neither Washington or California have a “right to work” statute.

(c) Merit Pay and Incentive Clauses

As an alternative to the traditional lock-step wage increases, employers are increasingly exploring merit pay systems as a way to motivate employees and, in turn, increase productivity. Unions are largely resistant to such proposals, viewing them as a way to undermine the power of unions and as potentially adversely affecting more senior employees.

Both the Supreme Court and the NLRB have determined that, under certain conditions, merit increases are subject to mandatory bargaining.⁴²⁷

⁴²² *Gen. Controls Co.*, 88 N.L.R.B. 1341 (1950).

⁴²³ *Comm'n Workers of Am. v. Beck*, 487 U.S. 735, *cert. denied*, 487 U.S. 1233 (1988).

⁴²⁴ 525 U.S. 33 (1998).

⁴²⁵ *Id.*

⁴²⁶ *See Local Union No. 435, IBT (Mercury Warehouse & Delivery Servs.)*, 327 N.L.R.B. 458, 460 (1999) (“[w]hile the States are thus free under Section 14(b) [of the NLRA] to prohibit union-security arrangements, and may place restrictive conditions precedent on enforcement of union-security arrangements as does the State of Colorado, Section 14(b) [of the NLRA] does not permit the States to sanction a more expansive union-security arrangement than permitted by Federal law...”).

⁴²⁷ *NLRB v. Berkeley Mach. Works*, 189 F.2d 904 (4th Cir. 1951); *NLRB v. J.H. Allison & Co.*, 165 F.2d 766 (6th Cir.), *cert. denied*, 335 U.S. 814 (1948); *NLRB v. Katz*, 369 U.S. 736 (1962).

The legitimacy of merit pay systems is uncertain. The NLRB and the courts are somewhat at odds in this regard, with the NLRB consistently favoring unions on the issue. Specifically, the Board and the courts are unclear as to whether an employer can unilaterally implement discretionary merit pay following an impasse in bargaining. In *Colorado-Ute Elec. Ass'n*, the Board found the employer in violation of Section 8(a)(5) of the NLRA because the timing and amounts of the merit pay had not been the subject of bargaining.⁴²⁸ The Tenth Circuit rejected the Board's decision, finding that no precedent existed requiring employers to do anything more than bargain in good faith about the merit system in general. In *McClatchy Newspapers*, a later case, the Board again found the merit pay system in violation basing its decision on a different rationale. The Board held that completely excluding the union from the determination of wages was inherently destructive to the fundamental principles of collective bargaining. The D.C. Circuit accepted the Board's reasoning and upheld the decision.⁴²⁹

Confusion regarding merit pay systems leaves employers with three options: (1) continue with lock-step wage increases; (2) carefully construct a merit pay system which includes a minimum pay for all job classifications, provisions for union representation in an appeal process, and bargained-for employer right to grant merit increase, timing schedule and criteria for increase; or (3) bargain for a provision in the contract that gives management the discretion to implement a merit pay system, subject to a wage floor.

(d) Most-Favored-Nation Clauses

"Most-favored-nation clauses" are aimed at equalizing all contracts negotiated by the same union. The object is to prevent competitors in a particular industry from using more favorable contract terms to their advantage. A most-favored-nation clause refers directly to provisions in other contracts arrived at through collective bargaining by the same union.

As a general rule, most-favored-nation clauses either specify that more favorable terms in another contract are automatically incorporated into the agreement, or that upon finding more favorable terms in another contract, an employer is entitled to incorporate them. Common examples of phrases in such a provision include:

- language absolving the employer of any duty to pay its employees more than that paid to employees under a like contract for the same job classification;
- provisions mandating that if lower wages or lesser compensation is found in another contract, it shall be called to the attention of the union and the contract shall be amended immediately;
- charge that more favorable terms shall be made immediately available to signatory employers; and
- guideline that if the union does not correct the discrepancy between the contracts within a given period of time, the more favorable terms are automatically deemed part of all contracts.

(e) Back-Loaded Contracts

Since the mid-1990's, an increasing number of employers are negotiating for back-loaded contracts as opposed to front-loaded contracts. A back-loaded contract is a multi-year labor agreement in which the greater increases in wages or benefits are weighted toward the final year. In such agreements, the wage increases in the early years often fall below inflation. The rationale for back-loaded contracts is the simple reality that pay increases cost less if delayed.

(f) Lump-Sum Payments

Under a lump-sum payment agreement, employees receive a certain amount of compensation at one particular time while actual wages remain the same. Employers often bargain for such a provision as an

⁴²⁸ *Colorado-Ute Elec. Ass'n*, 295 N.L.R.B. 607 (1989), *enforcement denied*, 939 F.2d 1392 (10th Cir. 1991), *cert. denied*, 504 U.S. 955 (1992).

⁴²⁹ *McClatchy Newspapers*, 321 N.L.R.B. 1386 (1996), *enforced*, 131 F.3d 1026 (D.C. Cir. 1997), *cert. denied*, 524 U.S. 937 (1998).

alternative to wage scale increases. Lump-sum payments also are used as signing bonuses. The advantage of a lump-sum system is that it reduces future costs because the lump-sum is a one-time transaction. Therefore, the amount received is not considered to be wages for the purposes of calculating overtime compensation or benefits, such as pension and vacation. Lump-sum payments also can be used as a mechanism for expediting contract negotiations, similar to the concept of a signing bonus.

There is some debate over the validity of using lump-sum payments as a means to avoid higher wage calculations for overtime purposes. The Department of Labor (“DOL”) has stated that certain types of lump-sum payments should be included in the base pay rate that is used to calculate overtime payments. However, the Third Circuit disagreed in *Minizga v. Stone Container Corp.*, opining that lump-sum payments are not compensation for hours worked and, therefore, should not be included when calculating the regular hourly wage for purposes of overtime compensation.⁴³⁰ The Fair Labor Standards Act (“FLSA”) holds that the application of lump-sum payments in this context is a fact-specific determination that depends on the specific language of the contract in question.⁴³¹

(g) Cost-of-Living Adjustments

Cost-of-living adjustments (“COLA”) are contract provisions that automatically tie wage changes to changes in the Consumer Price Index (“CPI”). COLA’s were never extremely widespread, covering only sixty-one percent of the workers at their peak in 1976.⁴³² COLA’s have generally been viewed as a means to help prevent the erosion of the purchasing power of wages from price increases over the life of the agreement. The demand for COLA clauses continue to be less common as more pressing demands are generally present.

(h) No-Strike and No-Lockout Pledges

A vast majority of contracts contain either a no-strike or no-lockout pledge, or both. No-strike provisions are generally conditional and are more common in non-manufacturing industries. Although the presence of a no-strike provision means that the union agreed not to strike, there are conditions under which a strike is allowed. A strike is permissible during the collective bargaining process if any precondition is met, including: exhaustion of the grievance process; employer action in violation of an arbitration award; employer action(s) not in compliance with the collective bargaining agreement; or employer refusal to arbitrate the dispute.

Many contracts include a provision that specifically outlines union liability in the event of a violation of the no-strike pledge. A provision may include some affirmative union duty to prevent the strike or bring an end to the strike. An affirmative duty may include requiring union leaders to attempt to persuade employees to return to work or to publicly disavow the strike. Additionally, liability may be imposed on any union officer who encourages or initiates the strike.

The flip-side of the conditional no-strike pledge is the no-lockout pledge. Similar to the no-strike pledge, a lockout is permissible despite a no-lockout pledge if any of a number of preconditions are met. Preconditions include: exhaustion of the grievance process; union action in violation of an arbitration award; union action(s) not in compliance with the collective bargaining agreement; or union refusal to arbitrate the dispute.

⁴³⁰ *Minizga v. Stone Container Corp.*, 842 F.2d 1456 (3d Cir.), cert. denied, 488 U.S. 909 (1988).

⁴³¹ 29 U.S.C. § 207.

⁴³² Janice Devine, Bureau of Labor Statistics, *Cost-of-Living Clauses: Trends and Current* (Dec. 1996).

SECTION 3.6 ECONOMIC WEAPONS DURING NEGOTIATIONS

When bargaining fails to result in an agreement, unions and employers often resort to economic weapons in an attempt to force their position. Common economic tactics are described below.

(a) Work Stoppages

(i) Contract Campaigns (aka In-Plant Actions)

The contract campaign, also known as an in-plant or on-the-job action, is an increasingly popular mechanism that avoids replacement, yet pressures employers. These campaigns tend to be heavily promoted by unions. For example, the American Federation of Labor and Congress of Industrial Organizations (“AFL-CIO”) published a handbook for local union officials urging them to keep workers on the job while putting pressure on employers from within.

Contract campaigns can take many forms including: rallies on company property; wearing t-shirts, buttons, or armbands in support of union causes; media campaigns; and consumer boycotts. The right to embark on these campaigns was enunciated by the Sixth Circuit in *NLRB v. Mead Corp.* when the court held that an employer violated Section 7 of the NLRA by refusing to allow employees to wear buttons and t-shirts protesting the terms of their employment.⁴³³

Most in-plant actions have a “work to rule” component which entails applying pressure on the employer by reducing production rather than striking. The theory is that certain activities can disrupt the workplace to the point that employers must concede to union demands without a formal strike. Specific mechanisms may include refusal to work overtime hours or refusal to do any task that is arguably outside the job description. Minimization of productivity or decreased use of timesaving techniques developed over a period of time on the job also constitute as “work to rule” tactics.

The NLRB dealt a blow to corporate campaigns in *Cent. Ill. Pub. Serv. Co.*, holding that a lock-out in response to “inside game” tactics was legal. That decision created an avenue for employers to combat “work to rule” type actions, so long as the employer has a “legitimate or substantial business interest” justifying the lock-out.⁴³⁴

(ii) Sick-Outs

“Sick-outs,” also known as “blue flu,” are a mechanism to pressure employers. A “sick-out” is an orchestrated effort when all, or at least a substantial portion of, employees call in sick and do not report to work on a particular day or over a series of days. This tactic is often used when employees do not have a right to strike. The most prominent case involving a “sick-out” occurred in 1999 in which American Airline pilots organized a successful, week-long “sick-out” in protest of the airline’s acquisition of Reno Air.⁴³⁵

⁴³³ *NLRB v. Mead Corp.*, 73 F.3d 74 (6th Cir. 1996).

⁴³⁴ *Cent. Ill. Pub. Serv. Co.*, 326 N.L.R.B. 928 (1998), *cert. denied*, 531 U.S. 1051 (2000).

⁴³⁵ Recently, a federal judge issued a preliminary injunction against a branch of the Air Line Pilots Association after finding that the union encouraged a sick-out at United Airlines in violation of the Railway Labor Act. United Airlines sued the union and four individual members on July 30, 2008, blaming the work stoppage for the cancellation of 329 flights that cost about \$8 million in revenue. *United Airlines, Inc. v. Air Line Pilots Ass’n, Int’l*, No. 1:08-cv-04317, 2008 WL 4936847 (N.D. Ill., Nov. 17, 2008); Department of Motor Vehicle workers shut down at least one office in Los Angeles County on August 16, 2008 in a staged sick-out. Molly Hennessy-Fiske, *DMV Workers’ Sick-Out Shuts One Office, Causes Delays*, Los Angeles Times, Aug. 16, 2008.

(iii) Corporate Campaigns

A corporate campaign can be any union action outside the traditional collective bargaining and organizing arena. The term can be used to refer to activities such as litigation, public pressure tactics (*e.g.*, the media and public dissemination of information) or shareholder activity.

Funding lawsuits against employers is a widely used corporate campaign tactic. For example, in *52nd St. Hotel Ass'n*, the NLRB found a union-funded FLSA claim against the employer that was filed just eight days before a representation election legitimate.⁴³⁶ However, that decision contradicted a Sixth Circuit holding that refused to enforce a bargaining order after the union filed a Racketeer Influenced and Corrupt Organizations Act (“RICO”) claim against the employer during the election period.⁴³⁷ The conflicting holdings create questionable parameters within which a union can lawfully fund lawsuits as a campaign tactic.

Union funding of lawsuits can be successful, but also can backfire. In *Fruend Baking Co. v. NLRB*, the D.C. Circuit found that a union-funded lawsuit filed during the election period was in violation of the rule against unions giving employees special benefits or gifts during the election period. In that case, the union filed a class action lawsuit against the employer one week before the union election alleging non-payment of overtime. The union won the election at which point the employer filed a complaint.⁴³⁸

Faced with a union-funded lawsuit, employers do have recourse and are potentially entitled to relief. Possible grounds for relief include: the NLRA, RICO, defamation claims, and criminal charges for threats or other malicious conduct.

(b) Strikes

Strikes protected under the NLRA fall into two categories: (1) unfair labor practice strikes; and (2) economic strikes. Both types of strikes are work stoppages by employees intended to put pressure on employers to concede to union bargaining demands.

Unfair labor practice strikes are initiated in whole or in part as a response to an unfair labor practice committed by the employer. For a strike to be deemed an unfair labor practice strike, the unfair labor practice need only be a contributing cause of the strike, not the sole cause.

A strike in violation of a no-strike pledge is only permissible if an unfair labor practice exists. Employees engaging in such a strike are entitled to reinstatement of their employment at the conclusion of the strike, even if the employer hired permanent replacement workers. However, if a striker is found guilty of strike misconduct, the striker has no right to reinstatement.

An economic strike is a work stoppage due to a conflict over issues that must be resolved through collective bargaining such as wages or working conditions. Economic strikes are aimed at pressuring an employer to concede to the economic demands of the union.

An economic strike can be converted into an unfair labor practice strike by an employer’s subsequent commission of an unfair labor practice. An economic strike is protected under Section 7 of the NLRA. Therefore, it is an unfair labor practice for an employer to discharge an employee for participating in an economic strike. However, an employer may lawfully refuse a request for reinstatement at the conclusion of an economic strike. In doing so, an employer must be mindful of the general obligation of employers to reinstate economic strikers if a vacancy still exists in his or her position. An employer must not discriminate between union and non-union employees and must grant equal benefits to all workers. As in

⁴³⁶ *52nd St. Hotel Ass'n*, 321 N.L.R.B. 624 (1996).

⁴³⁷ *Nestle Ice Cream Co. v. NLRB*, 46 F.3d 578 (6th Cir. 1995).

⁴³⁸ *Fruend Baking Co. v. NLRB*, 165 F.3d 928 (D.C. Cir. 1999), *decision supplemented by*, 330 N.L.R.B. No. 13, 1999 WL 1046776 (Nov. 16, 1999).

the case of unfair labor practice strikes, if a striker is guilty of unprotected misconduct during the strike, the employer is under no obligation to reinstate the worker.

If the aim of the strike is generally related to the betterment of working conditions, then the strike will typically be found valid. However, a strike in violation of the NLRA, a strike in breach of contract, or a strike aimed at circumventing the exclusive bargaining representative is not protected. For example, a strike aimed at forcing an employer to assign certain work assignments to certain employees is forbidden by Section 8(b)(4)(D) of the NLRA. Additionally, a strike for recognition in the face of another union's certification is prohibited by the NLRA. The NLRA establishes procedural requirements that must be followed when conducting a strike, such as notice. If the guidelines are not properly adhered to, a strike that would otherwise be protected is no longer legitimate under the NLRA.

Strikes in breach of contract are those carried out despite a no-strike pledge in the collective bargaining agreement. In *Mastro Plastics Corp. v. NLRB*, the Supreme Court held that a general no-strike pledge does not preclude employees from striking in response to an unfair labor practice.⁴³⁹ An unprotected walk-out or strike in the face of a no-strike pledge may gain protected status if the employer condones the activity by allowing the strikers to return to work with a promise of no reprisal. Finally, picketing, handbilling, or other concerted activity by a group of minority employees seeking to bargain directly with an employer rather than through the collective bargaining process is unprotected because doing so circumvents their elected union representative.

Strikes and other economic actions usually involve picketing. While workers generally have the right to picket, "mass or coercive" picketing, as opposed to "informational" picketing, may be a violation of state law subject to state police powers.⁴⁴⁰ The distinction between lawful and unlawful picketing is not always a bright line. However, when the purpose becomes to coerce, rather than inform, or the numbers of picketers becomes so large that the situation is unsafe (e.g., blocking traffic), the picketing will likely be viewed as unlawful.⁴⁴¹ Employers subject to mass or coercive picketing have the right to seek an injunction in state court prohibiting unlawful picketing.

(c) Lock-Outs

Employees use strikes to put pressure on employers, while employers may lock-out employees to similarly pressure employees. A lock-out is a situation in which an employer refuses to allow employees to work. The NLRB has held that a lock-out is legitimate as long as there is no evidence of anti-union motivation behind it.⁴⁴²

Lock-outs can be powerful pre-emptive and reactive tools. Lock-outs enable employers to place pressure on unions contemplating any type of work-stoppage. Employers who find themselves at an impasse may choose a lock-out rather than suffering the inevitable economic loss associated with work-stoppages in any form.

A lock-out also can be used as a preemptive measure. The D.C. Circuit held in *Boilermakers Local No. 374 v. NLRB*, that if an employer has a legitimate and justifiable business interest for doing so, it is permissible to hire temporary workers in order to remain in business during a lock-out.⁴⁴³ An employer also may

⁴³⁹ *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956).

⁴⁴⁰ *San Diego Bldg. Trades v. Garmon*, 359 U.S. 236 (1959); *Swenson v. Seattle Labor Council*, 27 Wn.2d 193 (1947); *Kaplan's Fruit & Produce Co. v. Superior Court of L.A.*, 26 Cal. 3d 60 (1979).

⁴⁴¹ A recent California case upheld state law barring injunctions for picketing near store entrance. *Ralphs Grocery v. UFCW*, 55 Cal. 4th 1083 (2012).

⁴⁴² *Int'l Union of Operating Eng'rs v. NLRB*, 829 F.2d 458, 462 (3d Cir. 1987).

⁴⁴³ *Boilermakers Local No. 374 v. NLRB*, 852 F.2d 1353 (D.C. Cir. 1988).

permanently subcontract for work during a lock-out.⁴⁴⁴ However, a mere threat of a lock-out as a bargaining tool is a violation of Section 7 of the NLRA.

(d) Replacement Workers

The rights of employers to permanently replace striking workers stems from a 1938 Supreme Court case, *NLRB v. Mackay Radio & Tel. Co.*, in which the Court held that Section 13 of the NLRA did not mean that an employer lost its right to stay in business by filling jobs left by strikers. Additionally, an employer was not required to discharge replacement workers at the conclusion of the strike.⁴⁴⁵ However, there are limitations on the right of an employer to permanently replace striking employees. One issue can be state or local “anti-strikebreaker” laws which ostensibly prohibit recruitment or transport of replacement workers. These laws, including Washington’s strikebreaker statute, are unenforceable because they are preempted by the NLRA, the federal law that allows strike replacements.⁴⁴⁶

A real limitation on the right to replace striking employees was articulated by the NLRB and confirmed by the Seventh Circuit in *Laidlaw Corp.* Therein, the Board held that economic strikers who unconditionally apply for reinstatement following a strike: (1) remain employees; and (2) are entitled to full reinstatement, unless they secured regular and equivalent employment elsewhere in the interim.⁴⁴⁷

Designation of replacement workers as “permanent” may pose considerable problems for employers. Unions may retaliate against the designation and inflate the conflict. Individual strikers may personally retaliate with misconduct that can be extremely troublesome. Additionally, the designation may open the door for striking workers to obtain unemployment compensation when ordinarily such a benefit is not available to strikers during the strike. In *Bridgestone/Firestone, Inc. v. Employment Appeal Bd.*, the Iowa Supreme Court upheld the grant of unemployment benefits to over 500 employees who were permanently replaced while on strike.⁴⁴⁸

In Washington, individuals who are unemployed due to a strike or lockout are disqualified for unemployment benefits. However, they may re-qualify if they can show they are not “participating or interested” in the strike.⁴⁴⁹ This means that workers actually on strike will not receive benefits, but others who lose work due to the disruption in operations will qualify for unemployment benefits if they do not stand to benefit from the strike.

The U.S. Supreme Court significantly broadened the rights of replacement workers in the 1983 case *Belknap, Inc. v. Hale*,⁴⁵⁰ in which the Court stated that as a general rule, employers hiring replacement workers do not have a duty to keep them employed following the conclusion of a strike. However, if replacement workers are hired as “permanent replacements,” they are not precluded from bringing a breach of contract claim for violation of the promise of permanent employment.⁴⁵¹ Therefore, if an employer informs replacement workers that they are “permanent employees” and then fires them to re-hire striking workers, replacement workers have legitimate grounds to bring a breach of contract suit against the employer.

U.S. Supreme Court and NLRB decisions have granted employers increased strength during a strike. In *Trans World Airlines, Inc. v. Ind. Fed’n of Flight Attendants*, the Court held that it was lawful for an employer to

⁴⁴⁴ *Int'l Paper Co. v. NLRB*, 115 F.3d 1045 (D.C. Cir. 1997).

⁴⁴⁵ *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938).

⁴⁴⁶ *State of Wash. v. Labor Ready, Inc.*, 103 Wn. App. 775 (2004).

⁴⁴⁷ *Laidlaw Corp.*, 171 N.L.R.B. 1366, 1369 (1968), *enforced*, 414 F.2d 99 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970).

⁴⁴⁸ *Bridgestone/Firestone, Inc. v. Emp't Appeal Bd.*, 570 N.W.2d 85 (Iowa 1997).

⁴⁴⁹ RCW 50.20.090(2).

⁴⁵⁰ 463 U.S. 491 (1983).

⁴⁵¹ *Id.*

refuse to discharge employees who crossed the picket line even when more senior employees applied for reinstatement to their position after the strike.⁴⁵² The Court stated, “we see no reason why those employees who chose not to gamble on the success of the strike should suffer the consequences when the gamble proves unsuccessful.”⁴⁵³

The Seventh Circuit affirmed the NLRB decision in *Aqua-Chem, Inc.*, expanding the rights of employers to use replacement workers to combat the strength of a strike.⁴⁵⁴ The court upheld the NLRB’s finding that an employer has the right to recall a temporarily laid-off replacement worker before economic strikers, even if the strikers retain recall rights. To challenge such an act, a union must prove that the replacement workers had no reasonable expectation of recall and that the lay-off was not temporary.⁴⁵⁵

The line between unfair labor practices and strategic management is often blurred. In *Pirelli Cable Corp. v. NLRB*, the Fourth Circuit found lawful a letter written to employees notifying them that if they went on strike for economic reasons, they could be replaced by permanent replacement workers. The employees went on strike and the employer refused to rehire them. The court reasoned that the letter did not constitute an unfair labor practice because it merely explained the rights of the employer when employees strike.⁴⁵⁶

When interpreting an employer’s rights under *Pirelli*, it is important to note the NLRB decision in *Am. Linen Supply Co.*, as upheld by the Eighth Circuit. In *Am. Linen Supply Co.*, the NLRB held that the employer violated Sections 8(a)(1) and 8(a)(3) of the NLRA by sending a letter to employees notifying them that if they did not return to work in 10 minutes they would be permanently replaced, and then, when employees did not return to work, informing them that they had been permanently replaced. The NLRB found the threat unlawful and the replacement invalid because the false replacement claim had not been corrected or retracted prior to the hiring of the replacement workers.⁴⁵⁷

The Supreme Court decision in *Pattern Makers’ League v. NLRB*, changed a long-standing union rule that unions could punish members for crossing a picket line. The Court stated that preventing union resignations during a strike or lock-out was contrary to the rights guaranteed in Section 7 of the NLRA, specifically the right to refrain from participation in a concerted activity. Therefore, once a union member resigns from the union, the union no longer has any control to prevent the employee from crossing a picket line.⁴⁵⁸ *Pattern Makers’* makes it very difficult for unions to sustain lengthy strikes in the face of significant member resignations. Consequently, employers should be forthright in fulfilling their right to inform employees of their resignation rights. However, an employer must never encourage or actively assist in any union resignation.

In *United Aircraft Corp.*, the NLRB granted unions the right to waive or modify the rights of un-reinstated strikers. The settlement agreement in dispute provided for the reinstatement of workers as work became available, but limited that right to a duration of four and a half months after the settlement of the strike. The rationale behind the decision was that an agreement such as this, bargained for in good faith, encourages collective bargaining as a means of settling labor disputes.⁴⁵⁹ The NLRB further held, in *Gem City Ready Mix Co.*, that a union may waive full pre-strike seniority as a means to end the strike.⁴⁶⁰

⁴⁵² 489 U.S. 426 (1989).

⁴⁵³ *Id.* at 438.

⁴⁵⁴ *Aqua-Chem, Inc.*, 288 N.L.R.B. 1108 (1988), *enforced*, 910 F.2d 1487 (7th Cir. 1990), *cert. denied*, 501 U.S. 1238 (1991).

⁴⁵⁵ *Id.*

⁴⁵⁶ *Pirelli Cable Corp. v. NLRB*, 141 F.3d 503 (4th Cir. 1998).

⁴⁵⁷ *Am. Linen Supply Co.*, 297 N.L.R.B. 137 (1989), *enforced*, 945 F.2d 1428 (8th Cir. 1991).

⁴⁵⁸ *Pattern Makers’ League v. NLRB*, 473 U.S. 95 (1985).

⁴⁵⁹ *United Aircraft Corp.*, 192 N.L.R.B. 382 (1971), *enforced in part sub. nom.*, *Int’l Ass’n of Machinists & Aerospace Workers v. United Aircraft Corp.*, 534 F.2d 422 (2d Cir. 1975), *cert. denied*, 429 U.S. 825 (1976).

⁴⁶⁰ *Gem City Ready Mix Co.*, 270 N.L.R.B. 1260 (1984).

Employers have the right to keep information regarding replacement workers confidential and unions do not have the right to access any such information. In *Brown & Sharpe Mfg. Co.*, the NLRB held that an employer did not violate the NLRA by refusing to release the names of replacement workers.⁴⁶¹ The NLRB noted that the widespread violence directed against the strike was reason to believe that such violence could be directed at replacement workers.⁴⁶²

The NLRB and the courts have yet to issue any affirmative statement on the issue of providing “perks” to workers and denying benefits to striking workers. Absent substantive case law in this regard, it remains uncertain to what extent such actions are legitimate. In 1996, the NLRB issued a complaint against Caterpillar, Inc., after the company gave benefits, such as free meals, t-shirts, and flu shots to non-striking employees. The NLRB alleged that the “perks” were intended to reward employees working during a strike which amounted to discrimination against strikers and inducement to cross the picket line. In 1998, the complaint was resolved through a settlement. Therefore, it remains unclear what the exact rule of law is with regard to “perks.”

It is established that depriving employees of benefits due to participation in a strike is an unfair labor practice. In *NLRB v. Swift Adhesives*, the Eighth Circuit held that withholding accrued vacation from striking workers who have been permanently replaced is an unfair labor practice.⁴⁶³ In that case, the court upheld the NLRB’s decision that vacation benefits already accrued were a non-mandatory subject of bargaining and the company could not unilaterally implement new terms negating the vacation benefits. Furthermore, the court found accrued vacation to be a debt owed on a previous contract, not a negotiable provision of the new contract.

SECTION 3.7 ADDITIONAL DEVELOPMENTS IN UNION-MANAGEMENT RELATIONS

(a) “Full Consent Election” Agreements Available to Employers

Under NLRB regulations, parties to a labor election may stipulate that the Regional Director decide all election disputes (both pre- and post-election) with no right of appeal to the NLRB in Washington, D.C.⁴⁶⁴ The Regional Director is still responsible for investigating election objections, conducting a hearing, and issuing a report setting forth Findings of Fact and Conclusions of Law. However, the Regional Director’s report is final and binding and not subject to appeal. Once certified by the Regional Director, the election results have the same binding force and effect as if they were certified by the NLRB.

Advantages to a “full consent” election include quicker resolution of representation disputes, access to a secret ballot election without delay, and savings in legal expenses and efficiency costs that result from pending representation issues. The obvious drawback of this type of election is the inability to appeal an unfavorable determination.

Two other procedures are available to parties to expedite resolution of representation issues: the “Stipulated Election” and the “Consent Election.” Details on all three types of expedited election arrangements are available at the website: <http://www.nlr.gov>.

(b) Changes in Ownership Under California Law

In 2011, the Supreme Court of California ruled that when there is a change in ownership certain unionized workplaces may be required by state or local governments to hire the existing non-managerial employees of the company for a 90-day transition period following a change in ownership. The case, *California Grocers*

⁴⁶¹ *Brown & Sharpe Mfg. Co.*, 299 N.L.R.B. 586 (1990), *reaff’d supplemental op.*, 312 N.L.R.B. 444 (1993), *cert. denied*, 524 U.S. 926 (1998).

⁴⁶² *Id.*

⁴⁶³ *NLRB v. Swift Adhesives*, 110 F.3d 632 (8th Cir. 1997).

⁴⁶⁴ 29 C.F.R. § 102.62(c).

Ass'n v. City of Los Angeles, upheld an ordinance giving employees of grocery stores that are 15,000 square feet or larger certain individual rights during a 90-day transition period.⁴⁶⁵

(c) Employers Should Be Wary of Overbroad Handbook Language

The NLRB has held in several cases that overbroad work rules in employee handbooks give rise to violations of Section 7 of the NLRA (violating employees' rights to engage in concerted activity).⁴⁶⁶ Three 2005 decisions highlight the need for employers to revisit their handbook policies.

In February 2005, the NLRB rejected that an overbroad work rule warranted setting aside an election in *Delta Brands, Inc.*⁴⁶⁷ Although the NLRB ruled in the employer's favor, its conclusions turned on specific facts. Delta Brands maintained a non-solicitation policy prohibiting "vending, soliciting, or collecting contributions for any purpose unless authorized by management." After the company won a representation election 10 to eight, an NLRB hearing officer recommended that the election be set aside because of the policy. The NLRB rejected the recommendation and upheld the election, reasoning that: (1) the rule was not adopted in response to the union's organizing effort; (2) it was part of a 36-page employee handbook that contained many rules; (3) there was no evidence the company called employees' attention to the rule; and (4) there was no evidence that the company "enforced the rule or that any employee was in fact deterred by the rule from engaging in Section 7 activity."⁴⁶⁸ Although the mere existence of an overbroad rule did not warrant setting aside an election in *Delta Brands*, the NLRB said it would do so if, looking to all the facts and circumstances, "the atmosphere was so tainted as to warrant the setting aside of the election."⁴⁶⁹

The NLRB held in two cases, *Guardsmark, LLC*⁴⁷⁰ and *KSL Claremont Resort & Spa*,⁴⁷¹ that overbroad work rules violated Section 7 of the NLRA. In *Guardsmark, LLC*, the NLRB held that a "Chain-of-Command" work rule requiring employees to bring complaints about workplace issues directly to their supervisors violated the NLRA.⁴⁷² The NLRB interpreted the employer's attempt to implement an internal complaint procedure that insulated clients and customers from hearing complaints to "entrench upon the right of employees under Section 7 to enlist the support of an employer's clients or customers regarding complaints about terms and conditions of employment."⁴⁷³ The employer was required to post a notice at all its facilities nationwide stating that: (1) the employer violated federal labor law; and (2) employees have the federal right to form, join or assist a union, choose representatives to bargain with the employer on behalf of employees, act together with other employees for benefits and protections and choose not to engage in any protected activities.⁴⁷⁴

In *KSL Claremont Resort & Spa*, the NLRB held that an employer violated the law by maintaining a work rule prohibiting employers from having "negative conversations" about their managers.⁴⁷⁵ The NLRB focused on the fact that the rule was overbroad, concluding that employees could reasonably construe this rule to "bar them from discussing with their co-workers complaints about their managers that affect working conditions, thereby causing employees to refrain from engaging in protected activities."⁴⁷⁶

⁴⁶⁵ *California Grocers Ass'n v. City of Los Angeles*, 52 Cal. 4th 177 (2011).

⁴⁶⁶ See, e.g., *Martin Luther Mem'l Home*, 343 N.L.R.B. No. 75, 2004 WL 2678632 (Nov. 19, 2004); *Lafayette Park Hotel*, 326 N.L.R.B. 824 (1998).

⁴⁶⁷ 344 N.L.R.B. No. 10, 2005 WL 319946 (Feb. 7, 2005).

⁴⁶⁸ *Id.*

⁴⁶⁹ *Id.*

⁴⁷⁰ 344 N.L.R.B. No. 97, 2005 WL 1378568 (June 7, 2005).

⁴⁷¹ 344 N.L.R.B. No. 105, 2005 WL 1452400 (June 16, 2005).

⁴⁷² 344 N.L.R.B. No. 97, 2005 WL 1378568 (June 7, 2005).

⁴⁷³ *Id.*

⁴⁷⁴ *Id.*

⁴⁷⁵ 344 N.L.R.B. No. 105, 2005 WL 1452400 (June 16, 2005).

These decisions illustrate the importance of conducting annual reviews of employee work rules and handbooks. In addition to avoiding labor relation problems, annual review of employee policies is necessary to ensure legal compliance with federal and state employment laws.

⁴⁷⁶ *Id.*

CHAPTER IV

NON-COMPETITION AGREEMENTS AND INTELLECTUAL PROPERTY PROTECTION

Employee non-competition agreements (a kind of restrictive covenant) are widely used today, perhaps with greater frequency than before, as companies concentrate on protecting their valuable technology rights, intellectual property, trade secrets, and customer good will. A typical non-competition agreement is a contract that restricts a former employee or a seller's right to compete for a specified period of time. Such agreements typically arise in one of two contexts. First, they arise when an employer, as a condition of employment, requires an employee to restrict the scope and nature of the employee's subsequent employment. Second, they arise when the buyer of a business, as a condition of the sale, requires the seller to agree not to compete with the buyer. This Chapter concentrates on the employer/employee context.

Non-competition agreements are governed by state law.⁴⁷⁷ An employer considering the use of a non-competition agreement must first carefully consider the law of the state in which the non-competition agreement is likely to be enforced. For example, although Washington courts look upon non-competition agreements with some disfavor because they are in partial restraint of trade, these agreements will be enforced so long as a valid contract exists and the restrictions placed upon the employee are narrowly tailored. Restrictions should be tailored to impose no greater restriction on the employee than is necessary to protect the legitimate interests of the employer.⁴⁷⁸

In lieu of (or in addition to) a non-competition agreement, an employer may consider other alternatives to achieve the same end. These include: (1) non-disclosure covenants that prohibit employees from revealing trade secrets or confidential information; (2) non-solicitation covenants that prohibit a departed employee from calling on former customers or clients; and (3) anti-raiding covenants that prohibit a departed employee from recruiting away the employer's valuable employees.⁴⁷⁹ If these restrictions are narrow in scope and reasonably necessary to protect the employer's legitimate interests, they may be enforceable.

An employer's trade secrets and other confidential information are also protected by state statutes and common law. Employees have a number of duties that restrain them from using such proprietary information to compete unfairly against an employer both during and after their employment.

SECTION 4.1 AGREEMENTS NOT TO COMPETE

(a) Washington Law

(i) Contract Validity

To be enforceable, a non-competition agreement must be a valid contract. Although other contract issues may arise, consideration is usually the most important issue in determining contract validity.

⁴⁷⁷ However, the Federal Arbitration Act may necessitate that if an agreement containing covenants not to compete have an arbitration clause, it is for the arbitrator to decide in the first instance whether the covenants not to compete are valid as a matter of applicable state law. See *Nitro-Lift v. Howard*, 133 S. Ct. 500 (2012).

⁴⁷⁸ *Knight, Vale & Gregory v. McDaniel*, 37 Wn. App. 366, 369 (1984); *Perry v. Moran*, 109 Wn.2d 691, 696 (1987), *modified on other grounds*, 111 Wn.2d 885, *cert. denied*, 492 U.S. 911 (1989).

⁴⁷⁹ An employment agreement may also require an employee to assign patents to an employer. RCW 49.44.140; see also *Waterjet Tech., Inc. v. Flow Intl Corp.*, 140 Wn.2d 313, 320 (2000) (finding that the statutorily required notice of the limitation on requirements that employees assign patents to an employer may be placed in an employment agreement itself).

“Consideration” is a bargained-for exchange of promises or things, and is required for an enforceable contract. If the non-competition agreement is supported by adequate consideration, it likely will be valid. The key is in the timing of the consideration.

In Washington, adequate consideration exists if the employee enters into the non-competition agreement when they originally accept a job offer.⁴⁸⁰ Courts are willing to enforce these agreements because they see the employee actually receiving something in exchange for signing the agreement for employment. If the employer does not advise the employee of the non-competition agreement at the time of offer, the non-competition agreement may not be enforceable, even if the employee signs the agreement before starting work.⁴⁸¹

The Washington Supreme Court has unanimously reaffirmed that a non-competition agreement entered into after employment has commenced will be enforced only if it is supported by additional, independent consideration.⁴⁸² Such consideration may include an increase in wages, a promotion, a bonus, a fixed term of employment, or access to protected information.⁴⁸³ For example, in *Wood v. May*,⁴⁸⁴ an employee signed a non-competition agreement after already being employed for two months. The court enforced that agreement because the employer offered adequate consideration by agreeing to teach the employee an additional skill.⁴⁸⁵ Consideration that the employee would have received even in the absence of a non-compete agreement (such as a regularly scheduled wage increase or training) does not support such a non-compete.⁴⁸⁶

In *Knight, Vale & Gregory*, the court found that although the parties did not discuss the covenant during employment negotiations, adequate consideration existed when the employee knowingly signed the non-competition agreement on the first day of work.⁴⁸⁷ The court noted that continued employment and training are sufficient consideration for an employee’s promise not to compete.⁴⁸⁸ This part of the *Knight* holding was limited to its facts by *Labriola*. There, the defendant cited to *Knight* for the proposition that continued employment could support a non-compete signed years after employment began. The *Labriola* court held that *Knight* only applies to cases where a non-compete is signed “even before the very first day of work.”⁴⁸⁹

(ii) Reasonableness

Once a non-competition agreement is found to be a valid contract, it will be judged on a case-by-case basis to determine its reasonableness. Reasonableness is measured by: (1) the existence of a protectable employer interest; and (2) the reasonableness of the restrictions imposed upon the employee. The general rule of thumb is to ask: “What is necessary to protect the interests of the employer under the circumstances?” Washington courts generally will enforce a non-competition agreement as reasonable if: (1) the restraint is necessary for the protection of the business or good will of the employer; (2) it imposes on the employee no greater restraint than necessary to protect the employer’s business or good will; and (3) the degree of injury to the public in terms of loss of the employee’s service and skill is not such a loss as to warrant non-enforcement.⁴⁹⁰ Washington courts have held that an employer has a legitimate interest in

⁴⁸⁰ *Wood v. May*, 73 Wn.2d 307, 310-11 (1968); *Racine v. Bender*, 141 Wash. 606, 609 (1927); *Knight, Vale & Gregory*, 37 Wn. App. at 368.

⁴⁸¹ *Schneller v. Hayes*, 176 Wash. 115, 118 (1934).

⁴⁸² *Labriola v. Pollard Group*, 152 Wn.2d 828 (2004).

⁴⁸³ *Schneller*, 176 Wash. at 118.

⁴⁸⁴ 73 Wn.2d 307, 310 (1968).

⁴⁸⁵ *Id.*

⁴⁸⁶ *Schneller*, 176 Wash. at 118.

⁴⁸⁷ *Knight, Vale & Gregory*, 37 Wn. App. at 368-69.

⁴⁸⁸ *Id.*

⁴⁸⁹ *Labriola*, 152 Wn.2d at 838.

⁴⁹⁰ *Knight, Vale & Gregory*, 37 Wn. App. at 369; *Sheppard v. Blackstock Lumber Co., Inc.*, 85 Wn.2d 929, 932-33 (1975).

protecting its trade secret and other confidential information, and customer good will.⁴⁹¹ There is no legitimate interest, however, in simply protecting an employer from the advantage a former short-time employee may have by reason of skills and training acquired during employment.⁴⁹² In analyzing the reasonableness of the imposed restrictions, courts look at many factors, including the duration of employment, geographic area of the proposed restriction, and the employee's ability to obtain other employment.⁴⁹³

Perhaps the most common restriction is that of duration. Almost all non-competition agreements have some durational component – a time period during which a departed employee may not engage in competitive activities. Washington courts have upheld durational components ranging from a few months to several years.

A non-competition clause that has no time limit likely will be deemed unreasonable. In *Sheppard*, the court struck down a non-competition clause that prohibited a former employee from participating in any competitive activity anywhere or anytime, and where the determination of what constituted “competitive activity” would be made by the former employer's board of directors.⁴⁹⁴

This is true even if the non-competition clause contains a geographical limitation.⁴⁹⁵ In *Schneller*, the court found that a non-competition clause prohibiting an employee from engaging in business within a one-mile radius of the former employer for an unlimited amount of time was unreasonable.⁴⁹⁶

In general, Washington courts have found non-competition agreements with a time limit of up to three years to be reasonable. The courts in *Perry*, *Racine*, and *Knight, Vale & Gregory* enforced three-year non-competition agreements with regard to solicitation of the former clients of the employer.⁴⁹⁷ However, a time limit of five years may not be enforceable.⁴⁹⁸

A restriction that limits the geographic area in which a departed employee may engage in competitive activities is also common in employee non-competition agreements. In determining whether a geographic restriction is reasonable, Washington courts will typically look to the area in which the employee was active and had client contact. The restriction may be as narrow as one county or as broad as nationwide, depending on what is reasonable under the circumstances. Generally, Washington courts look more favorably on covenants not to service the employer's clients, rather than on broad non-competition covenants with a geographic restriction.⁴⁹⁹

Also, a very short period of employment can make the enforcement of a non-compete unreasonable. In *Copier Specialists, Inc. v. Gillen*, an employee signed, at the outset of his employment, an agreement not to compete for three years following his termination.⁵⁰⁰ After working for the company selling and repairing office equipment for six months, he was terminated. The employee then became employed by another company repairing other brands of office equipment. The employer sued to enforce the employee's non-competition agreement, arguing that it was necessary to protect its investment in the employee's training. The court found, however, that because the employee was employed for such a short period of time, the agreement was unreasonable.

⁴⁹¹ *Perry v. Moran*, 109 Wn.2d at 670; *Knight, Vale & Gregory*, 37 Wn. App. at 370.

⁴⁹² *Copier Specialists, Inc. v. Gillen*, 76 Wn. App. 771, 774 (1995) (training acquired during employment, without more, does not warrant enforcement of covenant not to compete).

⁴⁹³ *Perry*, 109 Wn.2d at 701; *Racine v. Bender*, 141 Wash. at 611; *Alexander & Alexander, Inc. v. Wohlman*, 19 Wn. App. 670 (1978).

⁴⁹⁴ *Sheppard*, 85 Wn.2d 929.

⁴⁹⁵ *Schneller*, 176 Wash. at 121.

⁴⁹⁶ *Id.*

⁴⁹⁷ *Perry*, 109 Wn.2d at 697; *Racine*, 141 Wash. at 615; *Knight, Vale & Gregory*, 37 Wn. App. at 370.

⁴⁹⁸ *Wood v. May*, 73 Wn.2d 307, 311 (1968); *Alexander & Alexander*, 19 Wn. App. at 675.

⁴⁹⁹ *See Perry*, 109 Wn.2d at 702.

⁵⁰⁰ 76 Wn. App. 771 (1995).

(iii) Judicial Modification

Washington courts can modify a non-competition agreement that is unreasonably broad and enforce it only to the extent that it is reasonable.⁵⁰¹ A court is not, however, required to modify or “blue-pencil” an overly broad non-competition agreement; it may simply refuse to enforce the agreement.

In *Alexander & Alexander, Inc.*, the court narrowed the scope of the non-competition agreement from a 100-mile radius around the location of the former employer’s office to the greater Seattle area, and reduced the prohibition from precluding selection of an insurance broker to only precluding solicitation and diversion of business of any customer of the employer.⁵⁰² Similarly, the court in *Wood* found that a geographic restriction of a 100-mile radius was probably too broad, but left the clause open to modification by a court of equity.⁵⁰³

In *Armstrong v. Taco Time Int’l, Inc.*,⁵⁰⁴ the court also reduced the geographic area as well as the time restrictions of a non-competition agreement. The agreement barred post-termination competition for five years throughout the United States. The court found that the agreement was unreasonable as written, and limited the restrictions to a certain geographic radius around the employer, and to two and one-half years.

In light of the fluid nature of what is deemed “reasonable” in the scope of a non-competition agreement, employers may want to include certain provisions in their agreements. These provisions might include: (1) an admission of reasonableness by the employee; and/or (2) a severability/reformation clause that clearly allows a court to enforce an agreement to the fullest extent permitted.

(b) Minnesota Law

Unlike some states, Minnesota has no statutory provision specifically addressing the enforceability of non-compete agreements. Minnesota law on this subject is a creature of the common law (*i.e.*, judicial decisions). Although Minnesota courts look upon non-competition agreements with some disfavor because they are in partial restraint of trade and limit employee mobility, these agreements will be enforced so long as a valid contract exists and the restrictions placed upon the employee are narrowly tailored to impose no greater restriction on the employee than is necessary to protect the legitimate interests of the employer.⁵⁰⁵

(i) Contract Validity

In the context of non-compete agreements, contract validity generally turns on whether there is consideration for the contract – something of value that was bargained for that led to the agreement. Whether consideration exists or is adequate often depends on *when* the parties entered the non-competition agreement.

Adequate consideration exists if the employee enters into the non-competition agreement as part of accepting the offer, before he or she begins work. In return for signing the agreement, the employee is receiving something he or she did not previously have: employment.⁵⁰⁶ In this situation, the non-competition agreement must be made a part of the original job offer, presented as a condition of employment. A non-competition agreement that is presented and entered into *after* the initial offer of employment is accepted likely will not be enforceable unless supported by consideration other than

⁵⁰¹ *Perry v. Moran*, 109 Wn.2d at 703.

⁵⁰² *Alexander & Alexander, Inc. v. Wohlman*, 19 Wn. App. 670 (1978).

⁵⁰³ *Wood*, 73 Wn.2d at 310.

⁵⁰⁴ 30 Wn. App. 538, 543-44 (1981).

⁵⁰⁵ *Freeman v. Duluth Clinic, Ltd.*, 334 N.W.2d 626, 630 (Minn. 1983); *Bennett v. Storx Broad. Co.*, 134 N.W.2d 892, 899 (Minn. 1965).

⁵⁰⁶ *Overbolt Crop Ins. Serv. Co., Inc. v. Bredeson*, 437 N.W.2d 698, 702 (Minn. Ct. App. 1989).

employment itself, even if the agreement is entered into before the individual starts working.⁵⁰⁷ In this circumstance, the employment in and of itself will not supply the necessary consideration.

A non-competition agreement entered into *after* employment has begun will be upheld only if it is supported by independent consideration that provides the employee with “substantial economic and professional benefits,” such as increased wages, a promotion, a bonus, a fixed term of employment, or access to protected information.⁵⁰⁸ Continued employment is not automatically sufficient to uphold a non-competition agreement signed by a current employee, but it may be sufficient if the employee is employed for many years, advances within the company, and is given increased responsibilities.⁵⁰⁹ Employers must ensure that the proffered consideration is linked to the non-compete agreement and that it is not a benefit that is generally available to all employees, including employees who have not been asked to enter into a non-competition agreement or have refused to do so.

(ii) Reasonableness of Restrictions

If the non-competition agreement is considered a valid contract, it will be evaluated against a reasonableness standard. Reasonableness is measured principally by the existence of a protectable employer interest and the type and extent of the restrictions imposed upon the employee. The general rule for reasonableness is: *What is necessary to protect the legitimate interests of the employer under the circumstances?*⁵¹⁰

Minnesota courts generally will enforce a non-competition agreement if: (1) the restraint is for a just and honest purpose; (2) the restraint protects an identifiable and legitimate interest of the employer; (3) the restraint is reasonable; and (4) the restraint is not injurious to the public.⁵¹¹

To be enforceable, a non-competition agreement must protect a legitimate business interest of the employer. Minnesota courts have held that an employer has a legitimate interest in protecting its trade secret and other confidential information, customer good will, and the transfer of customer good will in the sale of a business.⁵¹² Customer good will includes the relationships that have developed between employees and customers as a consequence of their dealings in connection with the employer.

In analyzing the reasonableness of the imposed restrictions, courts look at many factors, including duration, geographic area, nature of the business, nature of the interests to be protected, and ability of the employee to obtain other employment.⁵¹³

Perhaps the most common restriction is that of duration. Almost all non-competition agreements specify a time period during which a departed employee may not engage in competitive activities. The reasonableness of the restricted time period requires an analysis of the nature of the protectable interest involved, the payments (if any) to the employee during the period of restriction, the employee’s access to the employer’s business information, and the nature of the employer’s business.⁵¹⁴ In balancing these factors, Minnesota courts have upheld temporal restrictions running from a few months to several years. Although courts consider the temporal restriction of a non-compete agreement on a case-by-case basis, most courts are skeptical of restrictive covenants longer than two years.

⁵⁰⁷ *Sanborn Mfg. Co. v. Currie*, 500 N.W.2d 161, 164 (Minn. Ct. App. 1993).

⁵⁰⁸ *Freeman*, 334 N.W.2d at 630; *Davies & Davies Agency, Inc. v. Davies*, 298 N.W.2d 127, 130-31 (Minn. 1980); *Sanborn Mfg. Co.*, 500 N.W.2d at 164.

⁵⁰⁹ *See Witzke v. Mesabi Rehab. Servs., Inc.*, No. 07-0421, 2008 WL 314535, at *3 (Minn. Ct. App. Feb. 5, 2008).

⁵¹⁰ *See Bennett*, 134 N.W.2d at 899.

⁵¹¹ *Bennett*, 134 N.W.2d at 898-899; *see also Jim W. Miller Const., Inc. v. Schaefer*, 298 N.W.2d 455, 458 (Minn. 1980).

⁵¹² *Cherne Indus., Inc. v. Grounds & Assoc., Inc.*, 278 N.W.2d 81, 92-93 (Minn. 1979); *Overholt Crop Ins. Serv. Co., Inc.*, 437 N.W.2d at 703; *Webb Pub. Co. v. Fosshage*, 426 N.W.2d 445, 450 (Minn. Ct. App. 1988); *Salterman v. Finney*, 361 N.W.2d 175, 178 (Minn. Ct. App. 1985).

⁵¹³ *See Roth v. Gamble-Skogmo, Inc.*, 532 F. Supp. 1029, 1031 (D. Minn. 1982); *Medtronic, Inc. v. Gibbons*, 527 F. Supp. 1085, 1094 (D. Minn. 1981).

⁵¹⁴ *See, e.g., Roth*, 532 F. Supp. at 1032 (finding five years reasonable for key executive).

A restriction that limits the geographic area in which a departed employee may engage in competitive activities also is common in employee non-competition agreements. In determining whether a geographic restriction is reasonable, Minnesota courts typically will look to the nature of the employee's job and to the area in which the employee was active and had customer contact.⁵¹⁵ Depending on the nature of the employer's business and the scope of the employee's job responsibilities, the restriction may be as narrow as one county or as broad as the nation.⁵¹⁶ Customer-specific restrictions (*e.g.*, prohibitions on the solicitation of customers with whom the individual had dealings on behalf of the employer) are often used in lieu of or in conjunction with geographic restrictions, and have been enforced by Minnesota courts.

The third critical component to a non-competition agreement is the substantive restriction imposed on the employee. Again, courts carefully evaluate whether the restriction imposed on the employee is limited to legitimate, protectable interests of the employer. The more reasonable the restriction the employer seeks to impose, the greater the likelihood the courts will find it enforceable.

Minnesota courts recognize the "blue-pencil" doctrine, which allows a court to modify a non-competition agreement that is unreasonably broad and enforce it only to the extent that it is reasonable.⁵¹⁷ However, Minnesota courts do not have limitless discretion to modify an agreement; the covenant first must be found unreasonable.⁵¹⁸ Furthermore, a court is not required to modify or "blue pencil" an overly-broad non-competition agreement; rather, it may simply refuse to enforce the agreement.⁵¹⁹

(iii) Enforcement

If an employee breaches a valid non-competition agreement, the employer may bring an action seeking injunctive relief and/or may sue for damages. In this context, an injunction is a court order prohibiting the employee from engaging in employment activities contrary to the non-competition agreement.

Compensatory damages, including out-of-pocket losses and lost profits directly caused by the breach, may be recovered. Unless it is specifically provided for in the non-competition agreement, attorneys' fees generally are not recoverable by a party attempting to enforce the agreement.⁵²⁰ Typically, a court will not enforce a non-competition agreement if the employee is wrongfully discharged.⁵²¹

(c) California Law

(i) Non-Competition Agreements

Non-competition agreements are generally unenforceable under California law, based on the well-established policy that a person has a substantial interest in the unrestrained pursuit of their livelihood.⁵²² Under California law, even when an employee has signed a reasonable non-competition agreement, that employee still has the right to enter into competition with his or her employer once the employment relationship ends.⁵²³ Requiring an employee to sign a non-compete agreement as a condition of employment can constitute a public policy violation.⁵²⁴ In addition, even honoring an employee's non-competition agreement with a former employer may violate California's public policy.⁵²⁵

⁵¹⁵ *Millard v. Elec. Cable Specialists*, 790 F. Supp. 857, 864 (D. Minn. 1992) (finding nationwide restraint reasonable).

⁵¹⁶ *Compare Walker Employment Serv., Inc. v. Parkhurst*, 219 N.W.2d 437-38, 442 (Minn. 1974) (single county), with *Millard*, 790 F. Supp. at 864 (nationwide).

⁵¹⁷ *Bess v. Bothman*, 257 N.W.2d 791, 794-95 (Minn. 1977).

⁵¹⁸ *See Satellite Indus., Inc. v. Keeling*, 396 N.W.2d 635, 640 (Minn. Ct. App. 1986).

⁵¹⁹ *Klick v. Crosstown State Bank of Ham Lake, Inc.*, 372 N.W.2d 85, 88 (Minn. Ct. App. 1985).

⁵²⁰ *Cherne Indus., Inc. v. Grounds & Assoc., Inc.*, 278 N.W.2d 81, 96 (Minn. 1979).

⁵²¹ *Edin v. Josten's, Inc.*, 343 N.W.2d 691, 694 (Minn. Ct. App. 1984).

⁵²² Under the California Business and Professions Code, "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." Cal. Bus. & Prof. Code § 16600.

⁵²³ *Muggill v. Reuben H. Donnelly Corp.*, 62 Cal. 2d 239, 242 (1965).

⁵²⁴ *D'Sa v. Playbut, Inc.*, 85 Cal. App. 4th 927, 932-34 (2000).

Washington employers should note that California law has been applied to invalidate non-competition agreements from outside of California in cases where the former employee accepts work in California. The California Supreme Court recently struck down a line of Ninth Circuit case law that had established “narrow restraint” exception, which had previously upheld restraints that were narrow and left a substantial portion of the market open to the employee.⁵²⁶

One exception to the non-enforceability of non-compete agreements in California exists where the agreement is reached in connection with the sale of a business. Section 16601 of the Business and Professions Code allows a seller to agree not to compete with the buyer in the geographic location where the seller had carried on business. However, such agreements must still be reasonable. Further, the permissible scope of the covenant must be tied to the sale of the old business.⁵²⁷ Employers may also rely on trade secret protection to enjoin employees that are competing unfairly.⁵²⁸

(ii) Non-Solicitation Agreements

Non-solicitation agreements are void as unlawful business restraints unless their enforcement is necessary to protect trade secrets. For example, in *Dowell v. Biosense Webster, Inc.*, a non-compete and non-solicitation clause did not qualify for the trade secret exception because it was not “narrowly tailored or carefully limited to the protection of trade secrets”; rather, it was “so broadly worded as to restrain competition.”⁵²⁹ In *Thompson v. Impaxx, Inc.*, an employee was terminated for refusing to sign an agreement not to solicit defendant’s customers after leaving the defendant’s employ. Because the identities of the customers at issue were public knowledge, the California Court of Appeal held the clause was invalid and allowed the former employee to recover.⁵³⁰ Alternatively, in *John F. Matull & Assocs., Inc. v. Cloutier*, a covenant not to compete was valid insofar as it protected confidential client lists but not in its attempt to restrain the former employee from working in her field.⁵³¹

Covenants not to solicit *specific customers* may be valid in California, regardless of whether the customer’s identity is public knowledge. California courts have ruled that such covenants may be enforceable in order to prevent unfair competition, but have stipulated that such agreements must not make a substantial part of a worker’s market off limits. In *Gen. Comm’l Packaging, Inc. v. TPS Package Eng’g*, an employee was held to a non-competition agreement that prohibited him from working with the employer’s largest client.⁵³²

(iii) Penalties Treated as Covenants Not To Compete

Any contract provision that seeks to punish an employee for engaging in competition is void under California law. In *Muggill v. Reuben H. Donnelly Corp.*, the defendant employer canceled payment on a retirement account when the plaintiff was hired by a rival employer. The Supreme Court of California reinstated the plaintiff’s retirement plan, explaining that Section 16600 voids every contract that restrains an actor from engaging in a trade, and thus the punitive pension provisions of the plaintiff’s employment contract were invalid.⁵³³ This principle has been repeated in cases where profit-sharing plans were cancelled

⁵²⁵ See *Siguero v. Creteguard, Inc.*, 187 Cal. App. 4th 60 (2010) (employer’s honoring of employee’s non-competition agreement with former employer is void and unenforceable under Cal. Bus. & Prof. Code. § 16600 and employee’s complaint alleges facts against employer for wrongful termination in violation of public policy for honoring such agreement out of “respect and understanding with colleagues in the same industry,” notwithstanding employer’s belief that “non-compete clauses are not legally enforceable” in California).

⁵²⁶ *Edwards v. Arthur Andersen LLP*, 44 Cal. 4th 937 (2008).

⁵²⁷ *Fillpoint v. Maas*, 208 Cal. App. 4th 1170 (2012) (stock purchase and employment agreements).

⁵²⁸ California courts’ ability to grant an injunction may be limited. See *Advanced Bionics Corp. v. Medtronic, Inc.*, 29 Cal. 4th 697 (2002) (California court cannot grant a temporary restraining order to block a lawsuit in another state’s court over the enforceability of a non-competition agreement).

⁵²⁹ 179 Cal. App. 4th 564 (2009).

⁵³⁰ *Thompson v. Impaxx, Inc.*, 113 Cal. App. 4th 1425, 1429 (2003).

⁵³¹ 194 Cal. App. 3d 1049, 1055 (1987).

⁵³² 126 F.3d 1131 (9th Cir. 1997).

⁵³³ *Muggill*, 62 Cal. 2d at 242.

and where fees were levied as forms of penalty. In *Ware v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, brokers formerly employed by Merrill Lynch successfully brought suit for profit shares cancelled when they joined a rival firm.⁵³⁴ In *Gordon Termite Control v. Terrones*, a California Court of Appeal ruled that an employment contract clause calling for a \$50 fee for each contact a former employee made with customers of the former employer was void.⁵³⁵ The court stipulated, however, that this would only be so where the knowledge of potential customers was not a trade secret.⁵³⁶

(d) Utah Law

Under Utah law, covenants not to compete are enforceable if they comply with the requirements set forth in *System Concepts, Inc. v. Dixon*: (1) the covenant is supported by consideration; (2) no bad faith is shown in the negotiation of the contract; (3) the covenant is necessary to protect the goodwill of the business; and (4) the covenant is reasonable in its restrictions as to time and area.⁵³⁷

Most commonly, enforcement turns on the reasonableness of the covenant. “Restrictive covenants are generally upheld by the courts where . . . no greater restraint is imposed than is reasonably necessary to secure such protection.”⁵³⁸ The reasonableness is determined on a case-by-case basis. “Of primary importance in the determination of reasonableness are the location and nature of employer’s clientele.”⁵³⁹

Utah Courts focus on the scope of the employer’s needs. Generally, covenants of two years or less have been held to reasonable. However, Utah Courts have found much longer covenants – even as long as seven years – to be enforceable where the circumstances of the business interest require such a length.⁵⁴⁰

Utah Courts have applied the same analysis to determine the reasonableness of the limitations as to geographic area. In *Allen v. Rose Park Pharmacy*, the Court found that a two-mile radius of the subject pharmacy was a reasonable geographic limitation.⁵⁴¹ In another case, the Court found that a geographic limitation was not necessary to render the covenant reasonable because the employer’s 2,500 customers were spread out over a large geographic area.⁵⁴²

It is generally undecided whether a Utah Court may modify a covenant not to compete to make it reasonable. Employers should presume that if a court finds the covenant to be overly restrictive, it will most likely be unenforceable.

SECTION 4.2 ENFORCEMENT OF NON-COMPETITION AGREEMENTS

If an employee breaches a valid non-competition agreement, the employer may bring an action seeking injunctive relief and for damages. An injunction is simply a court order prohibiting the employee from engaging in employment activities contrary to the non-competition agreement. Other damages are measured by the amount of harm caused by the competing employee.

⁵³⁴ 24 Cal. App. 3d 35, 42-43 (1972).

⁵³⁵ 84 Cal. App. 3d 176, 179 (1978).

⁵³⁶ *Id.* at 178 (“Knowledge of potential customers in the pest control business is not a trade secret within the meaning of *Muggill*.”).

⁵³⁷ 669 P.2d 421, 425-26 (Utah 1983).

⁵³⁸ *Allen v. Rose Park Pharmacy*, 237 P.2d 823, 826 (Utah 1951).

⁵³⁹ *Sys. Concepts*, 669 P.2d at 427.

⁵⁴⁰ *Id.* (seven-year covenant upheld); *see also Allen*, 237 P.2d at 838 (upholding five-year covenant).

⁵⁴¹ *Allen*, 237 P.2d at 828.

⁵⁴² *Sys. Concepts*, 669 P.2d at 427.

(a) Temporary Restraining Order

If the enforcement of the non-competition agreement is critical, and failure to enforce the agreement may cause irreparable harm, a court may grant an employer a temporary restraining order demanding an employee to cease working for a competitor. To obtain a temporary restraining order (“TRO”), the procedures an employer must follow are substantially similar to those for other civil cases. A TRO is intended only to temporarily restrain the opposing party until the court has a hearing on whether or not to grant a preliminary injunction.⁵⁴³ Unlike other civil actions, however, a plaintiff seeking a TRO must provide security (a bond) for payment of costs and other damages that the opposing party may incur if the TRO were inappropriately entered.⁵⁴⁴ A TRO may be granted without notice to the opposing party or his or her attorney if: (1) it clearly appears from specific facts shown by affidavit or by verified complaint that immediate and irreparable injury, loss, or damage will result before the opposing party can be heard in opposition; and (2) the plaintiff’s attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and reasons supporting his claim that notice should not be required.⁵⁴⁵ A TRO granted without notice must define the injury, state why it is irreparable, and why the order was granted without notice. A TRO issued without notice must expire by its terms within a proscribed period of time not to exceed 14 days, but the expiration period may be extended for good cause.

(b) Preliminary and Permanent Injunctions

Preliminary injunctions (before trial) and permanent injunctions are generally given where “it appears by the complaint that the plaintiff is entitled to the relief demanded and the relief . . . consists in restraining the commission or continuance of some act, the commission or continuance of which during the litigation would produce great injury to the plaintiff.”⁵⁴⁶ Thus, an injunction is inappropriate where the restrictive covenants, such as non-competition agreements, by their terms have already expired.⁵⁴⁷ Preliminary injunctions are issued before trial, but after giving notice to the party to be enjoined.⁵⁴⁸

The party seeking an injunction bears the burden of proof.⁵⁴⁹ The party seeking injunctive relief must demonstrate three elements: (1) a clear legal or equitable right; (2) a well-grounded fear of immediate invasion of that right; and (3) that the acts complained of are either resulting, or will result, in actual and substantial injury to the party.⁵⁵⁰ To determine whether there is a clear legal or equitable right, the court will examine the moving party’s likelihood of success on the merits, even though the court does not adjudicate the ultimate rights of the parties in the litigation.⁵⁵¹

An injunction may extend to persons who are not included within its terms, such as “to classes of persons through whom the enjoined party may act, such as agents, servants, employees, aiders, abettors, etc., even though they are not parties to the action.”⁵⁵²

(c) Damages

An employer may file a complaint in court seeking damages for violation of a non-competition agreement.⁵⁵³ Lost profits directly caused by the employee’s breach of the non-competition agreement may be recovered.

⁵⁴³ *State ex rel. Pay Less Drug Stores v. Sutton*, 2 Wn.2d 523, 528 (1940).

⁵⁴⁴ Washington Civil Rule (“CR”) 65(c).

⁵⁴⁵ CR 65(b).

⁵⁴⁶ RCW 7.40.020; CR 65(a).

⁵⁴⁷ *Alexander & Alexander, Inc. v. Wohlman*, 19 Wn. App. 670, 688 (1978).

⁵⁴⁸ CR 65(a); RCW 7.40.050.

⁵⁴⁹ *Fed. Way Family Physicians, Inc. v. Tacoma Stands Up For Life*, 106 Wn.2d 261, 265 (1986).

⁵⁵⁰ *Wash. Fed’n of State Employees v. State*, 99 Wn.2d 878, 888 (1983).

⁵⁵¹ *Tyler Pipe Indus., Inc. v. Dep’t of Revenue*, 96 Wn.2d 785, 793 (1982).

⁵⁵² *Lyle v. Haskins*, 24 Wn.2d 883 (1946).

In litigation, various other claims may be available for the departed employee's wrongful conduct. Such claims are detailed in this chapter. Claims may include misappropriation of trade secrets, tortious interference with contractual relationships, tortious interference with prospective business advantage, and breach of fiduciary duty.

(d) Attorneys' Fees

Unless it is specifically provided for in the non-competition agreement, attorneys' fees are generally not recoverable by a party attempting to enforce an agreement unless a claim includes the willful and malicious misappropriation of trade secrets.

SECTION 4.3 CONSUMER PROTECTION ACT

The law of unfair competition includes the non-contractual duties of loyalty to the employer, good faith, and fair dealing. California, Minnesota and Washington recognize the tort of unfair competition through their respective Consumer Protection Acts.⁵⁵⁴

(a) Washington Law

Washington's Act provides that:

The legislature hereby declares that the purpose of this act is to complement the body of federal law governing restraints of trade, unfair competition and unfair, deceptive, and fraudulent acts or practices in order to protect the public and foster fair and honest competition. It is the intent of the legislature that, in construing this act, the courts be guided by final decisions of the federal courts and final orders of the federal trade commission interpreting the various federal statutes dealing with the same or similar matters. . . . To this end this act shall be liberally construed that its beneficial purposes may be served.

It is, however, the intent of the legislature that this act shall not be construed to prohibit acts or practices which are reasonable in relation to the development and preservation of business or which are not injurious to the public interest, nor be construed to authorize those acts or practices which unreasonably restrain trade or are unreasonable *per se*.⁵⁵⁵

Five elements are required to establish a violation of the Consumer Protection Act: (1) an unfair or deceptive act or practice; (2) in trade or commerce; (3) that affects the public interest; (4) resulting in injury to the plaintiff in his or her business or property; and (5) a causal link between the unfair or deceptive act and the injury suffered.⁵⁵⁶

The Consumer Protection Act does not cover purely private acts. Instead, an allegedly unfair act must impact the public in general. Perhaps because of this limitation, to date, no Washington case discusses the tort of unfair competition under the Consumer Protection Act in the employment context. However, Washington courts recognize that every employee has an employment contract, although the agreement may not be in writing.⁵⁵⁷

⁵⁵³ See, e.g., *Raymond v. Pacific Chem.*, 98 Wn. App. 739 (1999), *rev'd on other grounds*, 143 Wn.2d 349 (2001) (employer's good faith attempt to enforce a non-competition against former employee does not support employee's claim of tortious interference with business relations).

⁵⁵⁴ See RCW 19.86.020; Cal. Bus. & Prof. Code § 17200; Minn. Stat. §§ 325D.44 *et seq.*

⁵⁵⁵ RCW 19.86.020.

⁵⁵⁶ *Galbraith v. TAPCO Credit Union*, 88 Wn. App. 939, 952 (1997); see also *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778 (1986) (articulating test for Consumer Protection Act cases).

⁵⁵⁷ *Swanson v. Liquid Air Corp.*, 118 Wn.2d 512, 537 (1992).

(b) California Law

California's Consumer Protection Act defines unfair competition as "any unlawful, unfair or fraudulent act or business practice."⁵⁵⁸ Judicial opinions vary on what types of conduct are prohibited as unfair competition. Unlike Washington law, a plaintiff suing under California's Consumer Protection Act need not satisfy traditional tort elements. Courts have held in favor of plaintiffs who fail to prove actual deception or injury.⁵⁵⁹ At least one court has prescribed a balancing test for determining whether competition is unfair. If the gravity of harm to the alleged victim is outweighed by the utility of the defendant's conduct, then the practice violates the Consumer Protection Act.⁵⁶⁰

(c) Deceptive Trade Practices in Minnesota

The Minnesota Deceptive Trade Practices Act and Minnesota common law prohibit deceptive trade practices.⁵⁶¹ It is not uncommon for an employee to leave a company to set up or join a competing business, and in the process disclose confidential information or make deceptive representations about a former employer's business in order to gain a customer under false pretenses.

Under Minnesota law, current and former employees are prohibited from "pass[ing] off goods or services as those of another"; "disparag[ing] the goods, services, or business of another by false or misleading representations of fact"; or using deceptive representations in connection with the characteristics of goods or services.⁵⁶² Remedies against a person violating this Act include injunctive relief, and costs and attorneys' fees in some situations.⁵⁶³

SECTION 4.4 DUTY OF LOYALTY

Employees in Washington, California, and Utah are bound by a duty of loyalty even in the absence of an enforceable covenant not to compete.⁵⁶⁴ An employee has a duty of loyalty to his or her employer not to compete with or solicit customers from the employer during employment.⁵⁶⁵ During the period of his or her employment, an employee is not entitled to "solicit customers for [a] rival business . . . or to act in direct competition with his or her employer's business."⁵⁶⁶

Directors or officers of a business are prohibited from appropriating to themselves business opportunities that rightfully belong to the business.⁵⁶⁷ Such business opportunities must be in the same line of business, and the business must have the financial ability to seize the opportunity.⁵⁶⁸

In *Organon, Inc. v. Hepler*, an employer sued a salesperson to enforce an agreement that the employee refrain from outside business activities while employed.⁵⁶⁹ The employee had used his employer's name to gain

⁵⁵⁸ Cal. Bus. & Prof. Code § 17200.

⁵⁵⁹ See, e.g., *S. Bay Chevrolet v. Gen. Motors Acceptance Corp.*, 72 Cal. App. 4th 861, 877 (1999).

⁵⁶⁰ *Motors, Inc. v. Times Mirror Co.*, 102 Cal. App. 3d 735, 740 (1980).

⁵⁶¹ Minn. Stat. §§ 325D.44 *et seq.*

⁵⁶² Minn. Stat. § 325D.44, subd. 1.

⁵⁶³ Minn. Stat. § 325D.45.

⁵⁶⁴ *Ed Novogroski Ins., Inc. v. Rucker*, 88 Wn. App. 350 (1997); see Cal. Lab. Code §§ 2850-2866.

⁵⁶⁵ See, e.g., *Kiebertz & Assoc. v. Rehn*, 68 Wn. App. 260 (1992); *Stokes v. Dole Nut, Co.*, 41 Cal. App. 4th 285 (1995) (employee attempt to start competing business during employment); *Aetna Bldg. Maint. Co. v. West*, 39 Cal. 2d 198, 203 (1952) (employee not entitled to solicit customers of current employer); *Huong Que, Inc. v. Lau*, 150 Cal. App. 4th 400 (2007) (upholding decision enjoining defendants, who began competing with their employer and using the employer's customer list while still employed, from using customer list; distributing calendars to those customers; soliciting business from them; and selling competing calendars to them); *Prince, Yeates & Geldzahler v. Young*, 94 P.3d 179, 184-85 (Utah 2004).

⁵⁶⁶ Restatement (Second) of Agency § 393, Comment (e) (1958).

⁵⁶⁷ *Wagner v. Foote*, 128 Wn.2d 408 (1996).

⁵⁶⁸ *Noble v. Lubrin*, 114 Wn. App. 812 (2003).

⁵⁶⁹ *Organon, Inc. v. Hepler*, 23 Wn. App. 432 (1979).

access to other businesses, and used his employer's car and expense account in his outside pursuits. The court found that the employee's agreement not to engage in outside business activities while employed was neither oppressive nor illegal.

SECTION 4.5 EMPLOYEE DUTIES CONCERNING TRADE SECRETS AND CONFIDENTIAL INFORMATION

An employer may bring a breach of confidentiality claim independent of a trade secrets claim.⁵⁷⁰ A "confidential relationship" alone is sufficient to prohibit disclosure of confidential information.⁵⁷¹ An agreement not to disclose or use an employer's trade secrets need not be expressly made. Under general principles of agency law in Washington, an agent may not use or disclose confidential information received during the course of employment with the principal.⁵⁷²

Directors and officers of a corporation must follow the required standards of conduct set forth in RCW 23B.08.300 and RCW 23B.08.420. Directors and officers have a fiduciary duty to discharge their duties in good faith and according to the best interests of the employer. Directors and officers of a corporation may not directly or indirectly obtain for themselves profit or other personal advantage when acting for a corporation.⁵⁷³

SECTION 4.6 TORT ACTIONS

(a) Washington Law

(i) Breach of Fiduciary Duty

Washington law permits the recovery of gross profits when fiduciaries breach their duties.⁵⁷⁴ This is based on a recognition of the trust relationship between employers and employees. In *St. Hilaire*, the court stated that if an agent obtains profit from a violation of a duty of loyalty to the principal, the agent must "deliver its proceeds to the principal."⁵⁷⁵ The court reasoned that the "reason for the award of gross profit damages for a breach of fiduciary duty is to discourage fiduciaries from abusing their trust relationship."⁵⁷⁶

An employer attempting to show breach by an employee has the burden of proving: (1) a breach of fiduciary duty to the employer; and (2) that the breach was the proximate cause of the losses incurred.⁵⁷⁷

Damages for a breach of fiduciary duty do not have to be proven with mathematical certainty, but must be supported by competent evidence in the record. Evidence of damages is sufficient if it affords a reasonable basis for estimating the loss and does not subject the trier of fact to mere speculation or conjecture. If the damages cannot be ascertained with precision, the court has discretion to determine the amount of damages.⁵⁷⁸

⁵⁷⁰ *Boeing Co. v. Sierracin*, 108 Wn. 2d 38, 48 (1987).

⁵⁷¹ *Id.*; see also *Faris v. Enberg*, 97 Cal. App. 3d 309 (1979).

⁵⁷² *Pacific Title, Inc. v. Pioneer Nat'l Title Ins. Co.*, 33 Wn. App. 874, 879 (1983).

⁵⁷³ *State ex rel. Hayes Oyster Co. v. Keypoint Oyster Co.*, 64 Wn.2d 375, 382 (1964).

⁵⁷⁴ *St. Hilaire v. Food Servs. of Am., Inc.*, 82 Wn. App. 343 (1996) (discussing the damage rules for fiduciaries).

⁵⁷⁵ *Id.* at 350.

⁵⁷⁶ *Id.*; see also *Cogan v. Kidder, Mathews & Segner, Inc.*, 97 Wn.2d 658 (1982) (finding that a real estate broker who breached his fiduciary duty to a client must compensate for actual damages and forfeit his commission).

⁵⁷⁷ *Id.*; *Leppaluoto v. Eggleston*, 57 Wn.2d 393, 403 (1960); *Smith v. Pacific Pools, Inc.*, 12 Wn. App. 578, 581 (1975).

⁵⁷⁸ *Interlake Porsche & Audi*, 45 Wn. App. at 510.

(ii) Tortious Interference with Business Relations

The tort of interference with business relations is recognized in Washington.⁵⁷⁹ To establish a claim against an employee's new employer for tortious interference with a non-competition agreement, the former employer must show:

- the existence of a valid business expectancy;
- that the new employer knew of that expectancy;
- that the new employer intentionally interfered with the expectancy;
- that the new employer had an improper purpose in so interfering; and
- resulting damages.⁵⁸⁰

After the former employer establishes these elements, the new employer bears the burden of justifying the interference or showing that the actions were privileged.⁵⁸¹ A three-year statute of limitations applies to these actions, meaning that the former employer must bring such an action within three years.⁵⁸²

In *Goodyear*, an employee who had signed a non-competition agreement began working for his employer's competitor. The former employer brought an action against the new employer for tortious interference with a non-competition agreement. The court found that genuine issues of material fact existed as to whether the new employer permitted the employee to sell tires to the former employer's customers after hiring him, in violation of the non-competition agreement. The court denied summary judgment in the former employer's favor.⁵⁸³

In *Newton Ins. Agency & Brokerage, Inc. v. Caledonia Ins. Group*, an employer was awarded damages because the defendant purposefully hired the employee with the intent that the employee would violate his non-compete agreement.⁵⁸⁴

Employees occasionally bring claims of tortious interference. In *Raymond v. Pac. Chem.*,⁵⁸⁵ a sales representative who had been terminated brought a claim for tortious interference against his former employer. He claimed that the non-competition clause was invalid, and that the employer's attempt to enforce the clause improperly interfered with his ability to obtain other work. The court disagreed, and found that the employer's good faith assertion of its legal interests does not constitute improper interference, even if the agreement sought to be enforced was invalid.⁵⁸⁶

A plaintiff with a tortious interference with business relations claim is not limited to recovery of expectancy damages the way it would be in a contract action. Instead, a plaintiff may recover "all losses proximately caused by the wrongful conduct of the [defendants]."⁵⁸⁷ Further, a plaintiff has no duty to mitigate damages because interference with business relations constitutes an intentional tort.⁵⁸⁸ Courts may also use legal mechanisms, such as the creation of a constructive trust, to prevent unjust enrichment.⁵⁸⁹

⁵⁷⁹ *Cherberg v. Peoples Nat'l Bank of Wash.*, 88 Wn.2d 595 (1977).

⁵⁸⁰ *Goodyear Tire & Co. v. Whiteman Tire, Inc.*, 86 Wn. App. 732, 745-46 (1997).

⁵⁸¹ *Commodore v. Univ. Mech. Contractors, Inc.*, 120 Wn.2d 120, 137 (1992).

⁵⁸² *Goodyear Tire*, 86 Wn. App. at 747 n.6.

⁵⁸³ *Id.* at 746-47.

⁵⁸⁴ 114 Wn. App. 151 (2002).

⁵⁸⁵ 98 Wn. App. 739 (1999), *rev'd on other grounds*, 143 Wn.2d 349 (2001).

⁵⁸⁶ *Id.*

⁵⁸⁷ *Sunland Invs., Inc. v. A.C. Graham*, 54 Wn. App. 361, 364 (1989).

⁵⁸⁸ *Id.*

⁵⁸⁹ *Scymanski v. Dufault*, 80 Wn.2d 77 (1971).

According to general principles of tort law, a plaintiff can recover any damages that were proximately caused by the defendant's interference. The Washington Supreme Court further recognizes that in tortious interference cases, courts can award damages for mental anguish, discomfort, inconvenience, injury to reputation, or humiliation.⁵⁹⁰

(b) California Law

Tort actions related to unfair competition may be brought under California law in the form of fraud, interference with contract or economic relations, breach of the implied covenant of good faith and fair dealing, breach of fiduciary duty, breach of confidential relationship, and conversion. Employers should consider tort actions in addition to statutory claims under the Uniform Trade Secrets Act and the Consumer Protection Act when considering whether to bring an action against a current or former employee.

(c) Minnesota Law

In addition to bringing a common law claim for deceptive trade practices, discussed in Section 4.8(c), an employer also may bring any number of Minnesota common law claims depending upon the circumstances. These may include, among other things, the following:

- tortious interference with contractual relationships,⁵⁹¹
- tortious interference with prospective advantage,⁵⁹²
- breach of duty of confidentiality,⁵⁹³
- inevitable disclosure;⁵⁹⁴ and
- defamation.⁵⁹⁵

(d) Utah Law

An employer has several common law claims to consider when bringing an action against an employee including tortious interference with contract and prospective economic relations, breach of the duty of loyalty and the covenant of good faith and faith dealing, defamation, and conversion.

Utah's common-law tortious interference claim is unique to other jurisdictions because Utah does not follow the Restatement (Second) of Torts.⁵⁹⁶ In Utah, a claim for intentional interference requires the plaintiff to prove “(1) that the defendant intentionally interfered with the plaintiff's existing or potential economic relations, (2) for an improper purpose or by improper means, (3) causing injury to the plaintiff.”⁵⁹⁷ Thus, a plaintiff alleges a claim by either showing improper means (such as defamation, breach of contractual duties, conversion, etc.) or an improper purpose (that defendant intended to do harm to

⁵⁹⁰ *Cherberg v. Peoples Nat'l Bank of Wash.*, 88 Wn.2d 595, 607 (1977); *but see Ed Nowogorski Ins., Inc. v. Rucker*, 88 Wn. App. 350, 358 (1997) (recognizing that the Uniform Trade Secrets Act (“UTSA”) “specifically displaces tort laws pertaining to trade secret misappropriation.”); RCW 19.108.900.

⁵⁹¹ *United Wild Rice, Inc. v. Nelson*, 313 N.W.2d 628, 632-33 (Minn. 1982); *Bennett v. Storx Broad. Co.*, 134 N.W.2d 892, 897 (Minn. 1965); *see also Midwest Great Dane Trailers, Inc. v. Great Dane Ltd.*, 977 F. Supp. 1386, 1394-95 (D. Minn. 1997).

⁵⁹² *United Wild Rice, Inc.*, 313 N.W.2d at 632-33.

⁵⁹³ *Electro-Craft Corp. v. Controlled Motion, Inc.*, 332 N.W.2d 890, 903 (Minn. 1982); *Jostens, Inc. v. Nat'l Computer Sys., Inc.*, 318 N.W.2d 691 (Minn. 1982).

⁵⁹⁴ The leading case on the inevitable disclosure doctrine is *PepsiCo. v. Redmond*, 54 F.3d 1262 (7th Cir. 1995). Minnesota state and federal courts have referred to the inevitable disclosure doctrine but have not stated whether or not they accept it. *See United Prods. Corp. of Am., Inc. v. Cedarstrom*, No. 05-1688, 2006 WL 1529478, at *5 (Minn. Ct. App. Jun. 6, 2006); *see also Lexis-Nexis v. Beer*, 41 F. Supp. 2d 950, 959 (D. Minn. 1999).

⁵⁹⁵ *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252, 255 (Minn. 1980); *see also Richie v. Paramount Pictures Corp.*, 544 N.W.2d 21, 25 (Minn. 1996).

⁵⁹⁶ *Pratt v. Prodata, Inc.*, 885 P.2d 786, 789-91 (Utah 1994).

⁵⁹⁷ *Leigh Furniture & Carpet Co. v. Isom*, 657 P.2d 293, 304 (Utah 1982).

plaintiff). To be successful in stating a claim for interference with a contract, the plaintiff must establish a breach of an actual contract resulting in damages.⁵⁹⁸ On a claim for interference with prospective economic relations, the plaintiff must show that “there were either dealings or a course of conduct between the plaintiff and a third party from which a reasonable expectation of future economic benefit arose.”⁵⁹⁹

Particularly in the employment setting, employers should beware that in Utah an employer’s truthful statements about an employee that interfere with his new employment could be sufficient to support a tortious interference claim if a court finds that the employer’s predominant purpose in making the statements was to injure the employee.⁶⁰⁰ Utah courts have declined to follow the majority position that truthful statements that are not otherwise tortious or wrongful cannot support a claim for tortious interference.⁶⁰¹

SECTION 4.7 EMPLOYEE INVENTIONS AND IDEAS

(a) Washington Law

Washington law explicitly allows an employer to require its employees to assign patents “directly related to the business of the employer” or “to the employer’s actual or demonstrably anticipated research or development” even if an employee develops such inventions on his or her own time or without the employer’s resources.⁶⁰² To obtain a valid assignment of an employee’s inventions, the employer must provide the following written notification to the employee:

[This] agreement does not apply to an invention for which no equipment, supplies, facility, or trade secret information of the employer was used and which was developed entirely on the employee’s own time, unless (a) the invention relates (i) directly to the business of the employer, or (ii) to the employer’s actual or demonstrably anticipated research or development, or (b) the invention results from any work performed by the employee for the employer.⁶⁰³

The employer may include this notification as part of the inventions assignment agreement signed by an employee; it does not have to be made as a separate written notification.⁶⁰⁴ If an invention assignment lacks the required notification, the assignment agreement will be deemed void.⁶⁰⁵

Even if an employer has not required its employees to assign their patents, the employer still may have a right to an employee’s invention. Employees are bound by a common law duty to assign patents to their employers.⁶⁰⁶ An employer has a right to any inventions invented by an employee who is hired to invent, or is directed to invent, that invention.⁶⁰⁷

(b) California Law

Like Washington, California generally allows an employer to require its employees to assign their rights to inventions to their employer. However, a recent Northern District of California decision demonstrates that such assignment provisions are not always enforceable in California. In *Applied Materials, Inc. v.*

⁵⁹⁸ *St. Benedict’s Den. Co. v. St. Benedict’s Hosp.*, 811 P.2d 194, 201 (Utah 1991).

⁵⁹⁹ See Model Utah Jury Instructions, 19.2 (1993) (citing *Leigh Furniture*); *Leigh Furniture*, 657 P.2d at 302.

⁶⁰⁰ *Pratt*, 885 P.2d at 789-91.

⁶⁰¹ *Id.*

⁶⁰² RCW 49.44.140(1)(a)(i)-(ii).

⁶⁰³ RCW 49.44.140(3).

⁶⁰⁴ *Waterjet Tech., Inc. v. Flow Int’l Corp.*, 140 Wn.2d 313 (2000).

⁶⁰⁵ *Machen, Inc. v. Aircraft Design, Inc.*, 65 Wn. App. 319, 327 (1992).

⁶⁰⁶ See *Waterjet Tech.*, 140 Wn.2d 313 (discussion regarding employer’s common law rights to inventions).

⁶⁰⁷ *Id.* at 315-16.

Advanced Micro-Fabrication Equip., Inc., the court held that an assignment clause in an employment contract, requiring that former employees assign any invention disclosed within one year of terminating their employment, provided the invention related to work that the employee performed for the employer, was void and unenforceable under California law, and constituted unfair competition.⁶⁰⁸ The court found that the assignment clause was overly broad because it was not limited to inventions conceived using employer's confidential information, and included any invention disclosed by the former employees, regardless of where they were conceived.

Any employment contract assigning employee inventions must notify the employee that the agreement does not apply to inventions that qualify fully under California Labor Code § 2870. This provision mimics RCW 49.44.140(3). The example notification listed above should comply with both Washington and California law. In addition to written notification, the employer should give employees a copy of California Labor Code §§ 2870-2872.

(c) Minnesota Law

Under Minnesota law, employers may require an employee to agree to assign or offer to assign any rights in an invention to the employer if the invention relates: (1) “directly to the business of the employer” or (2) “to the employer’s actual or demonstrably anticipated research or development.”⁶⁰⁹ However, such agreements are subject to certain statutory limitations imposed on an employer.⁶¹⁰ Depending on the nature of the business, an employer may wish to include language in the company’s employee handbook describing a proprietary information and inventions policy.

(d) Utah Law

An employer’s right to an employee’s invention is governed by Utah’s Employment Inventions Act.⁶¹¹ Employers may require an employee to assign or license rights in inventions unless the invention was created by the employee entirely on his own time or was not an employment invention.⁶¹² Utah is the only state that, by statute, indicates that the continuation of employment of an employee is consideration to support the enforceability of an assignment of inventions.⁶¹³ Care should be taken in ensuring that contract provisions and handbook policies meet statutory guidelines for enforceability.

SECTION 4.8 TRADE SECRETS

(a) Washington, Utah and Minnesota Law

The Washington Supreme Court has stated that trade secret law is important in maintaining and promoting standards of commercial ethics and fair dealing.⁶¹⁴ Thus, the court has interpreted the term “trade secret” expansively.⁶¹⁵ The Uniform Trade Secrets Act (“UTSA”),⁶¹⁶ adopted by Minnesota, Utah and Washington, provides a broad mechanism for protecting the confidentiality of trade secrets.⁶¹⁷ The UTSA grants courts great flexibility in their application and construction of its terms.⁶¹⁸

⁶⁰⁸ 630 F. Supp. 2d 1084 (N.D. Cal. 2009).

⁶⁰⁹ Minn. Stat. § 181.78, subd. 1.

⁶¹⁰ *Id.* subds. 1-3.

⁶¹¹ Utah Code Ann. § 34-39-3.

⁶¹² *Id.*

⁶¹³ *Id.*

⁶¹⁴ *Boeing Co. v. Sierracin*, 108 Wn.2d 38, 58 (1987).

⁶¹⁵ *Progressive Animal Welfare Soc. v. Univ. of Wash.*, 125 Wn.2d 243, 262 (1994).

⁶¹⁶ RCW 19.108.010 *et seq.*; Minn. Stat. §§ 325C *et seq.*; Utah Code Ann. §§ 13-24, *et seq.*

⁶¹⁷ *Progressive Animal Welfare Soc.*, 125 Wn.2d at 262.

⁶¹⁸ RCW 19.108.910.

Trade secret law, unlike other kinds of intellectual property law, such as patent or copyright law, can protect abstract ideas, as well as industrial processes, computer programs, formulae, and customer lists. The length of trade secret protection is indefinite, as long as the information remains secret and economically valuable.⁶¹⁹ Furthermore, trade secret protection may be cheaper and quicker to implement than other types of protection.

In California, employers can rely on trade secret law for some protection against competing employees. This Section will discuss some notable differences between Washington, Minnesota, Utah, and California law.⁶²⁰

(i) Definition of a Trade Secret

Washington, Utah, and Minnesota law define a trade secret as information, including a formula, pattern, compilation, program, device, method, technique, or process that:

- derives actual or potential independent economic value from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
- is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.⁶²¹

Trade secrets need not be used in business. Washington courts have recognized that trade secret law “protects the author’s very ideas if they possess some novelty and are undisclosed or disclosed only on the basis of confidentiality.”⁶²²

In Minnesota, whether particular information is a trade secret is a fact-specific inquiry; in any particular case, such information could be held not to be a trade secret were the information to have lost secrecy, or not to derive value from being secret. As a general matter, the talent, expertise, skills, or abilities of an employee are not considered trade secrets.⁶²³ Information that is considered general knowledge in the industry also is not a protected trade secret, although in some circumstances a “novel or unique combination of elements” may be a trade secret.⁶²⁴ Information that will quickly become obsolete, thereby losing its independent economic value, is not considered a trade secret.⁶²⁵

In Utah, “[t]o establish a claim for misappropriation of trade secrets, plaintiff must show ‘(1) the existence of a trade secret, (2) communication of the trade secret to [the defendant] under an express duty not to disclose it or use it, and (3) [defendants’] use of the secret that injures [plaintiff].’”⁶²⁶ Like in Minnesota, employees cannot be enjoined from “using [their] knowledge, skill and experiences in an independent business.”⁶²⁷ A plaintiff must “define its claimed trade secret with the precision and particularity necessary to separate it from the general skill and knowledge” possessed by the employee.⁶²⁸

⁶¹⁹ RCW 19.108.010(4); Minn. Stat. § 325C.01, subd. 5; Utah Code Ann. § 13-24-2(4).

⁶²⁰ The Federal Computer Fraud and Abuse Act has been interpreted in the Ninth Circuit not to govern actions by employers outside the scope of their permitted authority. *United States v. Nosal*, 676 F.3d 854 (9th Cir. 2012) (overturning indictment).

⁶²¹ *Id.*

⁶²² *Boeing Co. v. Sierracin*, 108 Wn.2d 38, 49 (1987).

⁶²³ *Strategic Directions Group, Inc. v. Bristol-Meyers Squibb Co.*, 293 F.3d 1062, 1065 (8th Cir. 2002); *Lasermaster Corp.*, 931 F. Supp. at 636-37.

⁶²⁴ *Strategic Directions*, 293 F.3d at 1065 (citing *Electro-Craft Corp.*, 332 N.W.2d at 899 (Minn. 1983)).

⁶²⁵ *Fox Sports Net N. v. Minn. Twins P’ship*, 319 F.3d 329, 336 (8th Cir. 2003); *Lexis-Nexis v. Beer*, 41 F. Supp. 2d 950, 958 (D. Minn. 1999).

⁶²⁶ *Utah Med. Products, Inc. v. Clinical Innovations Assoc., Inc.*, 79 F. Supp. 2d 1290, 1311 (D. Utah 1999) (citing *Water & Energy Sys. Tech., Inc.*, 974 P.2d 821, 822 (Utah 1999)).

⁶²⁷ *Microbiological Res Corp. v. Muna*, 625 P.2d 690, 699 (Utah 1981).

⁶²⁸ *Utah Med. Products, Inc.*, 79 F. Supp. 2d at 1313.

The UTSA pre-empts tort claims that depend on the existence of trade secrets, including misuse of confidential information and intentional interference.⁶²⁹ To establish a claim for misappropriation of a trade secret under the UTSA, a plaintiff must prove that a legally protectable secret exists.⁶³⁰ Under RCW 19.108.010(4), a trade secret exists if the plaintiff can establish: (1) that the information derives independent economic value from not being generally known or readily ascertainable to others who can obtain economic value from its use; and (2) that reasonable efforts have been taken to maintain the secrecy of the information.⁶³¹

The information an employee acquires about customers of the employer may be confidential and subject to trade secret protection, even though the customer names are easily ascertainable, if the specific attributes of the customers are important to a seller and are not obvious.⁶³² While customer lists that are carefully protected, and contain detailed, expensively accumulated information regarding customers that is not generally known to the public have been found to be trade secrets, simple lists of customers that are, or could easily be, found in the public domain generally are not.⁶³³ The identity of customers and their key contacts are not entitled to trade secret protection if the competitor is able to compile a list of customers through publicly available information.⁶³⁴ Often a court assessing whether a customer list is a trade secret will look to the time and expense the employer invested in compiling the particular list; the more taxing and expensive the development of the list, the more likely that list will be a trade secret.

The Washington Supreme Court has acknowledged that even memorized customer lists can be defined as trade secrets.⁶³⁵ The defendant in *Ed Nowogroski Ins., Inc. v. Rucker*, used a memorized customer list to contact and solicit his former employer's customers. The Court found that a former employee remains under a duty not to use or disclose trade secrets acquired during previous employment to the detriment of his or her previous employer.

Under Minnesota law, where an employee acquires a trade secret in the absence of express or specific notice thereof, a trade secret continues to exist if the employee knows or has reason to know that the employer intended or expected the secrecy of the information compromising the trade secret to be maintained.⁶³⁶ Carefully crafted non-disclosure/confidentiality agreements and policies (discussed further below) are helpful in demonstrating notice to employees and the existence of reasonable efforts by the employer to maintain confidentiality. However, simply having all employees sign a confidentiality agreement will not necessarily be sufficient.⁶³⁷ In determining whether reasonable efforts were taken, courts will often examine an employer's procedures to protect the information from outsiders along with the procedures by which the employer signals to its employees and to others that certain information is secret and should not be disclosed. For example, courts may look to the security of the employer's premises, security measures to protect electronically maintained trade secret information, labeling documents and/or files as confidential, whether confidential documents are revealed to clients, vendors, or other outsiders, and the existence and content of any confidentiality agreements.

A future employer may be held vicariously liable under the UTSA for the misconduct of a future employee if it knowingly benefits from the misconduct. In *Thola v. Henschell*, an employee worked at Thola's chiropractic clinic and agreed to take a new job at Henschell Chiropractic. Henschell offered the employee

⁶²⁹ *Ed Nowogroski Ins., Inc. v. Rucker*, 88 Wn. App. 350, 358 (1999).

⁶³⁰ *Precision Moulding & Frame, Inc. v. Simpson Door Co.*, 77 Wn. App. 20, 25 (1995).

⁶³¹ *Id.*

⁶³² *Kovarik v. Am. Family Ins. Group*, 108 F.3d 962, 966 (8th Cir. 1997) (using California law to interpret North Dakota UTSA).

⁶³³ *Id.*

⁶³⁴ *Lasermaster Corp. v. Sentinel Imaging*, 931 F. Supp. 628, 637 (D. Minn. 1996).

⁶³⁵ *Ed Nowogroski Ins.*, 137 Wn.2d at 440.

⁶³⁶ *Id.*

⁶³⁷ See, e.g., *Nordale, Inc. v. Samsco, Inc.*, 830 F. Supp. 1263, 1274 (D. Minn. 1993) (summary judgment dismissing trade secret claim for failure to take reasonable steps to maintain secrecy, notwithstanding confidentiality agreements required of all employees).

a bonus for each new client she attracted. During the several months the employee continued to work for Thola, the employee appropriated Thola's confidential patient list. Several of these patients left Thola's to obtain services at Henschell. Henschell kept the patients and paid the employee her bonus for attracting the clients. Thola sued the employee and Henschell for violating the UTSA. Henschell's claimed that it could not be vicariously liable for an employee's acts before she became its employee. The court disagreed, holding that an employer may be liable for the misconduct of a future employee during the interim period between when she accepts the job and when she officially starts work, if the employer knowingly benefits from the misconduct.⁶³⁸

(ii) Information Not Readily Ascertainable

A plaintiff cannot establish the existence of a trade secret if the information is generally known or readily ascertainable.⁶³⁹ To defeat a trade secret claim, a defendant involved in trade secret litigation does not need to go so far as to establish that the information is known to or readily ascertainable to the general public, just that it is readily ascertainable to those who can obtain value from the knowledge.⁶⁴⁰ On the other hand, a plaintiff need not prove that every element of an information compilation is unavailable elsewhere.⁶⁴¹ "Such a burden would be insurmountable since trade secrets frequently contain elements that by themselves may be in the public domain but together qualify as trade secrets."⁶⁴² Trade secret protection can attach to a unique combination of public and non-public information.

Courts closely examine information contained in processes, such as formulas or recipes, to determine whether such information is readily ascertainable. For instance, in *Precision Moulding*, a woodworking company brought a trade secret action against a door manufacturer for allegedly using the company's process to secure molding while adhesive was setting. The defendant submitted evidence that the process was included in a third company's employee handbook, and provided testimony from the company stating that they did not consider the use of the process a trade secret and had taken no precautions to maintain secrecy regarding its use.⁶⁴³ The court looked to the accessibility of the information within the industry to determine whether the information constituted a trade secret.⁶⁴⁴ The court held that the relevant industry included persons in the plaintiff's business as well as those in more general industries who could obtain economic value from using processes found in both groups.⁶⁴⁵ The court dismissed the claim on the grounds that the plaintiff had failed to establish that others in the industry could not readily ascertain the alleged trade secret information.

(iii) Reasonable Efforts to Maintain Secrecy

The Uniform Trade Secrets Act also requires that reasonable efforts have been made to maintain the secrecy of the information. Reasonable efforts to maintain the secrecy of trade secrets has not been interpreted as a requirement of absolute secrecy; relative secrecy is the appropriate standard.⁶⁴⁶ Washington courts follow the UTSA definition of reasonable efforts to maintain secrecy:

[R]easonable efforts to maintain secrecy have been held to include advising employees of the existence of a trade secret, limiting access to a trade secret on a "need to know basis," and controlling plant access. On the other hand, public

⁶³⁸ *Thola v. Henschell*, 140 Wn. App. 70 (2007).

⁶³⁹ *Sierracin*, 108 Wn.2d at 49-50.

⁶⁴⁰ *Precision Moulding*, 77 Wn. App. at 26-27.

⁶⁴¹ *Sierracin*, 108 Wn.2d at 50.

⁶⁴² *Id.*

⁶⁴³ *Precision Moulding*, 77 Wn. App. at 23.

⁶⁴⁴ *Id.* at 26.

⁶⁴⁵ *Id.* at 27.

⁶⁴⁶ *Machen, Inc. v. Aircraft Design, Inc.*, 65 Wn. App. 319, 327 (1992).

disclosure of information through display, trade journal publications, advertising, or other carelessness can preclude protection.

The efforts required to maintain secrecy are those “reasonable under the circumstances.” The courts do not require that extreme and unduly expensive procedures be taken to protect trade secrets against flagrant industrial espionage. It follows that reasonable use of a trade secret, including controlled disclosure to employees and licensees is consistent with the requirement of relative secrecy.⁶⁴⁷

In *Machen*, an aircraft product company brought suit to protect information that consisted of: (1) the knowledge that certain brakes were deficient; (2) the knowledge that a modified replacement brake would be a marketable product; (3) the knowledge that a particular brand of brake was a suitable candidate for modification; (4) a strategy to use another company’s existing technical expertise to obtain Federal Aviation Administration certification; and (5) a marketing strategy and business plan to obtain exclusive distribution rights for the brake.⁶⁴⁸ The defendant argued that the aircraft product company had not taken reasonable efforts to uphold the secrecy of the information because it had disclosed the information to other industry vendors during a trade show. The company’s response was that the information it disclosed would implicitly be kept secret as a “matter of industry custom.” The court in *Machen* recognized that trade secrets often contain elements that by themselves are in the public domain, but when taken together qualify for protection. However, the court held that the general physical security measures the plaintiff used to keep the information secret at its plant were not designed to prevent the disclosure of the information at a trade show.⁶⁴⁹ The court affirmed the dismissal of the trade secret claim, stating that “[g]ratuitous, unsolicited disclosure of information does not impose upon a recipient a contractual or fiduciary obligation not to disclose it.”⁶⁵⁰

Machen demonstrates that the recipient’s subjective belief regarding whether the information is confidential may be a material factor in determining if reasonable efforts to maintain the secrecy of information were made. For example, in *Precision Moulding*,⁶⁵¹ the court held that the plaintiff failed to demonstrate reasonable steps to ensure secrecy where the information was obtained from a person who did not consider the information a trade secret and took no steps to protect its secrecy, despite steps that the subsequent possessor of that information took to keep it secret.⁶⁵²

(iv) Misappropriation of a Trade Secret

The plaintiff must also show that the information was actually misappropriated. The UTSA defines “misappropriation” as:

- acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or
- disclosure or use of a trade secret of another without express or implied consent by a person who:
 - used improper means to acquire knowledge of the trade secret; or
 - at the time of disclosure or use, knew or had reason to know that his or her knowledge of the trade secret was (A) derived from or through a person who had utilized improper

⁶⁴⁷ *Id.*

⁶⁴⁸ *Id.* at 324.

⁶⁴⁹ *Id.* at 327.

⁶⁵⁰ *Id.* at 329.

⁶⁵¹ 77 Wn. App. 20.

⁶⁵² *Id.* at 27; see also *Spokane Research & Defense Fund v. City of Spokane*, 96 Wn. App. 568, 578 (1999) (holding that leases, credit studies, and *pro formas* relating to city funding of a private development project were public records and not trade secrets where a factual basis to establish harm caused by disclosure was lacking and where efforts to maintain secrecy were not reasonable).

means to acquire it, (B) acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use, or (C) derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or

- before a material change of his or her position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.⁶⁵³

Agreements between employers and employees that identify confidential and/or proprietary information usually provide a basis for a finding that the employee was aware of a duty to maintain the secrecy of the information. Failure to follow the terms of the agreement or maintain the confidentiality of the information may be actionable under the UTSA or general contract law.

“Improper means” under the UTSA includes theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage.⁶⁵⁴ The Washington Supreme Court confirmed that memorization of information constitutes improper means.⁶⁵⁵ In *Ed Nowogroski*, the Washington Supreme Court held that no distinction exists between written and memorized information under the UTSA.⁶⁵⁶

(v) Enjoining Misappropriation of a Trade Secret

The UTSA permits for injunctive relief for actual or threatened misappropriation of a trade secret.⁶⁵⁷ Employers can enjoin an employee who possesses a trade secret but has not yet used it. An injunction ordinarily terminates when the trade secret ceases to exist; however, it may be continued for an additional period to eliminate any commercial advantage that could be derived from misappropriation.⁶⁵⁸ In extreme cases, the court may find that it is unreasonable to prohibit future use of the trade secret. In such cases, the court may create an injunction that conditions future use upon payment of a reasonable royalty for no longer than the period of time the use could have been prohibited.⁶⁵⁹

Washington courts may compel affirmative acts to protect a trade secret.⁶⁶⁰ They can order the return of misappropriated material, destruction of the product developed on the basis of the misappropriated information, or removal from the market of such a product. Courts will not require a showing of irreparable harm to obtain such relief.⁶⁶¹

For example, in *Sierracin*, the Washington Supreme Court issued an injunction against future use of the plaintiff’s cockpit window drawings and information “derived from” those drawings.⁶⁶² The Court rejected the defendant’s argument that the injunction was too vague. The Court determined that the use of the language “derived from” in the definition section of the UTSA indicates that the term is not inherently vague.⁶⁶³

Under Minnesota law, to prevent a former employee from unfairly using confidential information under the Act, the employer may seek an injunction for actual or threatened misappropriation of a trade secret.⁶⁶⁴ In addition, an employer can seek damages for any actual loss and unjust enrichment; as well as exemplary

⁶⁵³ RCW 19.108.010(2).

⁶⁵⁴ RCW 19.108.010(1).

⁶⁵⁵ *Ed Nowogroski Ins., Inc. v. Rucker*, 137 Wn.2d 427, 449 (1999).

⁶⁵⁶ *Id.*

⁶⁵⁷ RCW 19.108.020.

⁶⁵⁸ RCW 19.108.010(1).

⁶⁵⁹ RCW 19.108.010(2).

⁶⁶⁰ RCW 19.108.010(3).

⁶⁶¹ *Sierracin*, 108 Wn.2d at 62.

⁶⁶² *Id.* at 63.

⁶⁶³ *Id.*

⁶⁶⁴ Minn. Stat. § 325C.02.

damages for willful and malicious misappropriation.⁶⁶⁵ If a claim of misappropriation is made in bad faith or willful and malicious misappropriation exists, the court may award reasonable attorney's fees to the prevailing party.⁶⁶⁶ An action for misappropriation of trade secrets must be brought within three years after the discovery of the misappropriation, or within three years of when it should have been discovered through reasonable diligence.⁶⁶⁷

In Utah, injunctive relief is available to enjoin both actual and threatened misappropriations. The court may go as far as requiring "affirmative acts" to protect a trade secret.⁶⁶⁸ Damages are also available, including both actual loss caused by the misappropriation as well as unjust enrichment obtained by the defendant.⁶⁶⁹ A plaintiff may also seek the imposition of a royalty for the unauthorized disclosure or use of the trade secret.⁶⁷⁰ Willful and malicious misappropriation may also give rise to punitive damages not to exceed twice the award of damages.⁶⁷¹ Additionally, bad faith claims, and willful and malicious misappropriation may give rise to an award of reasonable attorneys' fees.⁶⁷²

(vi) Protections for Trade Secrets During Litigation

By engaging in litigation to protect a trade secret, an employer runs a significant risk of disclosing the very secrets that the employer wants to protect. This is especially true when the new employer is a competitor. In litigation that seeks to enjoin actual or threatened misappropriation, the holder of a trade secret who in good faith uses this legal remedy does not thereby "publish" and lose its secrets at trial.⁶⁷³ Washington law provides several options to employers to protect against the unwanted disclosure of trade secrets and other proprietary information during litigation.

Washington Civil Rule 26(c)(7) enables courts to protect trade secrets and other confidential research, development, or commercial information from disclosure by issuing a protective order. The courts have the authority to make "any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."⁶⁷⁴ This provision allows courts to order that information be disclosed only in particular narrowly-tailored ways. Courts have recognized that CR 26(c) gives them "broad discretion to manage the discovery process in a fashion that will implement the goal of full disclosure of relevant information and at the same time afford the participants protection against harmful side effects."⁶⁷⁵

The UTSA also provides a mechanism designed to protect trade secrets during litigation. The UTSA enables courts, under appropriate circumstances, to compel affirmative acts for the protection of trade secrets.⁶⁷⁶ These actions might include "granting protective orders in connection with discovery proceedings, holding in-camera hearings, sealing the records of the action, and ordering any person involved in the litigation not to disclose an alleged trade secret without prior court approval."⁶⁷⁷

⁶⁶⁵ Minn. Stat. § 325C.03.

⁶⁶⁶ Minn. Stat. § 325C.04.

⁶⁶⁷ Minn. Stat. § 325C.06.

⁶⁶⁸ Utah Code Ann. § 13-24-3.

⁶⁶⁹ Utah Code Ann. § 13-24-4.

⁶⁷⁰ *Id.*

⁶⁷¹ *Id.*

⁶⁷² Utah Code Ann. § 13-24-5.

⁶⁷³ *Sierracin*, at 53.

⁶⁷⁴ CR 26(c). See, e.g., *Rufer v. Abbott Labs.*, 154 Wn.2d 530 (2005), and *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30 (1982), for Washington case law interpreting CR 26(c).

⁶⁷⁵ See *Penberthy Electromelt Int'l, Inc. v. U.S. Gypsum*, 38 Wn. App. 514, 521 (1984).

⁶⁷⁶ RCW 19.108.020(3).

⁶⁷⁷ RCW 19.108.050.

Protection of proprietary or secret information from undesired disclosure during the discovery process can also be a challenge during litigation. The former employer whose trade secrets are in dispute will not want a new employer to have access to any confidential or proprietary information. Therefore, employers should seek to have discovery material, to the extent they contain trade secrets, available only to the attorneys representing each party.⁶⁷⁸

In certain cases, an employee's new employer may contest the existence of a trade secret, and argue that it is entitled to discovery so that it can refute the charges being made against it. The new employer may also claim that it lacks the resources to defend the charges brought without its client's advice on technical issues that are beyond the expertise of its attorneys. In these situations, it may be sufficient to permit the former employee to advise counsel for his new employer in regards to technical issues; or the new employer might hire an independent third-party expert who agrees to be bound by his or her own non-disclosure agreement.

(vii) Damages and Other Relief for Misappropriation of a Trade Secret

A lawsuit for misappropriation of a trade secret must be brought within three years from the date that the misappropriation is discovered or by the exercise of reasonable diligence should have been discovered by the aggrieved party.⁶⁷⁹ The UTSA provides for various remedies for wrongful appropriation of trade secrets. First, a plaintiff may recover actual damages. Second, a plaintiff may also recover unjust enrichment damages. Third, in some cases, punitive damages are available. Lastly, a court also possesses the discretion to award attorneys' fees.

The UTSA provides that a plaintiff may recover actual damages for losses caused by misappropriation in addition to or in lieu of injunctive relief. Actual damages are measured by the actual value of the loss, for example the lost profits caused by the misappropriation.

Damages may also be recovered for the unjust enrichment caused by misappropriation that is not taken into account in measuring damages for actual loss.⁶⁸⁰ The court determines the amount of this remedy without reference to the actual losses the plaintiff suffers, and may award unjust enrichment damages in addition to any lost profit damages. Any benefit received by the party who misappropriated the trade secret may constitute unjust enrichment. Thus, a plaintiff may recover the profit created by the defendant's wrongful use of trade secrets, and the defendant may be liable for the amount of any benefit received as a result of access to the confidential information.

In *Organon, Inc. v. Hepler*,⁶⁸¹ damages for unjust enrichment were awarded to a plaintiff whose employee used employer property, including client lists, to operate a side business in violation of an agreement. The employee argued that he was not violating the agreement because the new product line did not directly compete with his employer's business. He further argued that because he was only soliciting his employer's current customers, little or no time was spent on the side business. Finally, the employee claimed that the employer suffered no loss because its customers remained satisfied and its business did not falter. Despite the employee's arguments, the court found that because the employee had "personally profited . . . while traveling on the expense account of [the employer]," an award of damages for unjust enrichment was proper.⁶⁸² Because *Organon* is not, strictly speaking, a trade secrets case, an employer may be able to recover damages even if it cannot prove that it has lost statutorily-defined trade secrets.

⁶⁷⁸ A California Court of Appeal recently held that accidental public disclosure of trade secrets does not lose their character as such. *Wallis v. PHL Assocs.*, 168 Cal. App. 4th 882 (2008).

⁶⁷⁹ RCW 19.108.060; *McLeod v. Nm. Alloys, Inc.*, 90 Wn. App. 30 (1998).

⁶⁸⁰ RCW 19.108.030(1).

⁶⁸¹ 23 Wn. App. 432 (1979).

⁶⁸² *Id.* at 437.

In *Staff Builders Home Healthcare v. Whitlock*, the defendant formed a competing company while employed by Staff Builders.⁶⁸³ Immediately after he terminated his employment, he began providing services to his former employer's customers. Staff Builders won a lawsuit against him for tortious interference with business expectancy, violation of a non-competition agreement, and violation of the UTSA. Staff Builders recovered damages based on lost profits and unjust enrichment. However, Staff Builders did not recover the former employee's salary for the time preceding his termination when he was forming a competing company. The court reasoned that the employee's salary would have been paid as wages in any event.

Punitive damages may also be available in cases of willful and malicious misappropriation. The UTSA provides that "if willful and malicious misappropriation exists, the court may award exemplary damages in an amount not exceeding twice any award made."⁶⁸⁴ An award of punitive damages lies within the discretion of the court.⁶⁸⁵ The court will look to whether the defendant "knew its actions to be of dubious legality" in deciding whether or not to impose punitive damages.⁶⁸⁶ Therefore, in order to recover punitive damages, an employer must prove that the employee or new employer was aware of the fact that former employees possessed trade secrets and that those secrets were willfully exploited.

Lastly, the UTSA permits the recovery of attorneys' fees if a plaintiff proves that the misappropriation of trade secrets was "intentional, willful and malicious."⁶⁸⁷ An award of attorneys' fees also lies within the trial court's discretion. Generally, courts consider the reasonableness of the time spent on a matter, the reasonableness of the hourly rate, and the difficulty of the matter in determining the award.⁶⁸⁸

(b) Comparing California Law: The Doctrine of Inevitable Disclosure

Like Minnesota, Utah and Washington, California has adopted the UTSA definition of trade secrets,⁶⁸⁹ and enforcement of trade secret law runs parallel in many respects.⁶⁹⁰ One notable difference is that Washington law recognizes the doctrine of *inevitable disclosure*,⁶⁹¹ whereby employees may be restrained from accepting competing work under the theory that the employee must inevitably rely on protected trade secrets learned from a previous employer in the course of their new employment. While most states that adhere to the UTSA recognize inevitable disclosure as an example of threatened misappropriation,⁶⁹² California courts explicitly reject the doctrine on the basis that it creates an after-the-fact covenant not to compete restricting employee mobility in violation of public policy.⁶⁹³ In practical terms this means that under California law, for an employer to prevail on a trade secret claim, the former employee must actually use or threaten to use the alleged trade secrets.

California Civil Code Section 2019.210 also requires a plaintiff suing for misappropriation of its trade secrets to identify with "reasonable particularity" the purported trade secrets which allegedly have been misappropriated "before commencing discovery relating to the trade secret[s]." In *Perlan Therapeutics v. Superior Court*, the court found that the employer plaintiff's trade secret statement failed to meet this standard because it lacked clarity, did not segregate its alleged trade secrets, did not clearly explain how its

⁶⁸³ *Staff Builders Home Healthcare v. Whitlock*, 108 Wn. App. 928 (2001).

⁶⁸⁴ RCW 19.108.030(2).

⁶⁸⁵ *Sierracin*, 108 Wn.2d at 61.

⁶⁸⁶ *Id.* at 62.

⁶⁸⁷ *Id.* at 64; RCW 19.108.040.

⁶⁸⁸ *Sierracin*, 108 Wn.2d at 64.

⁶⁸⁹ Cal. Civ. Code § 3426.1(d).

⁶⁹⁰ For examples of recent California cases involving trade secrets, see *FLIR Sys. Inc. v. Parrish*, 174 Cal. App. 4th 1270 (2009), *Brescia v. Angelin*, 172 Cal. App. 4th 133 (2009), and *K.C. Multimedia Inc. v. Bank of Am. Tech. & Ops., Inc.*, 171 Cal. App. 4th 939 (2009).

⁶⁹¹ See *Solutech Corp. v. Agnem*, 88 Wn. App. 1067 (1997).

⁶⁹² Under the UTSA, either actual or threatened misappropriation may be enjoined. Unif. Trade Secrets Act § 2(a).

⁶⁹³ See *Whyte v. Schlage Lock Co.*, 101 Cal. App. 4th 1443, 1462 (2002).

secrets differed from publicly available knowledge, included a large amount of “surplusage,” and referenced hundreds of pages of extra documents.⁶⁹⁴

SECTION 4.9 MEANS OF PROTECTING CONFIDENTIAL INFORMATION AND TRADE SECRETS

(a) Non-Disclosure and Confidentiality Agreements

Employers often use non-disclosure and/or confidentiality agreements as a means to protect confidential information and trade secrets. These agreements serve the purpose of making employees aware of the confidential nature of the employer’s information, defining what particular information the employer deems confidential, and evidencing – through the agreements – that the company takes significant (and legally sufficient) measures to ensure its proprietary information is kept confidential. Such non-disclosure or confidentiality clauses may be incorporated into employee agreements and/or separately set forth in, for example, employee handbooks or separate agreements. Often, it behooves an employer to draft a separate “non-disclosure and confidentiality agreement” to protect confidential information and trade secrets, in order to emphasize to its employees the significant concern that such information be kept confidential.

In addition to entering into such agreements with employees, employers should consider whether to, and often do, also enter into confidentiality and non-disclosure agreements with third parties such as independent contractors, vendors, or potential business partners (as in the midst of a contemplated corporate transaction such as a merger or acquisition). As with employees, such agreements are useful for emphasizing to such third parties the highly confidential nature of the employer’s information, and such agreements also evidence the employer’s reasonable efforts to protect its proprietary information.

In drafting non-disclosure and confidentiality agreements, employers should, first and foremost, ensure the agreement carefully and specifically defines the confidential information and trade secrets at issue. Avoid the temptation to define confidential information too broadly, such that it encompasses information that is not, in fact, confidential. A good practice is for employers to update the definition of confidential and trade secret information on a regular basis so that it accurately reflects the information the company is trying to protect.

Further, a non-disclosure and confidentiality agreement should: (1) clearly define employees’ and/or third parties’ obligations to keep information confidential, and provide specific instructions if, when, and to whom such information may be disclosed; (2) provide specific guidance as to where and how confidential and trade secret information should be maintained and (where appropriate) shared; and (3) specifically provide that all obligations survive the termination of employees’ employment.

Employers must also provide consideration for the non-disclosure and confidentiality agreement. If the agreement is entered into at the inception of the employment relationship (as it should be, wherever possible), the employer should specifically provide in the agreement that it is in consideration for the employee’s employment. If an employer is entering into such an agreement after an employee has already begun working with the company then, depending upon the jurisdiction, the employer may be able to provide that the consideration for the agreement is the employee’s continued employment. In other jurisdictions, however, continued employment is not sufficient consideration, and the employer will be required to offer further consideration to bind the employee to the agreement.

(b) Comprehensive Non-Disclosure Policy

As mentioned above, in addition to separate non-disclosure and confidentiality agreements, whether in employment agreements or as stand-alone contracts, employers often do – and should – have comprehensive non-disclosure policies in their employee handbooks or set forth as a separate policy. Just

⁶⁹⁴ *Perlan Therapeutics, Inc. v. Superior Court*, 178 Cal. App. 4th 1333 (2009).

as with non-disclosure and confidentiality agreements, employers should state as clearly and specifically as possible in such policies the information the company is seeking to protect, and place employees on notice of their obligation to keep such information secret. In addition, the policy should give guidance on: (1) how, when, and to whom, employees are permitted to share such information; (2) which employees are permitted to view such information; and (3) procedures that are to be used in working with trade secret and confidential information (such as, for example, providing that employees are to accompany visitors at the company at all times, or that employees are to keep trade secret material at the office and are not permitted to take such material home).

(c) **Best Practices in Protecting Confidential Information and Trade Secrets**

With the foregoing in mind, set forth below are some “best practices” in protecting an employer’s confidential information and trade secrets:

- Limit Information To Those Who “Need To Know.” Limit knowledge regarding, and access to, confidential information and trade secrets to those employees or third parties who “need to know.” Consider every measure possible to “reasonably maintain” the confidential nature of information. For example:
 - Limit access to employees with strong need for information.
 - Post signs denying admittance to particular areas where appropriate.
 - Ask visitors to sign agreements prohibiting disclosure of information viewed or learned during a visit, perhaps as a part of a sign-in log.
 - Prevent visitors from bringing devices (such as cameras, cell phones, blackberries, etc.) into restricted areas that would enable them to record or take pictures of trade secret or confidential subjects.
 - Require visitors to be accompanied by employees during visits to sites where confidential information or trade secrets might become known.
 - Emphasize to attendees at meetings or events where confidential information will be disclosed that the information is, in fact, confidential, and that the attendees have a duty to keep it confidential.
- Put In Place Appropriate Security Measures To Protect Confidential And Trade Secret Information. For example:
 - Place warnings on documents or materials that are confidential. Consistently mark appropriate documents and materials. Do not “overmark” (*i.e.*, mark materials that are not truly trade secrets or confidential) or “undermark” (*i.e.*, fail to appropriately designate material the company wishes to protect).
 - Keep sensitive information physically guarded in appropriate circumstances.
 - Password protect trade secret and confidential material that is stored electronically, and ensure that only appropriate individuals have access to such passwords. Establish firewalls or other technical protections as well.
 - Store items in locked cabinets.
- Train Employees. It is important to give employees appropriate training about the importance of non-disclosure, and to define the universe of information that must be protected. In addition:
 - Ask employees to sign documents acknowledging receipt and understanding of non-disclosure policies and training (in addition to any Agreements, discussed above).
 - Prohibit or limit employees from taking confidential or trade secret information home.

- Put In Place Appropriate Employee Termination Procedures. Adopt employee termination procedures aimed at minimizing risk of misappropriation. For example:
 - Provide terminated employees copies of any non-disclosure and confidentiality agreement they signed at their termination meeting, along with the company's policy on confidential information and trade secrets, and verbally remind the employee or his or her continuing obligations to keep information confidential. It may be appropriate to ask employees to sign an acknowledgement of their continuing obligations.
 - Escort terminated employees out of the building to ensure they do not take any trade secret or confidential material.
 - If the company perceives an increased risk of misappropriation, additional measures may be necessary, such as reviewing the computer hard drives and email records of departing employees or other measures.
- Adopt A Plan For Quick Response To Inadvertent Disclosure. For example,
 - If trade secret or confidential information is inadvertently publicized, immediately take steps to limit or curtail publication and remind employees and/or third parties of the confidential nature of the information.
 - If such information is inadvertently disclosed to only a few individuals, contact those individuals to alert them to the error, and instruct them as to the confidential and/or trade secret nature of the information. Ask them to sign acknowledgements of the confidential nature of the information, if appropriate.

The foregoing are simply examples. A company should tailor its efforts regarding protection to the particular trade secrets and confidential information at issue. Engaging in some of the foregoing activities should give the company a good start on protecting its proprietary, valuable, confidential information.

CHAPTER V

WAGE AND HOUR LAWS

Wage and hour actions have increased fourfold since 1997. Wage and hour class claims now surpass all other employment class actions. Despite the great risk of litigation, the Department of Labor estimates that seventy percent of employers are not in compliance with Federal Fair Labor Standard Act requirements.⁶⁹⁵ This chapter attempts to help employers better comply with federal and Washington, California, Minnesota, and Utah wage and hour law. Due to the complex nature of this area of law, consultation with an attorney with expertise in wage and hour law is recommended.

The Federal Fair Labor Standards Act of 1938 (“FLSA”),⁶⁹⁶ the Washington Minimum Wage Act (“WMWA”),⁶⁹⁷ the California Labor Code,⁶⁹⁸ the Minnesota Fair Labor Standards Act (“Minnesota FLSA”), the Minnesota Child Labor Standards Act, and the Utah Minimum Wage Act (“UMWA”)⁶⁹⁹ are the principal statutes governing setting hours and paying wages to employees in Washington, California, Minnesota, and Utah. These laws have two basic requirements: (1) the payment of certain minimum wage rates; and (2) the payment of overtime compensation. Employers in Washington, California, Minnesota, and Utah must comply with both the FLSA and their respective state wage and hour laws, resolving any conflict in favor of the law which provides the most benefit to the employee.⁷⁰⁰ Generally speaking, Washington, California, and Minnesota laws provide greater protection for employees than federal law.

Claims for violations of the FLSA and the UMWA must be filed within two years of the violation.⁷⁰¹ Claims for violations of Washington, California and Minnesota wage and hour laws must be filed within three years of the violation.⁷⁰²

The FLSA is administered by the U.S. Department of Labor, the Minnesota FLSA by the Minnesota Department of Labor & Industry, the WMWA by the Washington Department of Labor and Industries,

⁶⁹⁵ The Department of Labor announced in March 2009 that it was significantly increasing its force of wage and hour investigators and ratcheting up its enforcement of wage and hour laws, partly to ensure the compliance of contractors on stimulus projects under the American Recovery and Reinvestment Act. See <http://www.dol.gov/whd/media/press/whdpressVB3.asp?pressdoc=national/20090325.xml>.

⁶⁹⁶ See 29 U.S.C. §§ 201 *et seq.*

⁶⁹⁷ RCW 49.46 *et seq.*

⁶⁹⁸ California wage and hour law also includes Industrial Welfare Commission (“IWC”) Orders. Orders must be posted in the workplace in an area frequented by employees and be available for employees to easily read each workday. IWC Orders are broken down into four categories based on the employer’s industry, generally classified according to the main purpose of the business. Because the Orders are based on the *employer’s* industry, an Order that covers an employer also covers all of its employees, regardless of the work they perform. As many modern businesses conduct a variety of operations, correctly identifying the applicable IWC Order(s) may prove complicated. A business with several purposes may be governed by more than one IWC Order. See Cal. Code Regs. tit. 8, §§ 11010-11030, 11050-11130 (industry orders); §§ 11040, 11140-11160 (occupation orders); § 11170 (catch-all order applying to miscellaneous employees not covered by other orders); § 11010 (general minimum wage order).

⁶⁹⁹ Utah Code Ann. § 34-40-101 *et seq.*

⁷⁰⁰ 29 C.F.R. § 541.4; *Milner v. Farmers Ins. Exch.*, 748 N.W.2d 608, 611 n.1 (Minn. 2008).

⁷⁰¹ Or within three years of a willful violation. 29 U.S.C. § 255(a); Utah Code Ann. § 34-4-205(3).

⁷⁰² See *Mitchell v. PEMCO Ins. Co.*, 134 Wn. App. 723 (2006); Cal. Civ. Proc. Code § 338; see also *Murphy v. Kenneth Cole Prods., Inc.*, 40 Cal. 4th 1094, 1099 (2007) (California’s provision providing that an employer shall pay an employee one additional hour of pay for each workday that a meal or rest period is not given, is a form of wages subject to a three-year statute of limitations, rather than a penalty subject to a one-year filing limit); *Pineda v. Bank of Am.*, 50 Cal. 4th 1389 (2010) (three-year statute of limitations applies for lawsuit seeking penalties for failure to pay wages under Cal. Lab. Code § 203). Employment agreements shortening the period in which to bring wage and hour claims pursuant to the California Labor Code are unenforceable. *Pellegrino v. Robert Half Int’l, Inc.*, 181 Cal. App. 4th 713 (2010).

the California Labor Code by the California Division of Labor Standards Enforcement (“DLSE”), and the UMWA by the Utah Labor Commission.

Wage and hour law is complex with potentially serious fines. Employers are advised to consult legal counsel to ensure full compliance.

SECTION 5.1 EMPLOYERS COVERED

The FLSA has been interpreted broadly to cover almost all employees and employers.⁷⁰³ “Employer” includes “any person acting directly or indirectly in the interest of an employer in relation to an employee.”⁷⁰⁴ In other words, individuals exercising direct control over wages and hours on behalf of an employer may themselves be considered an “employer.”⁷⁰⁵ If an employee works for multiple companies that are operated under common control, the companies are considered joint employers and the amount of work done by the employee for each company is aggregated.⁷⁰⁶ The WMWA interprets the definition of “employer” consistent with the federal definition.⁷⁰⁷

California applies the definition of “employer” found in the IWC Orders. In actions under the California Labor Code for unpaid minimum wages or overtime, an “employer” is one who: (1) exercises control over the wages, hours, or working conditions of the employee; (2) suffers or permits the employee to work; or (3) engages the employee.⁷⁰⁸

Under the FLSA and WMWA, individuals acting in the capacity of an “employer” may be personally liable for damages and penalties resulting from wage and hour violations.⁷⁰⁹ California has a definition of “employer” that differs from the one used by the FLSA, so California does not impose personal liability for unpaid overtime violations on individual corporate agents acting within the scope of their agency.⁷¹⁰

SECTION 5.2 EXCLUDED WORKERS

Wage and hour laws only cover an individual if she or he is an “employee.” Non-employees who are not covered by wage and hour laws commonly include independent contractors, volunteers, and certain interns and trainees.

(a) Independent Contractors

To distinguish between employees and independent contractors for the purposes of the FLSA, courts apply the “economic realities” test. This test seeks to determine the extent to which a worker is economically dependent upon the particular business with which he or she is connected.⁷¹¹ Those who are sufficiently dependent are considered “employees” covered by the provisions of the FLSA. Those who are sufficiently independent to be considered self-employed are “independent contractors” and thus not covered.⁷¹²

⁷⁰³ 29 U.S.C. §§ 203(c)(1), 203(s)(1)(A), 206(a), 207(a)(1).

⁷⁰⁴ 29 U.S.C. § 203(d); RCW 49.46.010(4).

⁷⁰⁵ *Chelius v. Questar Microsystems, Inc.*, 107 Wn. App. 678 (2001).

⁷⁰⁶ *See Chao v. A-One Med. Servs. Inc.*, 346 F.3d 908, 917-18 (9th Cir. 2003).

⁷⁰⁷ RCW 49.46 *et seq.*

⁷⁰⁸ *Martinez v. Combs*, 49 Cal. 4th 35 (2010). *See also* Section 2 (Definitions) of all IWC Orders, codified at Cal. Code Regs. tit. 8, §§ 11010-11160 (“employer” defined as “any person . . . who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours, or working conditions of any person”).

⁷⁰⁹ *Id.*; *cf. Ellerman v. Centerpoint Prepress*, 143 Wn.2d 514 (2001) (court did not hold the company’s business manager liable because personal liability extends only to vice principals who directly supervise or control the payment of wages).

⁷¹⁰ *Martinez*, 49 Cal. 4th at 66 & 75.

⁷¹¹ *Bartels v. Birmingham*, 332 U.S. 126 (1947).

⁷¹² *Halferty v. Pulse Drug Co., Inc.*, 821 F.2d 261, *opinion modified*, 826 F.2d 2 (5th Cir. 1987).

There is no uniform test used to determine the economic realities of an employment relationship. Courts usually apply some version of the “economic realities” test, which targets some combination of the following specific factors in an examination of the totality of the circumstances:

- the degree of control exercised by the alleged employer over the worker;
- the extent of the relative investments of the worker and alleged employer;
- the degree to which the worker’s opportunity for profit and loss is determined by the alleged employer;
- the skill and initiative required in performing the job;
- the permanency of the working relationship;
- the extent to which the services performed by the worker are part of the regular business operations of the alleged employer;
- the extent to which the worker makes his or her services available to the relevant market; and
- the extent to which the work is an integral part of the alleged employer’s business.

In 2009, Washington enacted legislation to establish the definition of an independent contractor under prevailing wage requirements on public contracts.⁷¹³ To qualify for the exemption from prevailing wage requirements, individuals working on such public projects must:

- not be directed in the performance of their services;
- perform services outside the “usual course of business” of contractors for whom they work;
- customarily engage in an independently established trade;
- be responsible for filing paperwork with the Internal Revenue Service;
- be registered with the Washington Department of Revenue;
- maintain separate books and records; and
- possess contractor registrations or licenses as required by the type of work performed.

In a matter of first impression, the Washington Court of Appeals held in 2010 that the determination of whether a worker is an employee or independent contractor under the WMWA should be analyzed under the “economic realities” test.⁷¹⁴ In deciding that the “economic realities” test applied, the court noted that the U.S. Supreme Court and all federal circuits agreed that the “economic realities” test is the applicable test for the FLSA, on which the WMWA is based. In reaching its decision, the court found six factors identified by the State Department of Labor & Industries in distinguishing employees from independent contractors as instructive: (1) the degree of control that the business has over the worker; (2) the worker’s opportunity for profit or loss depending on the worker’s managerial skill; (3) the worker’s investment in equipment or material; (4) the degree of skill required for the job; (5) the degree of permanence of the working relationship; and (6) the degree to which the services rendered by the worker are an integral part of the business.

California courts presume that an individual is an employee unless the employer can prove that the individual is an independent contractor.⁷¹⁵

The employer’s designation of a worker as an independent contractor carries only moderate weight and may be ignored by courts or administrative agencies.⁷¹⁶

⁷¹³ RCW 39.12.100.

⁷¹⁴ *Anfinson v. FedEx Ground Package Sys.*, 244 P.3d 32 (Wash. Ct. App. 2010).

⁷¹⁵ Cal. Lab. Code § 3357; *S.G. Borello & Sons, Inc. v. Dep’t of Indus. Relations*, 48 Cal. 3d 341, 349, 354 (1989).

⁷¹⁶ More information on independent contractors can be found in Chapter I.

(b) Volunteers and Interns

The FLSA, WMWA, and California Labor Code do not cover volunteers and interns.⁷¹⁷ The Department of Labor defines a volunteer as an individual “who performs hours of service for a public agency for civic, charitable, or humanitarian reasons, without promise, expectation or receipt of compensation for services rendered.”⁷¹⁸ To qualify as a volunteer, a person likely must perform charitable or humanitarian services on a less than full-time basis. State law differs slightly. The Washington Department of Labor and Industries takes the position that *bona fide* volunteers cannot provide services anywhere but non-profit entities.

In California, the intent of the parties controls whether one is a volunteer or an employee. If an individual intends to donate her services to a religious, charitable, or similar non-profit “without contemplation of pay,” that individual is a volunteer not an employee, and thus falls outside the coverage of the wage and hour laws.⁷¹⁹

The Department of Labor applies six criteria when determining whether an intern must be paid minimum wage and overtime under the FLSA for services that they provide for “for-profit” private sector employers. If all of the following factors are met, an employment relationship does not exist under the FLSA:

- the internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;
- the internship experience is for the benefit of the intern;
- the intern does not displace regular employees, but works under close supervision of existing staff;
- the employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;
- the intern is not necessarily entitled to a job at the conclusion of the internship; and
- the employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.⁷²⁰

Washington and California follow the same test.⁷²¹

Although the UMWA does not exempt volunteers or interns, it does exempt registered apprentices and students employed by the educational institutions where they are enrolled.⁷²²

SECTION 5.3 EMPLOYEES EXEMPT FROM COVERAGE

Specific categories of employees are exempt from certain provisions of wage and hour law. These “exempt” employees include executive, administrative and professional employees, “computer professionals,” and retail/outside salespersons.⁷²³ The FLSA also has a ministerial exemption, under which those involved in ecclesiastical administration are not covered by the federal wage and hour law.⁷²⁴ California includes an exemption for teachers in private educational institutions.⁷²⁵ Because employers

⁷¹⁷ 29 U.S.C. § 203(e)(4)(A); RCW 49.46.065 (applies to individuals volunteering labor to state or local governmental agency).

⁷¹⁸ 29 C.F.R. § 553.101(a); see, e.g., *Benshoff v. City of Virginia Beach*, 180 F.3d 136, 138 (4th Cir. 1999); *Todaro v. Typ. of Union*, 40 F. Supp. 2d 226, 231 (D.N.J. 1999) (court determined that plaintiff special law enforcement officers were volunteers as a matter of law after looking at the totality of circumstances, including the non-civic, charitable, or humanitarian motivations of the plaintiffs).

⁷¹⁹ DLSE Opinion Letter 1988.10.27.

⁷²⁰ DOL Fact Sheet No. 71 (April 2010).

⁷²¹ DLSE Opinion Letter 04.07.2010; Washington Dept. of Labor and Industries, “Unpaid Internships 101” found at <http://www.lni.wa.gov/WorkplaceRights/files/UnpaidInternshipsFactSheet.pdf>.

⁷²² Utah Code Ann. § 34-40-104(j).

must follow the law which provides the employee with the greatest protection, teachers in California are exempt from state law, but protected by federal law.⁷²⁶ Utah law exempts all employees entitled to a minimum wage under the FLSA.⁷²⁷ It provides few other material exceptions.

Employers should take special care when categorizing employees as exempt. Under federal, Washington, and California law, no title, designation, agreement or intention determines whether an employee is exempt.⁷²⁸ Courts and administrative agencies narrowly construe exemptions and will overrule an employer's designation if the employer cannot show that the employee actually meets the required standards.⁷²⁹ Miscategorization may lead to costly damages and penalties.⁷³⁰ With that in mind, it is important for employers to understand the required standards for exempt status.

Generally, an employee will meet the criteria for an exempt executive, administrative, or professional employee if three factors are satisfied: (1) the employee performs exempt quality work; (2) the employee maintains a sufficient quantity of exempt quality work as part of his or her regular duties; and (3) the employee earns a sufficient type and amount of compensation. The first two factors are referred to as the "duties test," and the third factor as the "salary test." Any exemption must be determined by the duties and salary tests as set forth below.⁷³¹ The California duties and salary tests vary from their federal and Washington counterparts in important ways, noted below.

(a) Duties Tests

The "duties test" branches into separate tests for executive, administrative, and professional employees to establish "exempt quality" work.

The WMWA applies the "short" and "long" duties tests. Under each of these categories, the employee must earn a salary or fee rather than an hourly wage to qualify for the exemption. The amount of that salary or fee then determines which test applies. The short tests apply to salaried employees who earn at

⁷²³ The U.S. Department of Labor instituted new regulations in 2004 that define which employees qualify as "exempt" from the FLSA, eliminate the "short" and "long" tests used previously, made minor changes to the requirements for exemption, and raised the minimum salary to \$455 per week. This Chapter includes a summary of the new regulations and how they affect particular categories of employees. *See* 29 U.S.C. § 213(a)(1); RCW 49.46.010(c); 29 C.F.R. §§ 541.100-106 (executives); 29 C.F.R. §§ 541.200-204 (administrative employees); 29 C.F.R. §§ 541.300-304 (professionals); 29 C.F.R. § 541.400-402 (computer professionals); WAC 296-128-510 (executives); WAC 296-128-520 (administrative employees); WAC 296-128-530 (professionals); WAC 296-128-535 (computer professionals); Utah Code Ann. § 34-40-104(1)(b) (outside sales persons).

⁷²⁴ *See Alcazar v. The Corp. of the Catholic Archbishop of Seattle*, 627 F.3d 1288 (9th Cir. 2010) (*en banc*) (while declining to formulate a general test, court found that plaintiff was minister for purposes of ministerial exception when he alleged that he "entered the seminary to become a Catholic priest" and performed his duties "in a ministerial placement," "[a]s part of [his] preparation for ordination into the priesthood."). *But see* 29 C.F.R. § 779.214, which provides that when charitable, religious, or educational organizations engage in ordinary commercial activities, those activities have the same status under the FLSA as when they are performed by the ordinary business enterprise. *See Schleicher v. Salvation Army*, 518 F.3d 472 (7th Cir. 2008) (administrators of a Salvation Army rehabilitation center could not recover minimum wages or overtime pay under the Fair Labor Standards Act because they were employed as ordained ministers whose supervision of the center had a religious function; the fact that the center also operated a thrift shop was not enough to describe the center as "engag[ing] in ordinary commercial activities").

⁷²⁵ *See* Cal. Lab. Code § 515.8 (establishing a state overtime exemption for qualified teachers at private elementary or secondary academic institutions).

⁷²⁶ *See, e.g., Firestone v. S. Cal. Gas Co.*, 219 F.3d 1063 (9th Cir. 2000) (federal law did not pre-empt California's collectively bargained premium rate exemption from overtime requirements); *Pacific Merch. Shipping Ass'n v. Aubry*, 918 F.2d 1409 (9th Cir. 1990) (federal exemption for seamen did not pre-empt California overtime pay requirements); *Paul v. All Alaskan Seafoods, Inc.*, 106 Wn. App. 406 (2001) (federal maritime law did not pre-empt Washington remedy for willful withholding of fishermen's wages). *But see Fuller v. Golden Age Fisheries*, 14 F.3d 1405 (9th Cir. 1994) (FLSA exemption of seamen pre-empted application of the Alaska minimum wage statute because significant state interests were not present).

⁷²⁷ Utah Code Ann. § 34-40-104(1)(a).

⁷²⁸ 29 C.F.R. § 541.2.

⁷²⁹ *Webster v. Pub. Sch. Employees of Wash., Inc.*, 247 F.3d 910 (9th Cir. 2001).

⁷³⁰ *See, e.g.,* Cal. Lab. Code §§ 226.3, 226.6.

⁷³¹ *Id.*

least \$250 per week. Because this category constitutes the vast majority of salaried employees, only the short tests of the WMWA are discussed below.

Under the Minnesota regulations, the “short” and “long” duties tests continue to control (similar to the pre-August 2004 federal regulations).⁷³² Under each of these tests, the employee must earn a salary or fee rather than an hourly wage to qualify for an exemption. The amount of salary or fee earned determines which test applies. The long tests, which are more stringent than the short tests in terms of the “duty” requirements imposed, apply to employees who earn at least \$155 per week (administrative and executive employees) or at least \$170 per week (professional employees). The short tests apply to employees who earn at least \$250 per week.⁷³³

The scope of California’s wage and hour law exemption is narrower than under federal law, subjecting a greater number of employees to state minimum wage and overtime requirements. California’s “quantitative test” provides for an exemption for administrative, executive, or professional employees only if the employee is “primarily engaged in” exempt duties. An employee is “primarily engaged in” exempt duties if *more than one-half* of the employee’s work time is spent doing exempt work.⁷³⁴ To determine whether an employee meets the fifty percent requirement, a court will look both to “the *realistic* requirements of the job” and how the employee actually spends his or her time.⁷³⁵

California follows the federal regulations in defining “exempt duties,” but excludes from the fifty percent time requirement any non-exempt duties performed only occasionally.⁷³⁶ California further restricts state exemptions by making them inapplicable to employees who are training to become executive, administrative employees, or professionals or any other exempt category if the trainees are not actually performing the duties required to meet the test.

(i) Combination Exemptions

Before analyzing the individual exemptions, it should be noted that a combination of two or more exemptions allows employees to maintain their exempt status even though they are unable to satisfy every element of a particular exemption.⁷³⁷ For example, an office manager who both supervises two or more employees and performs a substantial amount of administrative work may qualify for the combination exemption, as long as he or she meets the stricter salary and non-exempt work requirements.

(ii) Executive Employees

An “executive employee” is an employee in charge of the business, or a department or subdivision of the business. Under the FLSA, an “executive employee” is exempt from minimum wage and overtime provisions if he or she:

- is paid “on a salary basis at a rate of not less than \$455 per week”;
- has a primary duty of “management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof”;
- and “customarily and regularly directs the work of two or more other [full-time or equivalent] employees”; and

⁷³² See Minn. R. 5200.0180-5200.0210.

⁷³³ Minn. R. 5200.0190-5200.0210.

⁷³⁴ Cal. Lab. Code § 515(e); DLSE Manual § 51.2.

⁷³⁵ *Ramirez v. Yosemite Water Co.*, 20 Cal. 4th 785, 802 (1999).

⁷³⁶ Compare IWC Statement as to the Basis for the 2000 Wage Orders, available at <http://www.dir.ca.gov/iwc/statementbasis.htm>, with 29 C.F.R. § 541.110 (including occasional non-exempt tasks as “directly and closely related” to exempt duties).

⁷³⁷ 29 C.F.R. § 541.709.

- “has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.”⁷³⁸

The requirement that the employee direct the work of at least two employees is satisfied if the employee regularly directs the work of at least “two full-time employees or their equivalent.” Thus, if the executive supervises one full-time employee and two part-time employees, or four part-time employees, this requirement has been met.⁷³⁹

Whether management is an employee’s “primary duty” depends on all the facts and circumstances in a particular case. Whether an employee carries the title of “manager” is not determinative; rather, the manager’s actual job duties must be analyzed when determining whether the employee predominantly performs management functions.⁷⁴⁰ Activities generally considered to be managerial in nature include:

- interviewing, selecting, and training employees;
- setting and adjusting employees’ rates of pay and hours of work;
- planning and apportioning work among subordinates;
- determining the work techniques to be used;
- evaluating the productivity and efficiency of subordinate employees for the purpose of recommending promotions or other changes in status;
- handling employee grievances and complaints and disciplining employees when necessary; and
- determining the type of materials, supplies, machinery or tools to be used or the merchandise to be bought, stocked, and sold.⁷⁴¹

Under Minnesota law, an executive employee is exempt under the short test if the employee: (1) receives a salary of at least \$250 per week; (2) maintains as his or her primary duty the management of the enterprise or one of its customarily recognized departments or subdivisions; and (3) customarily and regularly directs the work of at least two employees in the department or subdivision he or she manages.⁷⁴² Like the federal regulations, the requirement that the employee direct the work of at least two employees is satisfied under the short test if the employee regularly directs the work of at least “two full-time employees or their equivalent.”⁷⁴³ For example, if the executive supervises one full-time and two part-time employees, or four part-time employees, this requirement would be met.⁷⁴⁴

In Washington, a “*bona fide* executive” employee is exempt if the employee:

- receives a salary of not less than \$250 per week, exclusive of board, lodging or other facilities;
- has the primary duty of managing the enterprise or one of its departments or subdivisions; and
- customarily and regularly directs the work of at least two employees in that department or subdivision.⁷⁴⁵

⁷³⁸ 29 C.F.R. § 541.100. While the test is similar to the previously used “short test,” it is important to note the added requirement that exempt executive employees have the “authority to hire or fire.” See generally 29 C.F.R. §§ 541.100-.106.

⁷³⁹ See 29 C.F.R. § 541.104.

⁷⁴⁰ See, e.g., *Rodriguez v. Farm Stores Grocery, Inc.*, 518 F.3d 1259 (11th Cir. 2008) (although drive-in grocery store employees were designated store “managers” by their employer, they did not qualify for the executive exemption because they dealt mainly with sales and customer service, not management functions).

⁷⁴¹ 29 C.F.R. § 541.102.

⁷⁴² Minn. R. 5200.0190.

⁷⁴³ 29 C.F.R. § 541.104(a); see also Minn. R. 5200.0190.

⁷⁴⁴ See 29 C.F.R. § 541.104; see also Minn. R. 5200.0190.

Like the federal regulations, the requirement that the employee direct the work of at least two employees is satisfied if the employee regularly directs the work of at least “two full-time employees or their equivalent.”⁷⁴⁶

The California exemption for executive employees parallels the federal standards and adds two requirements: (1) an executive employee must spend at least fifty percent of his or her time performing exempt duties; and (2) must “customarily and regularly exercise discretion and independent judgment.”⁷⁴⁷

(iii) Administrative Employees

An “administrative employee” is an employee who assists executive employees in running the business. An administrative employee is exempt from Federal FLSA minimum wage and overtime provisions if he or she:

- is paid “on a salary or fee basis at a rate of not less than \$455 per week”; and
- has a primary duty of “performance of office or non-manual work directly related to the management or general business operations of the employer or the employer’s customers;” and has a primary duty that “includes the exercise of discretion and independent judgment with respect to matters of significance”,⁷⁴⁸ or
- has a primary duty of “performing administrative functions directly related to academic instruction or training in an educational establishment or department.”⁷⁴⁹ Note that an employee who qualifies for the exemption under this latter category must be paid either at the salary rate listed above or “on a salary basis which is at least equal to the entrance salary for teachers in the educational establishment by which employed.”⁷⁵⁰

The regulations state that the following job types generally qualify for the administrative exemption: insurance claims adjusters,⁷⁵¹ financial services employees,⁷⁵² team leaders, executive or administrative assistants to business owners, human resource managers, and purchasing agents.⁷⁵³ Still, as emphasized earlier, exempt status is determined by the employee’s actual job duties; job titles are never determinative.⁷⁵⁴

An administrative employee’s primary duty must include the exercise of discretion and independent judgment.⁷⁵⁵ Such an employee must have the authority to make an independent choice, free from

⁷⁴⁵ RCW 49.46.010(5)(c); WAC 296-128-510.

⁷⁴⁶ See 29 C.F.R. § 541.104.

⁷⁴⁷ See IWC Statement as to the Basis for the 2000 Wage Orders, available at <http://www.dir.ca.gov/iwc/statementbasis.htm>; DLSE Manual § 53.1.

⁷⁴⁸ 29 C.F.R. § 541.200. In illustration of the type of “independent judgment with respect to matters of significance” that might apply, the DOL released an opinion letter concluding that purchasing agents who exercise discretion and place purchase orders of up to \$25,000 without managerial approval qualify for the administrative employee exemption under the FLSA. Wage and Hour Opinion Letter, FLSA 2008-1 (Dep’t of Labor Mar. 6, 2008).

⁷⁴⁹ 29 C.F.R. § 541.204.

⁷⁵⁰ *Id.*

⁷⁵¹ *Contra Harris v. Super. Ct. of L.A. Cnty.*, 154 Cal. App. 4th 164, *review granted and opinion superseded by, Harris v. Superior Court (Liberty Mut. Ins.)*, 68 Cal. Rptr. 3d 528 (2007) (holding that California claims adjusters did not qualify under the administrative exemption because the primary work performed – investigating and estimating claims, setting coverage boundaries, negotiating settlements – was not carried out at the level of management policy or general business operations).

⁷⁵² The DOL does not consider employees who perform the typical job duties of a mortgage loan officer to qualify for the administrative exemption. Wage and Hour Administrator’s Interpretation, No. 2010-1 (Dep’t of Labor Mar. 24, 2010). Beginning in 2010, the DOL is now issuing Administrative Interpretations instead of Opinion Letters. The Administrative Interpretations are supposed to offer general guidance that applies to a broader range of employers than the opinion letters, which were more fact-specific.

⁷⁵³ 29 C.F.R. § 541.203.

⁷⁵⁴ 29 C.F.R. § 541.200.

immediate direction or supervision, with respect to matters of significance.⁷⁵⁶ This does not necessarily mean that the decisions have finality in the sense of unlimited authority or complete absence of review. The decisions made as a result of the exercise of discretion and independent judgment may consist of recommendations for action rather than the actual taking of action. However, an employee's authority to make recommendations will not be sufficient unless the employer consistently accepts and follows those recommendations.⁷⁵⁷

For example, in *Roe-Midgett v. CC Servs.*,⁷⁵⁸ the Seventh Circuit held that material damage appraisers ("MDAs") who worked for insurance company clients were properly classified as administrative employees exempt from FLSA overtime requirements. The employees argued that the duties of the MDA position did not directly relate to the employer's management policies or general business operations and did not require the exercise of discretion and independent judgment. The court disagreed because the MDAs provided claims adjustment services up to a \$12,000 limit of claims settlement authority and spent much of their time in the field without direct supervision. They conducted on-site investigations, interviewed claimants, witnesses, and law enforcement personnel, estimated loss, and negotiated the cost of repairs. The court reasoned that these duties directly related to the employer's business operations and reflected a sufficient degree of discretion and independent judgment to qualify for the FLSA's administrative exemption. The Washington requirements for the administrative exemption parallel the federal requirements. Under the WMWA, an employee is an exempt administrative employee under the short test if: (1) he or she receives a salary of at least \$250 per week, exclusive of board, lodging, or other facilities; and (2) his or her primary duty consist of the performance of office or non-manual work directly related to management policies or the general business operations of his or her employer or his or her employer's customers.⁷⁵⁹

Under Minnesota law, an administrative employee is exempt under the short test if: (1) the employee receives a salary of at least \$250 per week; (2) the employee's primary duty is either (i) the performance of office or non-manual work directly related to the management policies or general business operations of his or her employer or employer's customers, or (ii) the performance of work directly related to academic instruction or training carried on in the administration of a school system or educational establishment; and (3) the employee's primary duty includes work requiring the exercise of discretion and independent judgment. The employee must "regularly" exercise discretion or independent judgment to be deemed an administrative employee.⁷⁶⁰

To satisfy the discretion and independent judgment requirement of the administrative exemption, an employee must have the authority to make an independent choice, free from immediate direction or supervision, with respect to matters of significance.⁷⁶¹ An employee's authority may consist of making recommendations, but this authority will not be considered sufficient unless the employer consistently accepts and follows those recommendations.⁷⁶²

California's requirements generally follow the federal requirements as well, except the "primary duty" test is replaced by the "primarily engages in" quantitative requirement discussed above. California's administrative exemption was analyzed in *Eicher v. Advanced Bus. Integrators, Inc.*⁷⁶³ The employer in *Eicher* sold computer software and employed the plaintiff to provide on-site customer service and training of the

⁷⁵⁵ 29 C.F.R. § 541.202.

⁷⁵⁶ *Id.*

⁷⁵⁷ *Id.*

⁷⁵⁸ 512 F.3d 865 (7th Cir. 2008).

⁷⁵⁹ RCW 49.46.010(5)(c); WAC 296-128-520.

⁷⁶⁰ Minn. R. 5200.0200.

⁷⁶¹ Minn. R. 5200.0180.

⁷⁶² *Id.*

⁷⁶³ *Eicher v. Advanced Bus. Integrators, Inc.*, 151 Cal. App. 4th 1363, 1375 (2007).

company's product. When the plaintiff sued for overtime, the company claimed that the plaintiff was an administrative employee exempt from overtime requirements. The court held that the employer failed to prove that the plaintiff performed office or non-manual work directly related to management policies or general business operations of the company or its customers. The plaintiff did not assist executive employees in running the business. Rather, the customer service and training services he provided were part of the core day-to-day business of the company.⁷⁶⁴ In 2012, a California Court of Appeals court found that insurance claims adjusters do not qualify for the administrative exemption. The court explained that the adjusters were carrying out day-to-day operations of the business and acted more like production employees than true administrative employees that are involved in setting company policy or the company's general business operations.⁷⁶⁵

Utah also follows the federal regulations. In *Smith v. Batchelor*, the Utah Supreme Court overruled prior case law that was inconsistent with the regulations.⁷⁶⁶

(iv) Professional Employees

A "professional employee" is exempt from FLSA overtime provisions if he or she:

- is paid "on a salary or fee basis of not less than \$455 per week"; and
- has a primary duty of performing work that requires: (1) "knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction" (the "learned professional" exemption); or (2) "invention, imagination, originality or talent in a recognized field of artistic or creative endeavor" (the "creative professional" exemption).⁷⁶⁷

The learned professional exemption covers professions where work is "intellectual in character" like law, medicine, theology, accounting, actuarial computation, and other sciences. The regulations provide much more detail for when the exemption applies in these fields, as well as guidance on how to characterize other employees, such as medical technologists, nurses, dental hygienists, physician assistants, accountants, chefs, and paralegals, among others.⁷⁶⁸

The creative professional exemption may be applied in the fields of music, writing, acting, and graphic arts. The exemption generally applies to actors, musicians, composers, conductors, soloists, painters and writers.⁷⁶⁹

The professional exemption also generally covers teachers.⁷⁷⁰

Under Minnesota law, a professional employee is exempt under the short test if: (1) the employee receives a salary of at least \$250 per week; (2) his or her primary duty consists of work that (i) requires knowledge of an advanced type in a field of science or learning, or (ii) consists of teaching, instructing or lecturing in a school system or educational institution; and (3) the primary duty must include work that requires the consistent exercise of discretion and judgment. The employee must "consistently" exercise discretion and judgment, as opposed to simply having such work "included" in the employee's primary duty.⁷⁷¹ Alternatively, an employee whose primary duty consists of work requiring invention, imagination, or talent in a recognized field of artistic endeavor meets the short test for this exemption.⁷⁷²

⁷⁶⁴ *Id.*

⁷⁶⁵ *Harris v. Superior Court*, 207 Cal. App. 4th 1225 (2012).

⁷⁶⁶ 879 P.2d 1364, 1369 (Utah 1994) ("harmonizing [Utah] case law with the federal regulations").

⁷⁶⁷ 29 C.F.R. § 541.300.

⁷⁶⁸ 29 C.F.R. §§ 541.301, .304.

⁷⁶⁹ 29 C.F.R. § 541.302.

⁷⁷⁰ 29 C.F.R. § 541.303.

⁷⁷¹ Minn. R. 5200.0210.

In Washington, an employee is exempt from the WMWA overtime provisions as a “*bona fide* . . . professional” if: (1) he or she is compensated at a rate of not less than \$250 per week, exclusive of board, lodging, or other facilities; and (2) his or her primary duty consists of work either (i) requiring knowledge of an advanced type in a field of science or learning, which includes work requiring the consistent exercise of discretion and judgment; or (ii) requiring invention, imagination, or talent in a recognized field of artistic endeavor.⁷⁷³

The California exemption for professional employees generally parallels the federal standards, with two key differences: a professional employee must spend at least fifty percent of his or her time performing exempt duties, and must “customarily and regularly exercise discretion and independent judgment.”⁷⁷⁴ Also, California differs from federal law by generally treating pharmacists and registered nurses as non-exempt employees. Physicians are exempt only if they receive at least the required hourly rate for each hour they are employed and meet other criteria outlined in the regulations.⁷⁷⁵

(v) Computer Professionals

A “computer professional” is exempt from FLSA overtime provisions if he or she:

- is paid on a salary basis of “not less than \$455 per week” or at an hourly rate of \$27.63 or more; and
- has a primary duty in the field of computer system analysis, computer programming, software engineering or similarly skilled work in the computer field.⁷⁷⁶

This exemption is intended only for high-level analysts, programming, and engineering employees. Those who manufacture or repair computer equipment are not exempt employees.⁷⁷⁷

Misclassification can be costly; in 2005, technology company Computer Sciences Corp. agreed to pay \$24 million to settle claims that it misclassified 30,000 technical support workers as exempt “computer professionals.” A computer employee who does not satisfy the criteria of a “computer professional” may still be exempt if he or she qualifies as an administrative or executive employee.⁷⁷⁸

In Washington, employees fall under the computer professional exemption if their primary duty is one of the following: (1) applying systems analysis techniques and procedures to determine hardware, software, or system functional specifications for any user of such services; (2) following user or system design specifications to design, develop, document, analyze, create, test or modify any computer system, application or program, including prototypes; (3) designing, documenting, testing, creating or modifying computer systems, applications or programs for machine operation systems; or (4) any combination of the above primary duties whose performance requires the same skill level.⁷⁷⁹

The employee must also: (1) possess a high degree of theoretical knowledge and understanding of computer system analysis, programming and software engineering; (2) have the ability to practically apply that theoretical knowledge and understanding to highly specialized computer fields; (3) generally attain the necessary level of expertise and skill to qualify for an exemption through a combination of education and

⁷⁷² *Id.*

⁷⁷³ RCW 49.46.010(5)(c); WAC 296-128-530. *See, e.g., Litchfield v. KPMG, LLP*, 170 Wn. App. 431 (2012) (unlicensed accountant performing work to assist licensed auditors may qualify for professional exemption if they have the requisite educational background and the work they actually perform satisfies exemption elements).

⁷⁷⁴ *Id.*

⁷⁷⁵ Cal. Lab. Code § 515.6.

⁷⁷⁶ 29 C.F.R. § 541.400.

⁷⁷⁷ 29 C.F.R. § 541.401.

⁷⁷⁸ 29 C.F.R. § 541.402.

⁷⁷⁹ WAC 296-128-535.

experience in the field; (4) consistently exercise discretion and judgment in the application of their special knowledge as opposed to performing purely mechanical or routine tasks; and (5) engage in work that is predominantly intellectual and inherently varied in character as opposed to work that is routinely mental, manual, mechanical, or physical.⁷⁸⁰

The Minnesota FLSA does not have a separate exemption for computer professionals. Therefore, employees in this field must be paid overtime under the Minnesota FLSA, even if they are exempt under the federal computer professionals' exemption, unless they otherwise meet the requirements for executive, administrative, or professional employee exemptions.

In Washington, the exemption does not apply to employees covered by a collective bargaining agreement, trainees, non-expert computer-using employees, and repair technicians.

In California, computer software professionals are exempt under state law if each of the following requirements is met:

- “The employee is primarily engaged in work that is intellectual or creative and that requires the exercise of discretion and independent judgment, and the employee is primarily engaged in” enumerated duties;
- “The employee is highly skilled and is proficient in the theoretical and practical application of highly specialized information to computer systems analysis, programming, and software engineering”; and
- the hourly rate of pay is not less than a minimum amount that is adjusted October 1st of each year and effective January 1st of the following year (presently \$36 per hour, or if the employee is paid on a salary basis, \$75,000 per year, paid at least once per month in an amount of \$6,250).⁷⁸¹

In California, the exemption does not apply to: (1) an employee who relies on computers to perform his or her work but is not a computer systems analyst or programmer; (2) an employee who is a writer engaged in writing computer-related material; or, (3) an employee engaged in “creating imagery for effects used in motion picture, television, or theatrical industries.”⁷⁸²

To qualify for the computer professional exemption under the WMWA or California law, an employee need not have any particular academic degree, license or certification. However, this exemption does not apply to: (1) trainees or employees in entry level positions learning to become proficient in computer systems analysis, programming or software engineering (or “the theoretical and practical application of highly specialized information” in California); (2) employees in computer systems analysis, programming or software engineering positions who have not attained a level of skill and expertise which allows them to generally work independently and without close supervision; (3) employees engaged in the operation of computers; or, (4) employees engaged in the manufacture, repair or maintenance of computer hardware and related equipment.

(vi) Retail Service and Salespersons Exemptions

An “outside sales employee” is exempt from FLSA overtime provisions if he or she:

- has a primary duty of (1) “making sales”; or (2) “obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer”; and
- is “customarily and regularly engaged away from the employer’s place . . . of business in performing such primary duty.”⁷⁸³

⁷⁸⁰ *Id.*

⁷⁸¹ Cal. Lab. Code § 515.5(a).

⁷⁸² Cal. Lab. Code § 515.5(b).

There are no salary requirements for the outside sales employee exemption.

Generally, an outside sales employee is one who makes sales at a customer's home or place of business.⁷⁸⁴ With some exceptions, an outside sales employee does not include "sales made by mail, telephone or the Internet."⁷⁸⁵ The regulations discuss the requirements in more detail, including helpful factors for determining whether employees doing promotion work and drivers qualify for the exemption.⁷⁸⁶

Washington's outside sales employee test is different from federal law. It is more expansive than the federal test by exempting employees with a duty of demonstrating products or equipment for sale.⁷⁸⁷ It is more restrictive by requiring that an exempt employee be compensated by the employer on a guaranteed salary, commission or fee basis and be advised of his or her status as an "outside salesperson."⁷⁸⁸ All employees of a retail establishment whose pay is at least fifty percent comprised of commissions meet the requirements for the exemption.⁷⁸⁹ Washington's law also includes a "20%" limitation, under which a salesperson is exempt only if his or her non-exempt activities constitute twenty percent or less of the hours worked in the workweek.⁷⁹⁰

For example, the employees in *Miller v. Farmer Bros. Co.*, were "driver salesmen" who spent the majority of their time delivering products in prearranged quantities to established customers. The drivers satisfied some of the criteria for the outside salesperson exemption: when they had time, they would try to sell extra products to existing customers or solicit new customers; they worked away from the company premises; they were paid a salary plus commission on products sold; they were advised of their status as outside salespersons. However, the court held that these criteria were not dispositive. Sales and solicitations were merely incidental to their primary duty of delivering products. Because the employees were not employed *for the purpose* of making sales, they were not exempt outside salesmen.⁷⁹¹

Under Minnesota law, a salesperson is someone who: "makes sales of, or obtains orders or contracts for, materials, services, or the use of facilities." An outside salesperson performs those duties away from the employer's place of business, spending no more than twenty percent of his or her time on the employer's premises.⁷⁹²

California's exemption for outside salespersons only applies if the person regularly spends greater than fifty percent of his or her working time away from the employer's place of business selling tangible or intangible items or obtaining orders.⁷⁹³

As the decision in *Ramirez v. Yosemite Water Co.* made clear, California's outside salesperson exemption relies exclusively upon this test, and thus differs from the FLSA and WMWA approaches which focus on an employee's primary duty.⁷⁹⁴

⁷⁸³ 29 C.F.R. § 541.500. In 2012, the U.S. Supreme Court ruled that pharmaceutical sales representatives whose primary duty is to obtain non-binding commitments from physicians to prescribe their employer's prescription drugs in appropriate cases qualify as "outside sales" employees. *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012).

⁷⁸⁴ 29 C.F.R. § 541.502.

⁷⁸⁵ *Id.*

⁷⁸⁶ 29 C.F.R. §§ 541.503-.504.

⁷⁸⁷ RCW 49.46.010(5)(c); WAC 296-128-540.

⁷⁸⁸ *Id.*

⁷⁸⁹ *See Stahl v. Delcor of Puget Sound, Inc.*, 148 Wn.2d 876, 886-87 (2003).

⁷⁹⁰ WAC 296-128-540(2). Non-exempt work does not include work performed incidental to and in conjunction with the employee's own outside sales or solicitations, including incidental deliveries and collections. Federal law no longer includes a twenty percent limitation. *See* 29 C.F.R. § 541.500; former 29 C.F.R. § 541.507 (2003).

⁷⁹¹ *Miller v. Farmer Bros. Co.*, 136 Wn. App. 650 (2007).

⁷⁹² Minn. R. 5200.0220.

⁷⁹³ *Ramirez*, 20 Cal. 4th at 789.

(vii) Highly-Compensated Employees

An employee who earns at least \$100,000 per year on a \$455 per week salary basis, and who “customarily and regularly” performs “any one or more of the exempt duties or responsibilities of an executive, administrative or professional employee” under the FLSA is an exempt, highly-compensated employee.⁷⁹⁵

(viii) Other Exempt Employees

Washington, California, and Utah provide for partial or complete exemptions for additional categories of employees not exempt under the FLSA. In Washington, these include seasonal recreational employees; seamen; law enforcement officers, firemen; agricultural workers; truck or bus drivers; and airline employees.⁷⁹⁶ In California, these include the parents, spouses, or children of the employer; certain truck drivers and ambulance drivers; carnival ride operators; professional actors; certain commissioned employees; and camp counselors.⁷⁹⁷ Utah exempts seasonal employees of non-profit camping programs, religious or recreation programs, and non-profit educational and charitable organizations.⁷⁹⁸ It also exempts certain agricultural workers, registered apprentices, and seasonal amusement park workers.⁷⁹⁹ For more information concerning exemptions and related criteria, consult the regulations or a knowledgeable attorney.

(b) Salary Tests

To be eligible for an overtime exemption under the FLSA, executive, administrative, professional and highly compensated employees must be paid on a salary basis in addition to meeting the duties tests as described above. According to the federal regulations, an employee is paid on a salary basis “if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed.”⁸⁰⁰ This means that the employee must be paid his or her full salary for any week in which he or she performs *any* work, subject to certain exceptions discussed below.⁸⁰¹ The value of board, lodging or other facilities are not included in the “salary test” calculation.

While Washington courts generally rely on the federal salary basis test,⁸⁰² California’s test is slightly different. To satisfy the salary test in California, an employee must earn a pre-determined monthly salary of at least two times the California minimum wage for full-time employment (40 hours per week), which presently would equal at least \$2,560 monthly.⁸⁰³

⁷⁹⁴ In 2009, the Ninth Circuit Court of Appeals certified a question to the Supreme Court of California regarding exempt status for outside sales representatives. The circuit court sought guidance whether drug sales representatives are exempt from overtime pay under California law and whether they are covered under the state’s exemption for administrative employees. *D’Este v. Bayer Corp.*, 565 F.3d 1119 (9th Cir. 2009) (noting that California regulations do not further define the key terms “selling” and “obtaining orders” as used in the definition of “outside salesperson”). The Supreme Court of California denied the request made by the circuit court and cited to the *Ramirez v. Yosemite Water Co.* case in its denial, which indicates that California courts will rely exclusively on this test. Request for Certification Denied, *D’Este v. Bayer Corp.*, No. S172832 (Cal. June 10, 2009).

⁷⁹⁵ 29 C.F.R. § 541.601.

⁷⁹⁶ See generally RCW 49.46 *et seq.*

⁷⁹⁷ See http://www.dir.ca.gov/dlse/FAQ_overtimeexemptions.htm. See also *Muldrow v. Surrex Solutions Corp.*, 202 Cal. App. 4th 1232 (2012) (regarding commissioned employees’ exemption).

⁷⁹⁸ Utah Code Ann. § 34-40-104(1)(f).

⁷⁹⁹ Utah Code Ann. § 34-40-104(1)(j)-(k).

⁸⁰⁰ 29 C.F.R. § 541.602. See *Auer v. Robbins*, 519 U.S. 452 (1997) (setting forth a standard deferential to the DOL’s interpretation of the salary basis test).

⁸⁰¹ See 29 C.F.R. § 541.602.

⁸⁰² *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 300 (2000); see also *Clawson v. Grays Harbor Coll. Dist.*, 109 Wn. App. 379 (2001), *aff’d*, 148 Wn.2d 528 (2003).

(i) Deductions From Salary

Frequent issues arising from the classification of employees as exempt pertain to the type of deductions that may be taken from the exempt employee's salary without loss of exempt status. As a general rule, deductions may not be taken from an exempt employee's salary based on the quantity or quality of work performed.⁸⁰⁴ Rather, the employee must receive full salary for any week in which he or she has done any work.⁸⁰⁵ Under certain circumstances, *pro rata* deductions may be made for employee-occasioned absences.⁸⁰⁶

Employers should be careful in making any deductions from salary, as improper deductions may remove an employee from exempt status and subject the employer to overtime premiums and other liabilities.

(ii) Full-Day Absences

According to federal regulations, an exempt employee's salary may be reduced when the employee misses work for one or more full days for personal reasons, other than sickness or accident.⁸⁰⁷ Deductions may be made for full-day absences caused by sickness or disability, if the deductions are made in accordance with a *bona fide* plan, policy or practice to that extent. Deductions may be made for full-day absences taken before an employee has qualified under such plan, policy or practice, and after he or she has exhausted his or her leave thereunder.⁸⁰⁸ Deductions may not be made for absences caused by jury duty, attendance at a trial as a witness, or temporary military leave. The employer may, however, offset any amounts received by the employee as jury or witness fees or military pay for a particular week against the salary due for that week.⁸⁰⁹

According to the DOL, employee absences related to inclement weather qualify as absences for personal reasons under the FLSA.⁸¹⁰ This means that employers open for business may deduct from salary or banked leave for full-day, weather-related absences. Employers may not deduct salary when an employee misses only part of one day. When employers are closed due to inclement weather, they can ask exempt employees to take vacation or use leave, but employers cannot insist on leave without pay.

When calculating the amount of an allowed deduction, the employer may use an amount proportional to the time actually missed by the employee.⁸¹¹

Washington and California are consistent with federal law.

(iii) Partial-Day Absences

Salary reductions for partial-day absences of exempt employees are rarely permissible under federal law. Where an employee is entitled to leave under the FMLA, some specific partial-day deductions may be made for intermittent or reduced-schedule leave.⁸¹²

It is permissible to substitute or reduce vacation and sick time benefits for partial-day absences (including those for jury or witness duty), if by substituting such benefits the employee receives an amount equal to his or her total salary. Partial-day absences may also be offset against future leave accrual. However, the

⁸⁰³ Cal. Lab. Code § 515(a).

⁸⁰⁴ DLSE Opinion Letter 2002.05.01.

⁸⁰⁵ DLSE Manual § 51.6.3.1.

⁸⁰⁶ See, e.g., *Conley v. Pac. Gas & Elec. Co.*, 131 Cal. App. 4th 260 (2005) (allowing deductions from accrued vacation leave).

⁸⁰⁷ 29 C.F.R. § 541.602(b)(1).

⁸⁰⁸ 29 C.F.R. § 541.602(b)(2).

⁸⁰⁹ 29 C.F.R. § 541.602(b)(3).

⁸¹⁰ Wage and Hour Opinion Letters, FLSA 2005-41 (Oct. 25, 2005) and FLSA 2005-46 (Oct. 28, 2005).

⁸¹¹ 29 C.F.R. § 541.602(c).

⁸¹² 29 C.F.R. § 541.602(b)(7).

employer may not require the employee to use accrued leave time when the employee is available for work, but the employer lacks sufficient work for the employee.⁸¹³

It is important to note that courts closely scrutinize employer pay practices that effectively treat “exempt” employees like hourly workers. This is especially true in the area of attendance. In *Webster v. Pub. Sch. Employees of Wash., Inc.*,⁸¹⁴ the Washington Supreme Court stated that a single improper deduction from an employee’s salary will not destroy the employee’s status as salaried, but that an employee’s status as exempt could be destroyed if the employee is subject to a continuing practice of deductions for partial-day absences.⁸¹⁵ The court also concluded that requiring the make-up of deductions from accrued leave is not a *per se* violation of the WMWA, but that a court should consider whether the employer has a practice of requiring employees to make-up missed hours when determining whether an employee is exempt.⁸¹⁶ Finally, the court ruled that accrued leave time is not considered salary under the WMWA or FLSA, but deductions from accrued leave time may factor into a court’s determination of whether an employee is exempt.⁸¹⁷

Holding employees to a required-hours quota does not destroy their exempt status. However, if an employer imposes weekly hour quotas it may not impose pay deductions on its employees if they fail to meet the quotas.⁸¹⁸ The more an employer’s pay practices strictly monitor the hours worked by exempt employees, the more likely it is that the employees’ exempt status will be jeopardized. For example, the California Division of Labor Standards Enforcement views a reduction of an exempt employee’s salary based upon a reduction in days worked as a possible violation of California’s salary basis test that nullifies exempt status.

Under Minnesota law, it is unclear whether *any* partial-day deductions may be made (*e.g.*, where allowed under the federal rules for FMLA leave or infractions of major safety rules) without disqualifying the employee from the Minnesota exemptions. The Minnesota rules state that an employer may deduct complete days of absence for reasons other than that no work is available. If those deductions reduce the salary for the workweek below the minimum salary required for exemption, the employee loses the exemption for the week.⁸¹⁹ Complete workweeks in which no work is performed may be deducted.⁸²⁰

Unlike the federal FLSA, exemption under the Minnesota FLSA does not require regular receipt of a predetermined amount. Rather, the Minnesota FLSA requires that “employees be guaranteed a predetermined wage to be exempt.”⁸²¹ Accordingly, as long as an employee’s base-pay earnings remain static week-to-week, an employer may make deductions from the exempt employee’s paycheck, for example, to recover bonus overpayments, without risk of the employee losing the exempt designation under the Minnesota FLSA, even if such deductions affect net pay.⁸²² This is not the case under federal law, however.⁸²³

⁸¹³ WH Admin. Op. Ltr., Wage & Hour Manual (BNA) 99:8013 (Feb. 27, 1995).

⁸¹⁴ 148 Wn.2d 383 (2003).

⁸¹⁵ *Id.* at 394-98.

⁸¹⁶ *Id.* at 398-99.

⁸¹⁷ *Id.* at 400-02. *Clawson v. Grays Harbor Coll. Dist. No. 2*, 148 Wn.2d 528 (2003) (college’s policy of reducing the pay of part-time college instructors for partial-day absences when the instructors had exhausted their accrued leave time was not a violation of WMWA because the policy was created pursuant to the principles of public accountability and prevented the gifting of public funds. These principles do not apply to private companies, however, so the same analysis may not be valid for many employers).

⁸¹⁸ *Auer*, 519 U.S. 452.

⁸¹⁹ Minn. R. 5200.0211.

⁸²⁰ Minn. R. 5200.0211, subp. 2.

⁸²¹ *Erdman v. Life Time Fitness, Inc.*, 788 N.W.2d 50 (Minn. 2010).

⁸²² *Id.*

⁸²³ *Baden-Winterwood v. Life Time Fitness, Inc.*, 566 F.3d 618, 633 (6th Cir. 2009).

California law previously prohibited employers from using accrued vacation time to “pay” for an employee’s partial-day absence. That law changed in 2005. In *Conley v. Pac. Gas & Elec. Co.*, the court decided that employers may make deductions from exempt employees’ accrued vacation leave for employee-occasioned, partial-day absences without affecting an employee’s exempt status.⁸²⁴ However, if an employee has no accrued and unused vacation time, an employer may not deduct any amount from his or her wages for partial-day absences.⁸²⁵

(iv) Disciplinary Suspensions

Under the FLSA, penalties imposed in good faith for infractions of safety rules of major significance do not affect the employee’s salaried status. Such rules include only those relating to the prevention of serious danger and harassment.⁸²⁶ Such suspensions must be made pursuant to a written policy applicable to all employees.⁸²⁷

Such penalties are not permitted in California.⁸²⁸

(v) Additional Rules for Exempt Employees

Both the FLSA and WMWA permit employers to require exempt employees to work specific hours, record their time worked and time absent, use a time clock, and obtain permission for absences.

An employer may translate monthly salaries into hourly pay rates and record these hourly rates in personnel and other business records. The rate of compensation for a salaried employee can fluctuate without destroying the employee’s status as exempt, so long as the fluctuation is dictated by need and is not an effort to avoid the WMWA. Also, extra compensation may be paid to exempt employees on any basis for hours worked beyond their standard workweek without affecting their salaried status.⁸²⁹ The extra compensation may be paid at straight time, at one-half time, a flat sum, “comp time,” or any other basis.

DOL regulations do not allow an employer to make deductions from an employee’s salary for disability pay overpayments, advanced vacation pay, or other debts owed to the employer.

(vi) “Window of Correction”

The federal salary basis test contains a “window of correction” allowing employers to remedy violations and thereby preserve their employees’ exempt status under certain conditions. An employee’s exempt status will not be lost because of an improper deduction if the improper deduction was isolated or inadvertent and the employer reimburses the employee. The employer must have a clearly communicated policy regarding improper deductions (including a complaint mechanism), must reimburse employees for improper deductions, and must make a “good faith commitment to comply in the future.”⁸³⁰ Washington, California and Minnesota employers do not enjoy the benefit of this exception for the purposes of the applicable state laws.⁸³¹

⁸²⁴ 131 Cal. App. 4th at 271.

⁸²⁵ *Id.*

⁸²⁶ 29 C.F.R. §§ 541.602(b)(4)-(5); see generally *Block v. City of L.A.*, 253 F.3d 410 (9th Cir. 2001).

⁸²⁷ 29 C.F.R. § 541.602(b)(5).

⁸²⁸ DLSE Manual § 51.6.19.

⁸²⁹ *Boykin v. Boeing Co.*, 128 F.3d 1279 (9th Cir. 1997) (employers may pay overtime on an hourly basis to exempt employees who work more hours in a week than they were scheduled to work); citing *Capervi v. Rite Aid Corp.*, 43 F. Supp. 2d 83 (D. Mass. 1999).

⁸³⁰ 29 C.F.R. §§ 541.603(c)-(d).

⁸³¹ *Drinkwitz*, 140 Wn.2d at 306.

SECTION 5.4 MINIMUM WAGE AND HOURS WORKED

An employer covered by the FLSA must pay its non-exempt employees the federal minimum wage which currently is \$7.25 per hour, for all hours worked.⁸³² An employee who is under the age of 20 may be paid an “opportunity wage” of \$4.25 per hour during the first 90 days of employment.⁸³³ Utah has adopted the same minimum wage and 90-day opportunity period for minors.⁸³⁴ After 90 days, an employer must pay a minor the full minimum wage.⁸³⁵ However, both Washington and California employers must pay their employees the higher state minimum wage.

The Washington minimum wage changes every year consistent with changes in the Federal Consumer Price Index.⁸³⁶ Currently, Washington’s minimum wage is \$9.19 per hour. Employers may pay their employees who are 14 or 15 years old at a rate of eighty-five percent of the minimum wage.⁸³⁷ Employers may petition the state for permission to pay other categories of employees at less than the minimum wage.⁸³⁸ Employers may pay their non-exempt employees on a salary, commission, piece rate, daily rate, or virtually any other basis; however, each non-exempt employee’s total compensation for a particular workweek, when divided by the employee’s total hours for that week, must equal the statutory minimum.⁸³⁹

California employers must pay each employee at least the state minimum wage of \$8.00 per hour,⁸⁴⁰ except that “learners” regardless of age may be paid eighty-five percent of the minimum wage during their first 160 hours of employment in occupations in which they have no similar or related experience.⁸⁴¹ Under California’s law, an employee must receive minimum wage for *each hour worked*,⁸⁴² in contrast to the federal and Washington rules which allow an employer to divide the amount received by the total number of hours worked per pay period or per workweek.⁸⁴³

(a) Hours Worked Considerations

Not all time spent at a business is included as an “hour worked” for minimum wage and overtime considerations. The Washington Supreme Court has defined time “worked” broadly to include any and all time spent in physical or mental exertion controlled by the employer, and primarily for the employer’s benefit.⁸⁴⁴ Work time includes work requested, required, suffered, or permitted by an employer. Therefore, if an employer knows or has reason to know that an employee is continuing to work after a shift is over, the time the employee works is compensable working time. The rule applies to work performed on an employer’s premises, off an employer’s premises, and even at the employee’s home.⁸⁴⁵ Under the Portal-to-Portal Act, which amended the FLSA, the judicial construction of “hours worked” excludes from compensation activities that are “preliminary to or postliminary to said principal activity or activities.”⁸⁴⁶

⁸³² 29 U.S.C. §§ 206(a)(1)(B)-(C).

⁸³³ However, an employer may not displace another employee to hire an employee eligible to be paid the lower “opportunity wage” rate. 29 U.S.C. § 206(g).

⁸³⁴ Utah Admin. Code r. 610-1-3(A), (B).

⁸³⁵ Utah Admin. Code r. 610-1-3(B).

⁸³⁶ RCW 49.46.020(4)(b).

⁸³⁷ WAC 296-126-020(2).

⁸³⁸ RCW 49.12.110; WAC 296-126-010(2).

⁸³⁹ See *Inniss v. Tandy Corp.*, 141 Wn.2d 517 (2000).

⁸⁴⁰ Cal. Code Regs. tit. 8, § 11000, subd. 2.

⁸⁴¹ IWC Orders, section 4(A); see, e.g., Cal. Code Regs. tit. 8, § 11010, subd. 4(A).

⁸⁴² IWC Orders, section 4(B); see, e.g., Cal. Code Regs. tit. 8, § 11010, subd. 4(B).

⁸⁴³ *Hensley v. MacMillan Bloedel Containers*, 786 F.2d 353, 357 (8th Cir. 1986).

⁸⁴⁴ *Seattle Prof'l Eng'g Employees Assoc. v. Boeing Co.*, 139 Wn.2d 824, *opinion corrected on denial of reconsideration*, 1 P.3d 578 (2000).

⁸⁴⁵ 29 C.F.R. § 778.223.

⁸⁴⁶ 29 U.S.C.A. § 254(a)(2).

Such activities will only be compensable if they are deemed “integral and indispensable” to the employee’s work for the company.

California’s definition of “hours worked” is broader than the federal or Washington definitions. Under California law, “hours worked” includes “time during which an employee is subject to the control of an employer” or “all of the time the employee is suffered or permitted to work, whether or not required to do so.”⁸⁴⁷ This subtle difference in definition led one California court to hold that time agricultural employees spent being transported to and from work fields in employer-owned vehicles were compensable hours.⁸⁴⁸ Similarly, the Ninth Circuit found that time spent commuting in a company vehicle was compensable under California law where an employee: (1) was required to drive company vehicle; (2) could not stop for personal errands; (3) could not take passengers; (4) was required to drive the vehicle directly from home to their job and back; and (5) could not use cell phone while driving except to answer calls from company dispatcher.⁸⁴⁹ Another court allowed employees to proceed with their California law wage claims for time spent undergoing security inspections to enter or exit the workplace.⁸⁵⁰

The following is a non-exclusive list of situations that employers should consider in determining hours worked by their employees.⁸⁵¹

(i) Waiting Time or On-Call Time

Whether time spent on-call is compensable work time can be determined by considering the following four factors: (1) the parties’ employment agreement; (2) whether the employees are required to remain on the premises or at any particular place during the on-call time; (3) the extent to which the employees are permitted to engage in their own activities during on-call time; and (4) whether the employee is on-call for his or her benefit or for the employer’s benefit.⁸⁵² Generally, time spent on-call that is predominantly for the employer’s benefit and is not long enough to enable an employee to use the time effectively for his or her own purposes is compensable.⁸⁵³ In *Weeks v. Chief of the Wash. State Patrol*,⁸⁵⁴ the court held that the state troopers’ lunch period constituted hours worked because they were required to be available for duty during lunch.⁸⁵⁵

The Ninth Circuit uses the following factors to gauge the extent to which employees could pursue personal activities during the course of their on-call shifts:⁸⁵⁶

- whether there was an on-premises living requirement;
- whether there were excessive geographical restrictions on the employee’s movements;
- whether the frequency of calls was unduly restrictive;
- whether a fixed time limit for response was unduly restrictive;

⁸⁴⁷ See *Morillion v. Royal Packing Co.*, 22 Cal. 4th 575, 584 (2000).

⁸⁴⁸ *Id.* at 582.

⁸⁴⁹ *Rutti v. Lojack Corp.*, 596 F.3d 1046 (9th Cir. 2010).

⁸⁵⁰ *Kurihara v. Best Buy Co.*, No. C 06-1884, 2007 WL 2501698 (N.D. Cal. Aug. 30, 2007).

⁸⁵¹ 29 C.F.R. pt. 785; WAC 296-126-002(8).

⁸⁵² *Chelan Cnty. Deputy Sheriffs’ Ass’n v. Chelan Cnty.*, 109 Wn.2d 282, 292 (1987) (workers who spend a substantial portion of their work time on-call and not engaged in the performance of active duties are not treated as “employees” under the WMWA, and are thus not entitled to minimum wage). *Berrocal v. Fernandez*, 155 Wn.2d 585 (2005) (interpreting RCW 49.46.010(5)(j)) (whether time spent on-call is substantial and in the performance of active duties are questions of fact that will be decided on a case-by-case basis; the case of *Chelan County* provides useful analysis for the resolution of these questions).

⁸⁵³ 29 C.F.R. § 785.17.

⁸⁵⁴ 96 Wn.2d 893, 897-98 (1982).

⁸⁵⁵ *Id.*

⁸⁵⁶ *Brigham v. Eugene Water & Elec. Board*, 357 F.3d 931 (9th Cir. 2004).

- whether the on-call employee could easily trade on-call responsibilities with another employee;
- whether the use of a pager could ease restrictions; and
- whether the employee had actually engaged in personal activities during on-call time.⁸⁵⁷

In *Brigham v. Eugene Water & Elec. Board*, which involved electric utility employees, several factors weighed in their favor: they were subject to an on-premises living requirement and geographical restraints while on-call, they had to remain within earshot of their home phones and alarm systems, and a pager would not have lessened their burdens. Other factors weighed against them: each was called out on average only about once or twice a month, trading shifts with a colleague was usually possible in case of illness, vacation or other personal needs, and they were able to routinely participate in personal activities while on-call. The court held that the factors weighed narrowly in favor of the employees because of the “especially restrictive” geographic and time response requirements of their duty shifts and because the average number of call-outs and emergency alarms seemed less important. Further, the court considered that these employees were responsible for the safety of thousands of people while on-call and had to be “absolutely prepared” to respond at all times, “*i.e.*, rested, sober, clothed, and otherwise able to race immediately to the trouble source if needed.”⁸⁵⁸

In addition to on-call time compensation, California requires compensation for “[e]ach day an employee is required to report for work and does report, but is not put to work or is furnished less than half said employee’s usual or scheduled day’s work.” The employer need only pay for half the usual or scheduled day’s work at the employee’s regular rate of pay. However, where an employee is compensated for a minimum number of hours for reporting to work, only the actual number of hours *worked* count as hours worked.⁸⁵⁹ If an employee is not scheduled to work, or does not expect to work the employee’s usual shift, but must report to work for a meeting, and the meeting is shorter than two hours, the employee is entitled to only two hours of reporting to work pay.⁸⁶⁰

Reporting time pay is not required when the inability or failure to provide work results from a specific cause outside the control of the employer. Such cases include, but are not limited to: (1) inability of an employer’s operations to commence or proceed due to threats to employees or property, or because of the recommendation of civil authorities; and (2) an interruption of work caused by a natural disaster such as a fire or flood. However, an obligation to pay does arise when, due to a natural disaster, an hourly non-exempt employee is prevented from leaving the employer’s facility to go home, even if the employee is relieved of all duty during that time.⁸⁶¹

(ii) Split Shifts

Split shifts raise another consideration for employers in determining an employee’s “hours worked.” A split shift is an employer-established work schedule that contains two work periods interrupted by an unpaid work period. For instance, a split shift where a bus driver’s shifts were separated by more than one hour and during which the driver was free to do what he or she wanted before starting the second shift, was not compensable work time.⁸⁶²

⁸⁵⁷ *Id.* (citing *Owens v. Local No. 169, Ass’n of W. Pulp & Paper Workers*, 971 F.2d 347, 351 (9th Cir. 1992)).

⁸⁵⁸ *Id.* at 937-38; *Madera Police Officers Assoc. v. City of Madera*, 36 Cal. 3d 403 (1984).

⁸⁵⁹ IWC Orders, section 5.

⁸⁶⁰ *Price v. Starbucks Corp.*, 192 Cal. App. 4th 1136, 1146 (2011).

⁸⁶¹ DLSE Manual § 45.1.5.1.

⁸⁶² *United Transp. Union Local 1745 v. City of Albuquerque*, 178 F.3d 1109 (10th Cir. 1999); 29 U.S.C. §§ 206-07; 29 C.F.R. §§ 785.15, .16(a).

In California, an employer must pay one hour of minimum wage to any employee who is required to work a split shift in a workday.⁸⁶³ An employee-established split shift for personal reasons does not trigger the premium requirement.

(iii) Travel Time

While travel time to and from work is generally not compensable,⁸⁶⁴ a non-exempt employee's work-related travel during the course of a workday may be, depending on the degree to which the employee is subject to the control of an employer.⁸⁶⁵ For instance, traveling from job site to job site or traveling to a work-related meeting is compensable work time⁸⁶⁶ because it involves tasks or work that is "undertaken for the employer's benefit" and therefore is "indispensable" to the employer's work.⁸⁶⁷

In 2007, the Washington Supreme Court expanded the circumstances in which employee travel time may be compensable by holding that "hours worked" may include employee commute time. In *Stevens v. Brink's Home Sec.*,⁸⁶⁸ technicians who installed and serviced home security systems were assigned trucks bearing the company's logo and carrying the company's equipment. Some technicians kept the truck at their home and drove it directly to and from the first and last jobsites. The court held that this drive-time was compensable for two reasons. The technicians were "on duty" because Brink's strictly controlled the drive time and prohibited technicians from engaging in personal activities while driving. Brink's expected technicians to obey all traffic laws, not park haphazardly, lock the vehicle at all times, and not carry non-Brink's employees as passengers or use the truck for shopping. While *en route*, technicians were to remain available and could be redirected at any time. The court deemed the truck a "prescribed workplace" because the technicians worked almost exclusively from the trucks, reported to Brink's office only once each week, drove the trucks to customers' homes and completed work-related paperwork in them. Brink's treated the trucks "like a work premises" by setting standards for cleanliness, safety, organization, and servicing. Therefore, the time they spent in commute was compensable.⁸⁶⁹ It does not appear from the decision that Washington courts are about to force all employers to pay for all of their employee's commuting. However, an employee who is issued a vehicle with a company logo, subjected to extensive company rules while in the vehicle, and regularly works from that vehicle as though it were an office may convince a court that his or her commuting time should be compensated.

Under California law, if an employer requires an employee to attend an out-of-town meeting, the time spent traveling to and from that out-of-town location is time subject to the employer's control and counts as hours worked.⁸⁷⁰ Also, if an employer requires an employee to report to the business premises before traveling to an off-premises work site, the time spent between reporting to the premises and being returned to the premises and released to proceed directly home is compensable as hours worked.⁸⁷¹ In *Burnside v. Kiewit Pac. Corp.*, the Ninth Circuit allowed approximately 270 construction workers to proceed with their California wage and hour claims seeking upwards of \$16 million in overtime pay for time their

⁸⁶³ IWC Orders, section 4(C).

⁸⁶⁴ 29 C.F.R. § 785.35; see also *Anderson v. Dept. of Social and Health Servs.*, 115 Wn. App. 452 (2003).

⁸⁶⁵ 29 C.F.R. § 785.38.

⁸⁶⁶ *Id.*

⁸⁶⁷ *Adams v. United States*, 471 F.3d 1321 (2006), *cert. denied*, 522 U.S. 1096 (2008) (no compensation owed to federal law enforcement officers under the Fair Labor Standards Act for commuting time, where the officers were provided a government car, required to commute to and from work in their police vehicles, carry their weapons and equipment, and ensure that their communication equipment remained on; they also were prohibited during this time from running personal errands. The Federal Circuit reasoned that employees "must perform additional legally cognizable work while driving to their workplace in order to compel compensation for the time spent driving").

⁸⁶⁸ 162 Wn.2d 42 (2007).

⁸⁶⁹ *Id.*

⁸⁷⁰ See DLSE Manual § 46.3.1.

⁸⁷¹ See *Morillion v. Royal Packing Co.*, 22 Cal. 4th 575 (2000).

employer required they spend traveling on company vehicles between designated meeting places and distant jobsites.⁸⁷²

A California court held that an employee is not entitled to compensation for travel time riding on an employer-provided shuttle, where riding on the shuttle was not mandatory and the employees were free to choose alternate means of transportation to work.⁸⁷³ In contrast, the Ninth Circuit found that time spent commuting in a company vehicle was compensable under California law where employee: (1) was required to drive company vehicle; (2) could not stop for personal errands; (3) could not take passengers; (4) was required to drive the vehicle directly from home to their job and back; and (5) could not use cell phone while driving except to answer calls from company dispatcher.⁸⁷⁴

Even though California considers all travel time during which an employee is subject to the employer's control as "hours worked," an employer may establish a different pay rate for travel time than an employee's regular pay rate. The employer must inform the employee of the different rate before the travel begins.⁸⁷⁵

As all of these different scenarios make clear, determining whether an employee is entitled to compensation for drive time is likely very fact specific. Consulting with an attorney is recommended.

(iv) Time Changing Clothes

Generally, time spent changing into or out of clothes or a small amount of protective gear is not a compensable activity. However, an employer must compensate an employee for time spent if the clothes and/or protective gear are an integral and indispensable part of the principal activities that the workers are employed to perform.⁸⁷⁶ Additionally, employers must compensate for time spent if protective gear is required by law, by the employer, or due to the nature of the job.⁸⁷⁷

For example, where employees at a battery production plant were exposed to toxic chemicals, changing clothes and showering were compensable activities because they were necessary for reasons of health and safety while performing an integral part of the workers' principal activity.⁸⁷⁸

Recall that California's definition of hours worked is broader than the federal definition and explicitly includes time spent "subject to the control of an employer." The Division of Labor Standards Enforcement has stated that time spent changing clothes or washing on the employer's premises is

⁸⁷² *Burnside* also held that a worker's right to be paid for employer-mandated travel time is a right conferred by state law, independent of the terms of a collective-bargaining agreement covering the worker, unless the contract specifically waives that right pursuant to the IWC's opt-out provision. This opt-out provision applies only to collective bargaining agreements. *Burnside v. Kiewit Pac. Corp.*, 491 F.3d 1053 (2007).

⁸⁷³ *See Overton v. Walt Disney Co.*, 133 Cal. App. 4th 263, 274 (2006).

⁸⁷⁴ *Rutti*, 596 F.3d at 1062-63.

⁸⁷⁵ DLSE Manual § 46.3.2. *See also* 29 U.S.C. § 203(o) (providing that "hours worked" does not include time spent changing clothes or washing at the beginning or end of each workday when such time is excluded by the express terms of or by custom or practice under a *bona fide* collective bargaining agreement applicable to the particular employee).

⁸⁷⁶ 29 C.F.R. § 785.24; *see IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005) (holding that time spent waiting to don protective gear at start of workday is not "time worked" under the FLSA, even though time spent walking between locker room and production area after donning protective gear, and time spent waiting to doff protective clothing is compensable). *But see Bamonte v. City of Mesa*, 598 F.3d 1217 (9th Cir. 2010) (police officer's donning and doffing of uniform and related gear was not integral and indispensable activity and therefore not compensable under FLSA when there is no rule, regulation, policy or practice of the employer that required the donning and doffing of the uniform and related gear to be performed at the employer's premises). Failure to compensate in this area can be costly. Following a Department of Labor investigation that found violations of FLSA for failure to compensate for time spent putting on and taking off required clothing and equipment, Nestle Prepared Foods Co. had to pay nearly \$5.1 million in back wages to over 6,000 current and former employees. *See* <http://www.dol.gov/opa/media/press/esa/archive/esa20081886.htm>.

⁸⁷⁷ Wage and Hour Administrator's Interpretation, No. 2010-2 (Dep't of Labor June 16, 2010).

⁸⁷⁸ *Steiner v. Mitchell*, 350 U.S. 247 (1956).

compensable hours worked if the activities are “compelled by the necessity of the employer’s business, and are performed primarily, if not exclusively, for the benefit of the employer.”⁸⁷⁹

(v) Training and Orientation Time

Training directly related to an employee’s present position that is designed to facilitate his or her performance at that position should be counted as working time.⁸⁸⁰ Training time may not need to be counted as working time if the training takes place outside regular working hours, voluntary, and not directly related to the employee’s job, and no productive work is performed during attendance.⁸⁸¹ Time spent in training programs mandated by state or federal regulation, but *not* by the employer, are not counted as working time if attendance is voluntary, the employee performs no productive work during the training time, and the training takes place outside normal working hours.

Under California law, if a required meeting is scheduled for a day an employee is not scheduled to work, that employee must be paid at least one-half of their usual or scheduled day’s work if they attend.⁸⁸² If a required meeting is scheduled on a workday after employees’ scheduled shifts have finished, the employees are entitled to at least two hours pay for reporting a second time in one day.⁸⁸³ If the meeting immediately follows the scheduled shift, there is no additional reporting time pay requirement no matter how long the meeting lasts.

Orientation time is generally considered to be working time and is therefore compensable, but at a potentially reduced rate of pay. In *Seattle Prof’l Eng’g Employees Assoc. v. Boeing Co.*,⁸⁸⁴ the Washington Supreme Court held that employees were entitled only to statutory minimum wage for time spent at pre-employment orientation.

(vi) Breaks and Rest Periods

While breaks and other rest periods of short duration (*e.g.*, coffee or snack breaks lasting five to 20 minutes) must be counted and paid as time worked,⁸⁸⁵ *bona fide* meal periods are not work time.⁸⁸⁶ *Bona fide* meal periods are rest periods in which the employee is completely relieved from duty for 30 minutes or longer for the purposes of eating regular meals. The employee is not relieved if he or she is required to perform any duties, whether active or inactive, while eating. For example, an office employee who is required to eat at his or her desk or a factory worker who is required to be at his or her machine is working while eating.⁸⁸⁷ The FLSA currently does not require an employer to give employees any meal breaks. The Patient Protection and Affordable Care Act (“PPACA”)⁸⁸⁸ amended the FLSA to require employers to provide “reasonable break time for an employee to express breast milk for her nursing child for one year after the child’s birth each time such employee has need to express the milk.” This time may be unpaid, unless employers provide compensated breaks and the employee uses such compensated break time. Employers must provide “a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public.” Employers are required to provide a reasonable amount of

⁸⁷⁹ DLSE Opinion Letter 1998.12.23.

⁸⁸⁰ 29 C.F.R. § 785.29.

⁸⁸¹ 29 C.F.R. § 785.27. *See also Ulrich v. Alaska Airlines Inc.*, No. 07-1215, 2009 WL 364056 (W.D. Wash. Feb. 9, 2009) (airline was not required to pay prospective flight attendant candidates for the time they spent in training after receiving a conditional offer of employment because they were not employees, and the in-flight training, classroom training, and other exercises performed by the trainees were for their own benefit – to qualify for employment with the airline).

⁸⁸² DLSE Manual § 45.1.4.

⁸⁸³ *Id.*

⁸⁸⁴ 139 Wn.2d 824.

⁸⁸⁵ 29 C.F.R. § 785.18.

⁸⁸⁶ 29 C.F.R. § 785.19.

⁸⁸⁷ *Id.*

⁸⁸⁸ Pub. L. 111-148 (2010).

break time to express milk as frequently as needed by the nursing mother. Only employees who are not exempt from the FLSA's overtime pay requirements are entitled to breaks to express milk. Additionally, employers with fewer than 50 employees are not subject to the FLSA break time requirement if compliance with the provision would impose an undue hardship.⁸⁸⁹

Minnesota law, however, provides that an employer must allow an employee "adequate time" from work. Under Minnesota law an employer must permit each employee who is working for eight or more consecutive hours "sufficient time" to eat a meal.⁸⁹⁰

Washington law requires a 30-minute meal period, beginning no less than two and not more than five hours from the shift start, and an additional 30-minute meal period before or during overtime of three or more hours following the normal workday.⁸⁹¹ An employer is not required to schedule a meal period for its employees; it must only allow employees to take a meal period within the designated time.⁸⁹² Company meal periods must be paid when the "employee is required by the employer to remain on duty on the premises or at a prescribed worksite in the interest of the employer."⁸⁹³ However, employees are not entitled to any compensation beyond their regular rate of pay for being on-call during meal and rest periods.⁸⁹⁴ Washington law also requires rest periods of at least 10 minutes for every four hours of working time, and prohibits an employee from working more than three hours without a rest period.⁸⁹⁵ Rest period requirements apply to both regular and overtime hours.⁸⁹⁶ Essentially, the Washington rest period and meal period provisions combine to create some sort of rest for an employee approximately every two hours.⁸⁹⁷ When employees are so busy that they cannot take a rest period, this time worked will be counted as *additional* "hours worked" and may trigger overtime obligations even if the employee is not physically at the job site more than eight hours on that day or 40 hours total for that week.⁸⁹⁸

The 10-minute breaks established under Washington law are mandatory, but the 30-minute meal period can be waived by the employee.⁸⁹⁹ If the employee and employer agree, the employee does not have to take a break for lunch. However, if the employee ever asks for his mealtime back, the employer is obligated to provide the meal time. Since the Federal FLSA contains no requirement about meals or break time, there is no legal reason why an employer should refuse to allow an employee to waive the meal break. Allowing such a waiver can potentially cut down on record-keeping problems. If an employee is taking no lunch break, the employer need not expend energy making sure employees are not taking overly long breaks. However, it is advisable for the employer to get the waiver in writing, so that there is proof of such waiver if any litigation were to arise. It is also very important for an employer to know that the employee is always entitled to get the meal time back, even if he previously waived it. Every supervisor should be trained accordingly. The safest course is to refuse to allow employees to waive lunch breaks, and mandate that all employees take a 30-minute break during their shift.

⁸⁸⁹ 29 U.S.C. § 207(r). See <http://www.dol.gov/whd/regs/compliance/whdfs73.pdf> for more information.

⁸⁹⁰ Minn. Stat. § 177.254.

⁸⁹¹ WAC 296-126-092.

⁸⁹² *White v. Salvation Army*, 118 Wn. App. 272, 279 (2003).

⁸⁹³ WAC 296-126-092; *White*, 118 Wn. App. at 277-78, 281-84; *Iverson v. Snohomish County*, 117 Wn. App. 618 (2003), *contra Pellino v. Brink's Inc.*, 164 Wn. App. 668 (2011) (court awarded additional compensation and fees even though workers had to work through their breaks and were paid for the time worked).

⁸⁹⁴ *White*, 118 Wn. App. at 278, 284; *but see Weeks*, 96 Wn.2d at 897-98.

⁸⁹⁵ *Id.*

⁸⁹⁶ *Wingert v. Yellow Freight Sys., Inc.*, 104 Wn. App. 583 (2001).

⁸⁹⁷ *Id.*

⁸⁹⁸ *Wash. State Nurses Ass'n v. Sacred Heart Med. Ctr.*, 175 Wn.2d 822 (2012).

⁸⁹⁹ This distinction arises from the different language that is used to describe the rights established in WAC 296-126-092. The Washington Department of Labor and Industries has published guidance that agrees with this analysis, <http://www.lni.wa.gov/WorkplaceRights/files/policies/esc6.pdf>.

California employers are required to provide one mid-shift meal period of at least 30 minutes for each five hours worked.⁹⁰⁰ However, if the employee's total work period is less than six hours per day, then the meal period may be waived by mutual consent of both employer and employee. Employees working more than 10 hours per day must be provided with a second meal period of at least 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of both employer and employee if the first meal period was not waived. A meal period is counted as time worked unless the employee is relieved of all duty for a 30-minute period.⁹⁰¹ Meal periods are considered "on duty" time subject to the control of the employer, and thus hours worked.⁹⁰²

California law permits "on duty" meal periods only if: (1) the nature of work prevents an employee from being relieved of all duty; and (2) the employer and employee agree in writing to an on-the-job paid meal period.⁹⁰³ The employee must still be permitted to eat during this "on duty" period. If an employer fails to provide a meal period, the employer must pay the employee one hour of regular rate pay for each workday the meal period was not provided.⁹⁰⁴

California law also requires employers to provide a paid 10-minute net rest time per four hours worked or major fraction thereof.⁹⁰⁵ Although it is preferable to schedule the break in the middle of the four-hour period, it is not necessary if, because of the nature of the work or the circumstances of a particular employee, it is not practicable.⁹⁰⁶ As with meal periods, if an employer fails to provide 10 minute net rest time, the employer shall pay each employee one hour at regular rate for each workday the rest period was not provided.⁹⁰⁷

In 2012, the California Supreme Court issued its long-awaited decision in *Brinker v. Superior Court*, holding that California employers must "provide" meal breaks but need not "ensure" that employees take them.⁹⁰⁸ A California employer satisfies its obligation if it relieves its employees of all duty, relinquishes control over their activities and permits them a reasonable opportunity to take an uninterrupted 30-minute break, and does not impede or discourage them from doing so. While California employers may not impede employees from taking rest and meal breaks to which they are entitled, employers "need only provide, not ensure," that employees take the breaks.⁹⁰⁹

⁹⁰⁰ IWC Orders, section 11(A); Cal. Lab. Code § 512(a). *Brinker Rest. Corp. v. Superior Court*, 53 Cal. 4th 1004 (2012) (absent waiver, Section 912 requires a first meal period no later than the end of an employee's fifth hour of work, and a second meal period no later than the end of an employee's tenth hour of work). Effective January 1, 2011, there is an exemption from the meal period requirements for employees in a construction occupation, commercial truck drivers, security officers and employees of electrical or gas corporations and local publicly-owned electric companies if: (1) the employee is covered by a valid collective bargaining agreement; (2) the collective bargaining agreement, among other things, expressly provides for the meal periods for those employees; and (3) employer's regular hourly rate of pay is not less than thirty percent more than the state minimum wage. Assembly Bill 569 (Sept. 30, 2010), amending Cal. Lab. Code § 512.

⁹⁰¹ *Id.*

⁹⁰² *Bono Enters. v. Labor Comm'r*, 32 Cal. App. 4th 968 (1995).

⁹⁰³ IWC Orders, section 11(C).

⁹⁰⁴ Cal. Lab. Code § 226.7; *see also* *Bufl v. Dollar Fin. Group, Inc.*, 162 Cal. App. 4th 1193 (2008) (where hourly employees were required to take "on-site" meal breaks because employee was the only person in store or only person with a trainee, employer was held liable for paying employees one hour of pay at employees' regular rate of compensation for each workday that an off-duty meal break was missed, because the employer's reasons for denying meal period did not fall within the "nature of the work" exception to meal and rest break requirements).

⁹⁰⁵ Cal. Code Regs. tit. 8, § 11050, subd. 12(A).

⁹⁰⁶ *Brinker Rest. Corp. v. S.C. (San Diego)*, 80 Cal. Rptr. 3d 781 (Cal. App.), *review granted and opinion superseded by*, *Brinker Rest. Corp. v. S.C. (Hobbsbaum)*, 85 Cal. Rptr. 3d 688 (2008).

⁹⁰⁷ Cal. Lab. Code § 226.7(b); *see also* *Murphy v. Kenneth Cole Prods., Inc.*, 40 Cal. 4th 1094, 1099 (2007) (California's requirement to pay an employee one additional hour of pay for each workday that a meal or rest period is not provided, is a form of wages subject to a three-year statute of limitations, rather than a penalty subject to a one-year filing limit. However, attorney fees are unavailable with claims asserting violation of rest break requirements under Cal. Lab. Code § 226.7. *Kirby v. Immoos Fire Prot. Inc.*, 53 Cal. 4th 1244 (2012).

⁹⁰⁸ *Brinker Rest. Corp. v. Superior Court*, 53 Cal. 4th 1004 (2012).

Whether a break is “provided” may be very fact specific.⁹¹⁰ In *Cicairos v. Summit Logistics*,⁹¹¹ the plaintiff truck driver employees delivered goods to grocery stores. The California Court of Appeal rejected the employer’s argument that, because it could not monitor its drivers’ activities, it could only assume that the drivers were taking their authorized meal breaks. The court held that the employer was, in fact, monitoring its drivers’ activities through the use of an on-board computer system, and that it failed to provide meal periods by not designating an activity code and by pressuring its drivers to make more than one daily trip. The court stated that employers could not simply assume their employees were taking meal periods; rather, they had “an affirmative obligation to ensure that workers are actually relieved of all duty.”⁹¹² In other words, although the employer did not actually prohibit meal periods, it was liable for failing to “provide” meal breaks because of its policy or practice of prohibiting or discouraging meal breaks.^{913 914}

Failure to adequately provide meal and rest breaks can be very costly for employers. For example, delivery drivers sued United Parcel Service alleging that the company’s delivery deadlines were so rigid that workers were prevented from taking meal and rest breaks or were required to shorten their state-mandated breaks in order to meet deadlines. The company settled in 2007 for \$87 million, plus taxes and administrative costs estimated to be millions more.⁹¹⁵

(vii) Sleep Time

If an employee is required to be on duty for a period under 24 hours, the employer must compensate the employee for time spent asleep.⁹¹⁶ However, if the employee is required to be on duty for more than 24 hours, employers can contract around such compensation.

Under the FLSA, sleep time is not compensable if the following conditions are met: (1) the employee is required to be on duty for more than 24 hours; (2) the employer and employee have agreed to exclude a meal period; (3) the employer and employee have agreed to exclude a sleeping period of not more than eight hours; (4) the employer furnishes adequate sleeping facilities; and (5) the employee can usually enjoy a night’s sleep.⁹¹⁷ If, however, there is not an express or implied agreement providing for sleeping time then that time is compensable work time.⁹¹⁸ Regardless of whether an agreement is in place, interruptions from sleep to perform work should be counted toward hours worked.⁹¹⁹

Under Washington law, workers whose duties require that they sleep at their place of employment are not considered “employees” under the WMWA, and are thus not entitled to minimum wage or overtime.⁹²⁰ In

⁹⁰⁹ *Brinker Rest.*, 80 Cal. Rptr. 3d 781. See also *Brown v. Fed. Express Corp.*, 249 F.R.D. 580, 585 (C.D. Cal. 2008) (employer’s obligation under Cal. Lab. Code § 512 to “provide” meal periods “does not suggest any obligation to ensure that employees take advantage of what is made available to them”); *Hernandez v. Chipotle Mexican Grill, Inc.*, 189 Cal. App. 4th 751 (2010).

⁹¹⁰ See generally *Brinker Rest. Corp. v. S.C. (San Diego)*, 80 Cal. Rptr. 3d 781; *Perez v. Safety-Kleen Sys.*, No. C05-5338, 2007 WL 1848037 (N.D. Cal., June 27, 2007); *White v. Starbucks Corp.*, 497 F. Supp. 2d 1080 (N.D. Cal. 2007); *Cicairos v. Summit Logistics*, 133 Cal. App. 4th 949 (2005).

⁹¹¹ *Cicairos*, 133 Cal. App. 4th 949 (2005).

⁹¹² DLSE Opinion Letter No. 2002.01.28 (Jan. 28, 2002).

⁹¹³ *Cicairos*, 133 Cal. App. 4th 949.

⁹¹⁴ See also *Perez v. Safety-Kleen Sys., Inc.*, 253 F.R.D. 508 (N.D. Cal. 2008) (holding the employer had not affirmatively provided the employees with a meal break where the it had no policy in place regarding meal breaks, never told employees to take breaks, and employees were required to fill out a call log stating they were on duty all day long).

⁹¹⁵ *Cornn v. United Parcel Serv., Inc.*, No. 03-02001, 2006 WL 2642540 (N.D. Cal. Sept. 14, 2006) (motion for settlement approval granted April 9, 2007). Also, Wal-Mart Stores, Inc., in a recent settlement, agreed to pay \$35 million to a class of over 88,000 workers in Washington State in connection with state law wage and hour claims for working off the clock and during required meal and rest breaks. *Barnett v. Wal-Mart Stores, Inc.*, No. 01-2-24553-8 (Wash. Super. Ct. Jul. 20, 2009).

⁹¹⁶ 29 C.F.R. § 785.21.

⁹¹⁷ 29 C.F.R. § 785.22(a).

⁹¹⁸ *Id.*

⁹¹⁹ 29 C.F.R. § 785.22(b).

⁹²⁰ RCW 49.46.010(5)(j).

Berrocal v. Fernandez,⁹²¹ the court determined that two categories of workers are not “employees” for WMWA purposes: (1) those individuals who reside or sleep at their place of employment;⁹²² and (2) those individuals who otherwise spend a substantial portion of work time subject to call, and not engaged in the performance of active duties.⁹²³ *Berrocal* involved two Chilean shepherders who were required to live at the ranch where they worked and be on call 24 hours a day, seven days a week. The Washington Supreme Court held that the shepherders were exempt from the WMWA for *all* hours, not only those hours when they were not engaged in active duties.⁹²⁴

California law allows an employer to deduct eight hours of an employee’s uninterrupted sleep time if an employee is scheduled for a 24-hour work shift and is required to remain on the premises during the work shift.⁹²⁵ Such employees are frequently called “residential employees.” For example, in *Brewer v. Patel*,⁹²⁶ a motel clerk was required to live on the premises 24 hours a day and to keep the office open from 6 a.m. – 10 p.m. every day. His other duties (answering the telephone; checking guests in and out of their rooms; helping clean the grounds and the rooms doing laundry) took him less than five hours a day to perform, and he was paid only for those hours. Similarly, in *Isner v. Falkenberg/Gilliam & Assocs., Inc.*,⁹²⁷ two employees (husband and wife) were required to live on the premises of their employer, a residential company for the elderly, from 5 p.m. on Friday until 8 a.m. on Monday. During this time, the employees were required to remain on the facility premises within hearing distance of the emergency alarm systems and telephone but were otherwise free to use the time as they chose. The employer counted all time spent responding to emergencies as hours worked, but not the remaining on-call hours. The employees in both *Brewer* and *Isner* sued their employers, claiming they were entitled to compensation for the entire time spent residing on their employer’s premises (less allowances for sleep time and meal time). In both cases, the court held that while employees who are required to reside where they work are entitled to be compensated for time spent performing their assigned duties, they are not entitled to be compensated for time spent simply being available to perform those duties, even if they are required to be in a specific place during that time. The courts reasoned that employees should not be compensated for on-call hours during which they can attend to personal matters, and in both cases, the plaintiffs were free to sleep, eat, talk on the telephone, use the Internet, play computer games, read for leisure and watch television while they were not responding to the demands of their job.

SECTION 5.5 OVERTIME

Federal, Washington, Minnesota and California law provide an economic incentive for employers to establish workweeks not exceeding 40 hours. As a general rule, non-exempt employees must be paid one and one-half times (“time and a half”) their regular rate of pay for all hours worked in excess of 40 hours in a workweek.⁹²⁸ For enforcement purposes, each workweek is examined separately; averaging of hours over two or more weeks is not permitted. The workweek must be a fixed and regularly recurring period of 168 consecutive hours (seven consecutive calendar days). A workweek does not have to coincide with the calendar week, but once it is established, it remains fixed. An employer needing a fluctuating workweek will be accommodated pursuant to certain requirements.⁹²⁹ Employers should be aware that the California

⁹²¹ *Berrocal v. Fernandez*, 155 Wn.2d 585 (2005).

⁹²² See, e.g., *Schryvers v. Coulee Cmty. Hosp.*, 138 Wn. App. 648 (2007) (holding that under the FLSA two employees who resided on the employer’s premises were exempted from overtime requirements); see 29 C.F.R. § 785.23; 29 U.S.C. § 213(a)(1).

⁹²³ *Berrocal*, 155 Wn.2d 585 (discussing RCW 49.46.010(5)(j)). Compare *Strain v. West Travel, Inc.*, 117 Wn. App. 251 (2003) (ruling that overtime claim of cruise ship employee who was required to sleep on ship was properly dismissed because employees who are required to sleep at their places of employment are not covered by the WMWA).

⁹²⁴ *Id.*; see *Berrocal*, 155 Wn.2d 585.

⁹²⁵ See *Aguilar v. Assoc. for Retarded Citizens*, 234 Cal. App. 3d 21 (1991).

⁹²⁶ 20 Cal. App. 4th 1017 (1993).

⁹²⁷ 160 Cal. App. 4th 1393 (2008).

⁹²⁸ 29 U.S.C. § 207(a); RCW 49.46.130(1).

⁹²⁹ See, e.g., *Inmiss v. Tandy*, 141 Wn.2d 517 (2000).

Labor Code applies to overtime work performed in California by out-of-state residents.⁹³⁰ In Utah, the 40-hour-per-week and time-and-a-half requirements apply only to public works projects.⁹³¹

The Washington Supreme Court ruled in 2007 that “hours worked” for overtime purposes may include hours worked outside the state of Washington. In *Bostain v. Food Express, Inc.*, an employer claimed that it was not required to pay one of its employees overtime because, while the employee averaged 48 hours of work each week, his work inside the state of Washington never exceeded 40 hours per week.⁹³² The court disagreed, holding that under the WMWA, the driver was entitled to overtime based on all hours worked, whether within Washington State or outside the state.⁹³³

The Minnesota FLSA differs in that it requires “time and a half” pay for hours worked in excess of 48 during the workweek.⁹³⁴

California regulations also differ from federal law in several ways. Any work performed in excess of 12 hours in a workday must be compensated at double the regular rate of pay.⁹³⁵ Also, the first eight hours of work on the seventh consecutive day of work in any workweek are paid at time-and-one-half, regardless of the amount of hours worked the previous six workdays. After the first eight hours on a seventh consecutive day, employees earn double time.⁹³⁶ Daily overtime liability is based on the hours worked each day; California regulations do not permit averaging.⁹³⁷ Likewise, weekly overtime must be calculated independently each workweek. Overtime hours should be included either in the paycheck that corresponds to the pay period during which they worked the overtime hours. If an employer fails to include them in that paycheck, it can comply with payroll law if overtime hours are included as itemized corrections on the pay stub for the next regular pay period, provided it identifies the date of the pay period to which they refer.⁹³⁸

California law allows for alternative workweek arrangements beyond the standard five eight-hour days workweek, and adjusts overtime liability according to more flexible workweek provisions.⁹³⁹ Effective February 20, 2009, California’s alternative workweek rules have been amended to give employers more flexibility in setting up alternative workweek schedules. The new law allows employers to offer employees a menu of options for alternative workweek schedules, which may include a regular schedule of five eight-hour shifts per week among the options. In addition, employees can now move from one schedule option to another from week to week, provided the employer consents.

A California court has limited overtime for employees working alternative workweek schedules, holding that health care employees working an alternative schedule of three 12-hour days are only entitled to overtime pay after performing 40 hours of work, rather than for every hour worked beyond their regularly scheduled alternative workweek schedule.⁹⁴⁰

⁹³⁰ *Sullivan v. Oracle Corp.*, 51 Cal. 4th 1191, 1206 (2011).

⁹³¹ Utah Code Ann. § 34-30-8.

⁹³² *Bostain v. Food Express, Inc.*, 159 Wn.2d 700 (2007). The driver spent sixty-three percent of his hours working outside the state of Washington.

⁹³³ *Id.* (by definition, an interstate trucker will spend some hours driving outside Washington State and the WMWA makes no distinction between the hours spent driving in state and those spent driving outside Washington).

⁹³⁴ Minn. Stat. § 177.25.

⁹³⁵ Cal. Lab. Code § 510(a).

⁹³⁶ *Id.*

⁹³⁷ DLSE Opinion Letter 1986.12.01.

⁹³⁸ See Cal. Lab. Code § 204(b)(2).

⁹³⁹ See Cal. Lab. Code § 511 (authorizing alternative workweek schedules).

⁹⁴⁰ See *Singh v. Super. Ct.*, 140 Cal. App. 4th 387, 402 (2006).

Overtime pay owed by the employer may not be waived by an employee. However, a California court has recently held that California Labor Code does not prohibit release of a claim for unpaid wages where there is a *bona fide* dispute over whether any wages were owed. In *Chindarah v. Pick Up Stix, Inc.*, the employer entered into individual settlement and release agreements with a number of employees who were also members of a putative class that was suing for unpaid overtime wages.⁹⁴¹ The employees later attempted to revive their claims, alleging that the releases were void under California Labor Code § 206.5, which provides that: “an employer shall not require the execution of a release of a claim or right on account of wages due . . . unless payment of those wages has been made.”⁹⁴² The court disagreed and confirmed that an employee may release a claim for unpaid wages where there is a *bona fide* dispute over whether any wages are actually owed. The *Chindarah* ruling validates the ability of employers to seek releases of wage claims where the amount owed is disputed.

To circumvent overtime requirements, many employers may want to provide employees with compensatory time off, or “comp time,” in lieu of paying overtime. However, the FLSA prohibits private employers from employing such a practice.⁹⁴³ Comp time may be accrued in the public sector up to a specified annual limit.⁹⁴⁴

State law on comp time differs slightly from federal law. Washington law prohibits the use of comp time in lieu of overtime payments by any employer unless the employee voluntarily requests it.⁹⁴⁵ California law prohibits the use of “comp time” policies by private employers,⁹⁴⁶ and instead provides employee-controlled “make-up work time” which allows employees to make a written request to employers to make up work time that is or would otherwise be lost as a result of a personal obligation of the employee.⁹⁴⁷ The make-up time must be performed in the same workweek in which the time was lost in order to not be included in overtime calculations.⁹⁴⁸ However, make-up time will count for overtime purposes even if used in the same workweek for hours in excess of 11 hours in one day or 40 hours in one week.⁹⁴⁹ Employees may make a written request for make-up work time for time lost to a recurring personal obligation up to four weeks in advance, but the make-up time must still be worked in the same workweek as the time lost.

Under federal, Washington, and California law, an employer’s refusal to authorize overtime work will not prevent an employee from recovering for such work if it is known and accepted by the employer. A good practice in this regard is to adopt a policy stating that overtime must be approved in advance by a supervisor and to exercise managerial control to see that work is not performed if the employer does not want it performed. If the work is performed despite the employer’s instruction to the contrary, some disciplinary measure should be taken but the employee must nonetheless be paid for all hours worked.

A recent case illustrates the importance of employers actively regulating their employees’ overtime. In *Chao v. Gotham Registry, Inc.*,⁹⁵⁰ the employer staffing agency provided hospitals with nurses. Although the employer was required to pay its nurses time and one-half wages for overtime, the hospitals did not always pay the employer a premium for overtime hours. The employer thus adopted a policy requiring advance notice and authorization for overtime; failure to comply with the policy resulted in payment at a straight-

⁹⁴¹ 171 Cal. App. 4th 796 (2009).

⁹⁴² See Cal. Lab. Code § 206.5.

⁹⁴³ 29 U.S.C. § 207. Employers may accomplish the same result by adjusting an employee’s schedule, but only within the same workweek.

⁹⁴⁴ *Collins v. Lobdell*, 188 F.3d 1124 (9th Cir. 1999) (FLSA does not prohibit *public* employers from requiring employees to use their accumulated compensatory time).

⁹⁴⁵ WAC 296-128-560.

⁹⁴⁶ DLSE Manual § 6.1.

⁹⁴⁷ IWC Orders, section 3; Cal. Lab. Code § 513.

⁹⁴⁸ *Id.*

⁹⁴⁹ *Id.*

⁹⁵⁰ 514 F.3d 280 (2d Cir. 2008).

time rate. Despite this policy, nurses often acquiesced to the hospitals' requests for extra shifts without prior approval. When the employer occasionally refused to compensate such shifts at the overtime rate, the DOL brought suit alleging that the employer's overtime practices violated the FLSA. The court agreed, holding that employers are required to compensate employees for all hours (including overtime) they are permitted or suffered to work, and that the employer implicitly permitted the nurses to work the overtime work because it was regularly documented in their time sheets.

SECTION 5.6 DETERMINING REGULAR RATES OF PAY

(a) Regular and Overtime Pay

Overtime pay is calculated at a rate not less than one and one-half times the "regular rate of pay,"⁹⁵¹ which is an hourly rate that may not be less than the established minimum wage rate.⁹⁵² Since employers are not required to compensate employees on an hourly basis, the regular rate calculation becomes necessary to determine what an employer owes. For instance, a non-exempt, salaried, piece rate or commissioned employee who exceeds his or her 40-hour workweek must still be paid overtime for those extra hours, but without a specific "hourly wage," the time-and-a-half calculation is more complicated.⁹⁵³ The statutes provide employers with a calculation for determining the overtime rate. With the exception of eight statutory exclusions,⁹⁵⁴ all of the compensation paid to or on behalf of an employee during any workweek must be considered in determining the regular rate.⁹⁵⁵ Compensation includes salary, commissions, value of employer-provided meals and lodging, and bonuses based on work performed or company performance. To calculate the regular rate, divide the total compensation of the employee for any workweek by the total number of hours actually worked in that workweek for which the compensation was paid.⁹⁵⁶

Determining regular rates and overtime pay when employees receive bonuses can prove especially tricky and employers frequently neglect to properly include bonuses in the regular rate. For example, in a Washington case, employees successfully sued to collect an overtime premium on a \$10.60 per hour retroactive contract-signing incentive bonus that was not included in determining the regular rate of pay.⁹⁵⁷ And, as discussed in Section 5.27, improper bonus calculations have increasingly been the subject of class action lawsuits.

The California method for calculating regular rates of pay for salaried workers differs from the federal method. In California, non-exempt salaried employees have a rate of pay equal to one-fortieth the employees' weekly salary, regardless of whether the employee had a different hourly agreement. Thus, the regular rate of pay must be calculated by dividing weekly straight time salary by no more than 40 hours, regardless of the actual hours worked by the employee.⁹⁵⁸

An example will illustrate the consequences of the differing methods of calculating regular rates of pay. If an employee received a weekly salary of \$600 for an agreed workweek of 60 hours, one would expect that the rate of pay was equal to \$10 per hour. However, under California law, the rate of pay equals \$600

⁹⁵¹ 29 U.S.C. § 207(a)(1); RCW 49.46.130(1).

⁹⁵² 29 C.F.R. § 778.109; WAC 296-128-550.

⁹⁵³ 29 C.F.R. §§ 778.108-.109.

⁹⁵⁴ 29 U.S.C. §§ 207(e)(1)-(8). For example, any value or income derived from employer provided stock option plans, stock appreciation rights, or stock purchase programs are excluded as long as various informational, exercise, and procedural safeguards are in place. 29 U.S.C. § 207(e)(8). Also excluded are payments to health and welfare plans, paid time off, and non-work related bonuses (e.g., Christmas). 29 U.S.C. §§ 207(c)(1), (2) & (4).

⁹⁵⁵ 29 U.S.C. § 207(e).

⁹⁵⁶ 29 C.F.R. § 778.109. The way to calculate the regular rate of payment can be complicated and varies depending on the method of payment. The regulations contain many useful illustrations. Reference to 29 C.F.R. § 778.108 through 29 C.F.R. § 778.122 is recommended.

⁹⁵⁷ *Hisle v. Todd Pac. Shipyards Corp.*, 113 Wn. App. 401 (2002).

⁹⁵⁸ Cal. Lab. Code § 515(d).

divided by 40, or \$15. Thus, for overtime liability, the time-and-one-half premium rate would be based on \$15 (\$22.50) and not \$10 (\$15).

(b) Fluctuating Workweek

Where a salary is paid to a non-exempt employee who works hours that vary from week to week, a fluctuating workweek method is used to calculate the regular rate necessary to pay overtime.⁹⁵⁹ If there is a clear and mutual understanding between the parties that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek, whatever their number, such a salary arrangement is permitted and, typically, the fluctuating workweek method applies.⁹⁶⁰ The regular rate is calculated by dividing the salary by the number of hours worked that workweek.⁹⁶¹ A fluctuating workweek agreement will not be enforced if the amount of gross pay is less than the employee would receive under the applicable minimum wage.⁹⁶²

The fluctuating workweek method of calculating overtime, though permitted under federal regulations and Washington state law, is not permissible in California.⁹⁶³ In *Skyline Homes v. Dep't of Indus. Relations*, the court emphasized that the fluctuating workweek impermissibly reduces an employee's regular hourly rate with each overtime hour worked.⁹⁶⁴ However, California law allows employers and employees to establish alternative workweek arrangements.⁹⁶⁵ The rules concerning alternative workweek arrangements are difficult to navigate, and employers should be very careful to ensure they are properly complying with them.

SECTION 5.7 PAYMENT OF WAGES

In Washington, wages must be paid on at least a monthly basis on established regular paydays.⁹⁶⁶ Upon termination of employment, wages must be paid to employees at the end of the established pay periods.⁹⁶⁷

In Utah, wages must be paid on at least a semi-monthly basis on established regular paydays.⁹⁶⁸ Wages must be paid for services rendered during a pay period within ten days after the close of that pay period.⁹⁶⁹ When an employee is removed from an employer's payroll (*i.e.*, terminated), any unpaid wages are due to the employee within 24 hours of the removal.⁹⁷⁰

In California, wages generally must be paid twice a month on pre-designated regularly scheduled paydays.⁹⁷¹ However, the salaries of exempt administrative, professional, or executive employees of employers covered by the FLSA may be paid once a month. Under California law, if an employer discharges an employee, all wages earned and unpaid at the time of discharge are due and payable

⁹⁵⁹ See *Inniss*, 141 Wn.2d at 527-28 or 29 C.F.R. §§ 778.114(a)-(c) for a detailed analysis and sample calculation of the fluctuating hours method.

⁹⁶⁰ 29 C.F.R. § 778.114.

⁹⁶¹ *Id.*

⁹⁶² 29 C.F.R. § 778.114(a); see also *Arnold v. Kelly's Cafe Am., Inc.*, No. 04-1557, 2005 WL 1950238 (W.D. Wash. Aug. 12, 2005) (invalidating a fluctuating workweek agreement).

⁹⁶³ *Skyline Homes, Inc. v. Dep't of Indus. Relations*, 165 Cal. App. 3d 239 (1985); Cal. Lab. Code § 515(d).

⁹⁶⁴ *Skyline Homes*, 165 Cal. App. 3d at 245.

⁹⁶⁵ Cal. Lab. Code § 511.

⁹⁶⁶ WAC 296-126-023. This section of the Code describes many different ways that employers may legally structure pay periods. Reference to it is advised.

⁹⁶⁷ RCW 49.48.010.

⁹⁶⁸ Utah Code Ann. § 34-28-3(1)(a).

⁹⁶⁹ Utah Code Ann. § 34-28-3(1)(b).

⁹⁷⁰ Utah Code Ann. § 34-28-5(a).

⁹⁷¹ Cal. Lab. Code § 204.

immediately.⁹⁷² If an employee without a written contract for a definite period quits, his or her wages are due and payable within 72 hours of notifying the employer.⁹⁷³ If the employee has given more than 72-hours' notice before quitting, wages are due at the time of quitting. An employee performing a one-day job is entitled to immediate payment of wages upon completion of the job and release by the employer.⁹⁷⁴ If the nature of the wages makes them presently incalculable, such as commissions, the employer must pay as soon as the amount is ascertained. An employee who is laid off without a specific return date within the current pay period is treated as a discharged employee and is entitled to immediate payment of earned and unpaid wages.⁹⁷⁵ If, however, there is a return date within the pay period, the wages need only be paid the next regular pay day. California law uniquely allows employers in the entertainment industry to establish a time limit for payment of wages after an employee is discharged or laid off in a collective bargaining agreement with their unions.⁹⁷⁶

California has stiff penalties for employers who fail to timely pay wages upon termination. If an employer willfully fails to timely pay the due wages of an employee who is discharged or who quits, the employee continues to earn his or her regular rate of wages from the due date until the employer pays the past due wages, up to a period of 30 days.⁹⁷⁷ Penalties accrue for *every* past due day, not just workdays.⁹⁷⁸ A three-year statute of limitations applies to such claims.⁹⁷⁹

State law also covers situations in which an employee who is owed wages dies. Under Washington law, if an employee who is owed wages dies, and no executor or administrator has been appointed to handle the deceased employee's estate, the employer must, upon request, pay that employee's surviving spouse, or if there is no surviving spouse, the employee's children, and if there are no surviving children, the employee's parents, the amount of wages due up to \$2,500.⁹⁸⁰ If a California employee who is owed wages dies, the surviving spouse or conservator of the estate may collect compensation from the employer of up to \$15,000.⁹⁸¹ California and Washington also allow registered domestic partners to have their earnings treated on par with married couples.⁹⁸²

Wages are not considered paid under the FLSA unless they are paid unconditionally, without requiring any "kick-back" to the employer or another person for the employer's benefit.⁹⁸³ Both Washington and California prohibit employers from withholding or diverting any portion of an employee's wage in most circumstances.

Washington law provides an exception if the deduction is (1) specifically agreed upon orally or in writing by the employee and employer; or (2) required for medical, surgical, or hospital care or service, pursuant to any rule or regulation. All such deductions must be made openly and clearly and recorded by the

⁹⁷² Cal. Lab. Code § 201(a). *But see Schachter v. Citigroup, Inc.*, 47 Cal. 4th 610 (2009) (the forfeiture provision of an employee compensation plan allowing employees to receive a portion of their annual wages in the form of restricted stock, but providing that the shares would be forfeited if the employee resigned or was terminated with cause before the stock shares vested, did not violate the Labor Code provisions requiring prompt payment of all earned wages when an employee is terminated or resigns).

⁹⁷³ Cal. Lab. Code § 202.

⁹⁷⁴ *Smith v. Super. Ct. (L'Oreal USA, Inc.)*, 39 Cal. 4th 77, 93-94 (2006).

⁹⁷⁵ *Campos v. EDD*, 132 Cal. App. 3d 961 (1982).

⁹⁷⁶ See Cal. Lab. Code § 201.9.

⁹⁷⁷ Cal. Lab. Code § 203.

⁹⁷⁸ *Mamika v. Barca*, 68 Cal. App. 4th 487, 492-93 (1998).

⁹⁷⁹ *Pineda v. Bank of Am.*, 50 Cal. 4th 1389 (2010).

⁹⁸⁰ RCW 49.48.120.

⁹⁸¹ Cal. Prob. Code § 13600.

⁹⁸² See Cal. Fam. Code § 297.5; Cal. Rev. & Tax Code §§ 17024.5, 18521; RCW 26.60.010.

⁹⁸³ 29 C.F.R. § 535.31. See also *Gordon v. City of Oakland*, 627 F.3d 1092 (9th Cir. 2010) (employer complied with FLSA minimum wage requirements as employee's repayment of training costs was not a kick-back under FLSA).

employer.⁹⁸⁴ Consulting the statute prior to authorizing a deduction is recommended as additional restrictions may apply.

California employers may also deduct from an employee's wages if (1) the deduction is expressly authorized in writing by the employee to cover insurance premiums, hospital or medical dues, or other deductions not amounting to a rebate or deduction from the standard wage; or (2) a collective bargaining or wage agreement authorizes a deduction to cover health and welfare or pension plan contributions.⁹⁸⁵ No employer may withhold or deduct from compensation the cost of pre-employment medical or physical examinations imposed solely by the employer as a condition of employment.⁹⁸⁶

California and Washington specifically prohibit employers from making deductions from wages for any cash shortage, or failure of a customer to pay, breakage, or loss of equipment, unless it can be shown that it was by a dishonest or willful act of the employee.⁹⁸⁷

Washington also prohibits employers from making deductions from wages for any of the following:

- acceptance of a bad check, unless it can be shown that the employee accepted the bad check in violation of previously known procedures; or
- any shortage of cash from a cash register, unless the employee has sole access to the cash and has participated in the cash accounting at the beginning of his or her shift and again at the end of the shift.⁹⁸⁸

California law additionally provides that it is unlawful for an employer to attempt to collect or receive from an employee any part of wages already paid by the employer to the employee.⁹⁸⁹ This does not apply to advances. In 2006, former sales associates sued their former employer, alleging that “chargebacks” on commissions already paid due to cancelled customer orders, was a violation of California labor law.⁹⁹⁰ The court disagreed, finding that advances by definition were not wages because all conditions for performance were not satisfied.⁹⁹¹

California law prohibits employers and their agents from sharing in or keeping any portion of a gratuity left for one or more employees by a patron.⁹⁹² However, the applicable statute does not give employees a private right to sue.⁹⁹³ It is also unlawful for employers to make wage deductions from gratuities, or from using gratuities as direct or indirect credits against an employee's wages. For gratuities paid by credit card, employers may not deduct the credit card fees from the gratuity and must remit the full gratuity to the employee no later than the next regular payday following the date the credit card payment is authorized by the patron.

The Ninth Circuit has determined that the FLSA does not restrict an employer-mandated employee tip-pooling arrangement when no tip credit is taken by the employer (*i.e.* the employer does not count any of the employee's tips towards the minimum wage owed).⁹⁹⁴

⁹⁸⁴ RCW 49.48.010.

⁹⁸⁵ Cal. Lab. Code §§ 221, 224.

⁹⁸⁶ Cal. Lab. Code § 222.5.

⁹⁸⁷ WAC 296-126-025; Cal. Lab. Code § 224.

⁹⁸⁸ WAC 296-126-025.

⁹⁸⁹ *See* Cal. Lab. Code § 221.

⁹⁹⁰ *See Koehl v. Verio, Inc.*, 142 Cal. App. 4th 1313 (2006).

⁹⁹¹ *See id.* at 1332. *See also Deleon v. Verizon Wireless, LLC*, 207 Cal. App. 4th 800 (2012).

⁹⁹² *See* Cal. Lab. Code § 351; *but see Jon Chau v. Starbucks Corp.*, 174 Cal. App. 4th 688 (2009) (shift supervisors could share in tip proceeds left for baristas and shift supervisors collectively even though they could be characterized as “agents” of Starbucks); *see also Etheridge v. Reins Intern. Cal., Inc.*, 172 Cal. App. 4th 908 (2009) (restaurant employees who participate in the “chain of service” may participate in mandatory, employee-imposed tip pools).

⁹⁹³ *Lu v. Hawaiian Gardens Casino, Inc.*, 50 Cal. 4th 592 (2010).

SECTION 5.8 VACATION PAY AND SICK LEAVE

An employee's right to vacation pay in Washington is a matter of contract.⁹⁹⁵ Employer policy therefore governs whether an employer pays out accrued vacation at termination, or maintains a "use it or lose it" vacation policy. To be effective, any such policy should be in writing and distributed to employees. An employee's right to sick pay in Washington is also a matter of contract. Therefore, unless the employer's employment policy states the contrary, a statutory right to wages due upon termination of employment does not create a substantive right to payment for accrued sick leave.⁹⁹⁶ Employers should proceed with caution before making deductions based on an employee's debt from that employee's termination pay. With few exceptions, it is unlawful to deduct or withhold wages due upon termination.⁹⁹⁷

California employers have no obligation to provide vacation benefits either.⁹⁹⁸ If California employers choose to provide vacation benefits, courts treat them as deferred wages that vest as they are earned. Consequently, if an employer chooses to offer vacation benefits, and an employee is terminated without using all of his or her vacation time, all vested vacation is due to the employee as wages at his or her final regular rate of pay, without any reductions.⁹⁹⁹ Vested vacation benefits may not be forfeited upon termination.¹⁰⁰⁰ Also, employers may not institute "use it or lose it" policies whereby vacation is forfeited if it is not used within a certain time period.¹⁰⁰¹ However, under limited circumstances California employers may institute a cap past which no additional vacation accrues. Any paid leave that an employer provides without condition is assumed to be vacation, and thus vests and is payable on termination. Employers should tie any other paid leave policies, such as sick leave, holidays or bereavement leave, to objective events to ensure that courts will not treat these policies as vested deferred wages.¹⁰⁰²

SECTION 5.9 UNIFORMS

As of May 15, 2008, all employers must implement the Occupational Safety and Health Administration ("OSHA") rule that requires employers to pay for all required personal protective equipment ("PPE"). PPE includes hard hats, gloves, goggles, welding helmets, safety glasses, and face shields. An employer need not pay for an employee's everyday clothing and weather-related clothing, ordinary safety-toed footwear (*e.g.*, steel-toed boots), or ordinary prescription safety eyewear.¹⁰⁰³

In Washington, employers are required to compensate employees for the purchase of apparel that an employer requires to be worn if (1) it is a uniform that is of a distinctive style and quality that, if worn outside the work place, clearly identifies that person as an employee of a specific employer; (2) the apparel is marked with a specific logo; (3) the apparel is unique and represents a historical time period or an ethnic tradition; or (4) it is formal apparel like evening gowns and tuxedos.¹⁰⁰⁴ An employer may require

⁹⁹⁴ *Cumbie v. Woody Woo, Inc.*, 596 F.3d 577 (9th Cir. 2010).

⁹⁹⁵ *Walters v. Ctr. Elec., Inc.*, 8 Wn. App. 322, 326 (1973).

⁹⁹⁶ *Teamsters, Local 117 v. Nm. Beverages, Inc.*, 95 Wn. App. 767 (1999). For other statutory requirements involving sick leave, see Chapter VI.

⁹⁹⁷ RCW 49.48.010; see also RCW 49.52.050; RCW 49.52.070; *Seattle Prof's Eng'g Employees Assoc. v. Boeing Co.*, 139 Wn.2d 824, opinion corrected on denial of reconsideration, 1 P.3d 578 (2000); *Cameron v. Neon Sky, Inc.*, 41 Wn. App. 219 (1985).

⁹⁹⁸ Cal. Lab. Code § 227.3.

⁹⁹⁹ *Suastez v. Plastic Dress-Up Co.*, 31 Cal. 3d 774 (1982).

¹⁰⁰⁰ Cal. Lab. Code § 227.3.

¹⁰⁰¹ *Boothby v. Atlas Mech.*, 6 Cal. App. 4th 1595, 1601 (1992).

¹⁰⁰² See DLSE Opinion Letter 1992.04.27.

¹⁰⁰³ OSHA Rule, 29 C.F.R. §§ 1910, 1915, 1917, 1918, 1926. Offering additional guidance in a recent opinion letter, the DOL advised that a restaurant operator that required employees to wear dark shoes with closed toes and non-slip soles was not mandating the wearing of a "uniform" under the Fair Labor Standards Act and was not responsible for the cost of the shoes. Wage and Hour Opinion Letter, FLSA 2008-4 (Dept. of Labor, May 15, 2008). Washington adopted amended regulations consistent with OSHA requirements for supplying PPE. See 09-15-145 Wash. Reg. (Jul. 21, 2009).

employees to wear a limited number of common colors.¹⁰⁰⁵ If the employer changes the required color or colors during a two-year period, the employer will be required to furnish or compensate those employees affected by the change.¹⁰⁰⁶

If a California employer requires uniforms as a condition of employment, the employer must provide and maintain those uniforms.¹⁰⁰⁷ For purposes of California law, “uniforms” include clothing and accessories “of distinctive design or color.”¹⁰⁰⁸ An employer is not required, however, to pay for attire consisting of “basic wardrobe items” of unspecified design that are “usual and generally usable in the occupation.”¹⁰⁰⁹

SECTION 5.10 RECORD KEEPING

To comply with relevant wage and hour laws, employers must adhere to certain basic record keeping requirements.¹⁰¹⁰ The basic federal record keeping obligations include:

- name;
- sex;
- home address;
- date of birth (if under 18);
- Social Security number;
- any number or symbol used to identify an employee, if applicable;
- occupation in which employed;
- the beginning date of an employee’s employment, and the separation date, if applicable;
- time of day and day of week on which workweek begins;
- hours worked each day and hours worked each week (non-exempt employees only);
- the employee’s regular rate of pay;
- the basis for the wage, including the number of units earned or produced if payment is made on a piecework basis;
- all inclusions and exclusions from the regular rate;
- total gross straight time and overtime earnings and deductions from earnings, and the purpose of any deductions; and
- date of payment, amount of payment and period included in payment.

Washington, California, and Utah requirements generally mirror those of the federal law.¹⁰¹¹ Employers should keep payroll records for at least three years.

¹⁰⁰⁴ RCW 49.12.450(3).

¹⁰⁰⁵ RCW 49.12.450(4). White, tan, or blue for tops and tan, black, blue, or gray for bottoms.

¹⁰⁰⁶ RCW 49.12.450(4)-(5).

¹⁰⁰⁷ IWC Orders, section 9(A).

¹⁰⁰⁸ *Id.*

¹⁰⁰⁹ *See* DLSE Opinion Letter 1990.09.18.

¹⁰¹⁰ *See* 29 U.S.C. § 211; 29 C.F.R. pt. 516. In 2010, the DOL issued a Notice of Proposed Rulemaking that would change the FLSA’s recordkeeping requirements. Among other things, the proposed rule would require any “employers that seek to exclude workers from the FLSA’s coverage will be required to perform a classification analysis, disclose that analysis to the worker, and retain that analysis to give to WHD enforcement personnel who might request it.” *See* Chapter XI: Employment Records and Employee Access to Records.

¹⁰¹¹ *See* RCW 49.46.070; WAC 296-126-050; WAC 296-128-010; WAC 296-17-35201; IWC Orders, section 7(A); Utah Code Ann. § 34-40-201.

In Washington, an employer or person charged with keeping an employer's records who willfully fails to show openly and "clearly in due course" any deductions from an employee's wages in those records, can be found guilty of a misdemeanor.¹⁰¹² Additionally, for every such offense, a fine of \$250 will be assessed against the employer or bookkeeper (*e.g.*, one offense per violation per employee, two offenses if two employees, and so on).¹⁰¹³

Upon written request by a terminated employee, Washington employers are also under an obligation to provide within 10 working days of that request, a signed written statement setting forth the reasons for that termination and the effective date thereof.¹⁰¹⁴

In California, an employer who fails to provide an employee with a wage deduction statement or who fails to keep the required records is subject to a \$250 penalty per employee per violation for the initial violation, and \$1,000 per employee for each violation in subsequent citations.¹⁰¹⁵ Any employer, officer, agent, employee, fiduciary, or other person who controls or pays any wages who knowingly and intentionally participates in a violation of the record keeping requirements is guilty of a misdemeanor punishable by up to \$1,000 or one year in jail.¹⁰¹⁶

SECTION 5.11 CHILD LABOR

Federal, Minnesota, Washington, California and Utah law regulate the employment of minors.¹⁰¹⁷ These laws regulate the maximum number of hours that minors may work, the scheduling of those hours, and the types of duties that minors may perform. Employers in Minnesota, Washington and California are required to obtain work permits before employing minors under age 18, and must retain these permits for inspection by interested authorities.¹⁰¹⁸ These laws apply with equal force to relatives, including children, who work for an employer.

Under Minnesota law, each employer must require proof of age of any minor employee or applicant, which can be an age certificate, a copy of a birth certificate, a driver's license, or United States Department of Homeland Security Citizenship and Immigration Services Employment Verification Form I-9. Age certificates are issued from the minor's school district.¹⁰¹⁹

An employer's best protection against a child labor violation is to obtain an age certificate from the minor before allowing him or her to work. Such a certificate is considered conclusive proof under the FLSA of the minor's age even if it turns out that the certificate is inaccurate.¹⁰²⁰

(a) Maximum Hours

Federal, Washington, Minnesota, California, and Utah laws all prohibit the employment of minors under the age of 14, except for a few very limited circumstances.¹⁰²¹ In those limited instances, organizations must often get permission from the county court.¹⁰²² Washington and California law provide that minors

¹⁰¹² RCW 49.52.050.

¹⁰¹³ WAC 296-17-35201.

¹⁰¹⁴ WAC 296-126-050.

¹⁰¹⁵ Cal. Lab. Code § 226.3.

¹⁰¹⁶ Cal. Lab. Code § 226.6.

¹⁰¹⁷ 29 U.S.C. § 212; RCW 49.12 *et seq.*; Minn. Stat. §§ 181A.d *et seq.*; Minn. Stat. §§ 177.21-177.35; Utah Code Ann. § 34-23-101 *et seq.*

¹⁰¹⁸ Cal. Lab. Code § 1299; RCW 49.12.121.

¹⁰¹⁹ Minn. Stat. § 181A.06.

¹⁰²⁰ 29 U.S.C. § 203(l); 29 C.F.R. § 570.121.

¹⁰²¹ *See* 29 C.F.R. § 570.31 (in agriculture or housework); WAC 296-125-018; Cal. Lab. Code § 1294.4 (exceptions for newspaper delivery, errand runners, and certain food preparation and serving work); Minn. Stat. § 181A.04, subd. 1; Minn. Stat. § 181A.07; Utah Code Ann. §§ 34-23-205 to 207.

who are 14 and 15 years of age may work up to 40 hours a week and eight hours in any 24-hour period when school is not in session, and up to 18 hours a week and three hours a day when school is in session.¹⁰²³

In Washington, minors may not work on school days during school hours unless they first secure an employment certificate issued by the school district, superintendent, or some other person designated by the Board of Education.¹⁰²⁴ If an individual under 18 is emancipated by the court, he or she is no longer considered a minor and is subject to the same requirements as adults.

Minnesota law forbids the employment of minors who are 14 and 15 years of age on school days during school hours unless the minor first obtains an employment certificate issued by the school district superintendent or some other person designated by the Board of Education.¹⁰²⁵ The employment certificate is issued only for a specific position. Once an employment certificate is obtained, Minnesota law restricts minors who are 14 and 15 years of age from working more than 40 hours a week or more than eight hours in a 24-hour period.¹⁰²⁶

Under California law, minors are prohibited from working more than eight hours in any workday.¹⁰²⁷ Minors aged 16 or 17 may work up to 48 hours per workweek (six eight-hour days, with eight hours overtime), but not more than four hours a day while school is in session unless the minor is enrolled in a school-supervised career program.¹⁰²⁸ If an individual under 18 is not required by law to attend school, he or she is no longer considered a minor and is subject to the same requirements as adults.

In Utah, minors under 16 are prohibited from working during school hours unless they obtain authorization from the proper school authorities.¹⁰²⁹ Minors under 16 are also prohibited from working for more than four hours before or after school, or before 5:00 a.m. or after 9:30 p.m., unless the next day is not a school day.¹⁰³⁰ Utah prohibits minors under 16 from working more than eight hours in any 24-hour period and more than 40 hours in any week.¹⁰³¹

(b) Scheduling of Hours

With few exceptions, Washington minors under the age of 18 may not work after 10:00 p.m. on an evening before a school day, or before 7:00 a.m. on a school day.¹⁰³² In addition, minors under the age of 16 may work only between 7:00 a.m. and 7:00 p.m., except that, from June 1 through Labor Day, such minors may work until 9:00 p.m.¹⁰³³ There is an exception for minors under age 16 in service occupations, who may work past 8:00 p.m. provided they are supervised by a responsible adult employee who is present at all times.¹⁰³⁴

¹⁰²² See <http://www.lni.wa.gov/WorkplaceRights/TeenWorkers/>. Also, youths under the age of 14 may volunteer to referee games and may receive a stipend from a non-profit sports organization. See *id.*

¹⁰²³ Cal. Lab. Code §§ 1391(a)(1)-(2).

¹⁰²⁴ 29 C.F.R. § 570.35(a); RCW 28A.225.080.

¹⁰²⁵ Minn. Stat. § 181A.05.

¹⁰²⁶ Minn. Stat. § 181A.04, subd. 4.

¹⁰²⁷ Cal. Lab. Code § 1391(a).

¹⁰²⁸ Cal. Lab. Code §§ 1391(a)(3)-(4).

¹⁰²⁹ Utah Code Ann. § 34-23-202(1).

¹⁰³⁰ Utah Code Ann. § 34-23-202(2)(a)-(b).

¹⁰³¹ Utah Code Ann. § 34-23-202(2)(c)-(d).

¹⁰³² WAC 296-125-027.

¹⁰³³ 29 C.F.R. §§ 570.35(a), .119; WAC 296-125-027.

¹⁰³⁴ WAC 296-125-027.

Under Minnesota child labor laws, with certain very limited exceptions, high school students under the age of 18 may not work after 11:00 p.m. on an evening before a school day or before 5:00 a.m. on a school day.¹⁰³⁵ Under Minnesota law, minors who are 14 and 15 are restricted to the hours between 7:00 a.m. and 9:00 p.m. throughout the entire year.¹⁰³⁶

In California, minors aged 15 and younger may not work before 7 a.m. or after 7 p.m., except from June 1 through Labor Day they may work until 9 p.m.¹⁰³⁷ Minors aged 16 or 17, however, may work between the hours of 5 a.m. and 10 p.m. on any day preceding a school day, and may work until 12:30 a.m. on a non-school day.¹⁰³⁸

(c) Prohibited Job Duties

Minors under the age of 16 and those under the age of 18 are restricted in the type of duties they may perform. Federal and state regulations set forth in detail the duties that minors are prohibited from performing.¹⁰³⁹

SECTION 5.12 PENALTIES FOR VIOLATION OF WAGE AND HOUR LAWS

The penalties for an employer's violation of the wage and hour laws are numerous.¹⁰⁴⁰ An employer who violates the minimum wage or overtime compensation provisions of the FLSA faces potential for an extensive DOL investigation and an injunction against any further illegal activity. A repeated or willful violation of the minimum wage or overtime compensation provisions of the FLSA subjects the violator to a civil penalty not to exceed \$1,000 per violation.¹⁰⁴¹ The aggregation of many such violations can lead to plaintiffs receiving enormous damage awards.

State law imposes additional penalties. In Washington, an employer who violates the WMWA may be liable in the amount of the unpaid minimum wages or unpaid overtime compensation, as well as an equal amount of liquidated damages, and attorneys' fees, and costs.¹⁰⁴² Even small wage and hour cases can balloon into a large award of fees.¹⁰⁴³ Additionally, an individual¹⁰⁴⁴ violating certain provisions of the act may be guilty of a misdemeanor.¹⁰⁴⁵ Courts liberally construe these provisions to benefit employees. For example, one Washington case awarded attorneys' fees under the WMWA to police department employees

¹⁰³⁵ Minn. Stat. § 181A.04, subd. 6.

¹⁰³⁶ Minn. Stat. § 181A.04, subd. 3.

¹⁰³⁷ Cal. Lab. Code § 1391(a)(1).

¹⁰³⁸ *Id.* § 1391(a)(3).

¹⁰³⁹ *E.g.*, Cal. Code Regs. tit. 8, §§ 11701-11707.

¹⁰⁴⁰ 29 U.S.C. § 216; RCW 49.46.090.

¹⁰⁴¹ *Id.*

¹⁰⁴² RCW 49.46.090; RCW 49.52.070; *Int'l Ass'n of Firefighters, Local 46 v. City of Everett*, 101 Wn. App. 743 (2000) (statute assessing attorney fees against employer when "any person" obtains judgment for wages or salary owed applies even when employee's wage recovery is secondary issue). The Washington Supreme Court recently ruled that an employer's Chapter 7 bankruptcy was not a valid defense to the finding that an employer willfully deprived employees of wages due. The court found the individual defendant owners to be personally liable under RCW 49.52.070 for non-payment of wages. *See Morgan v. Kingen*, 166 Wn.2d 526 (2009). *See also Boucher v. Shan*, 572 F.3d 1087 (9th Cir. 2009) (managers held individually liable under FLSA for unpaid wages despite bankruptcy proceedings of employer corporation). Attorneys' fees may also be awarded pursuant to the contract on which the wage claim is based. *LaCoursiere v. CamWest Dev.*, 289 P.3d 683 (Wash. App. 2012) (discretionary bonus).

¹⁰⁴³ *Fiore v. PPG Indus., Inc.*, 169 Wn. App. 325 (2012) (parties stipulated to \$12,203.10 in damages, but plaintiff was awarded \$500,000 in legal fees by the trial court).

¹⁰⁴⁴ "Employer" in this context is defined as any person, firm, or corporation, failing to pay all wages due an employee upon termination, or who fails to pay wages due, or who willfully maintains falsified books or records regarding wages for employees.

¹⁰⁴⁵ RCW 49.48.020; RCW 49.52.020.

who successfully sued to recover pension monies, holding that pension contributions are “wages” under the WMWA.¹⁰⁴⁶

Employers violating California wage and hour laws may be liable for both penalties owed to employees and civil penalties to the state. For example, an employer who fails to timely pay wages is subject to a civil penalty owed to the state for each missed or untimely pay day. A civil penalty of \$50 for *each* failure to pay *each* employee is imposed for any initial violation.¹⁰⁴⁷ Each subsequent violation carries a civil penalty of \$100 for each failure to pay each employee plus twenty-five percent of the amount unlawfully withheld.¹⁰⁴⁸

If an employer is found to have repeatedly or willfully violated the Minnesota FLSA, the employer shall be subject to a civil penalty of up to \$1,000 for each violation for each employee.¹⁰⁴⁹

Further, employers are guilty of misdemeanors if they violate timely payment laws or have the ability to pay wages due but willfully refuse to do so.¹⁰⁵⁰ An employer who violates the California minimum wage law (or any other provision of the Labor Code) is guilty of a misdemeanor and may be fined at least \$100, imprisoned for at least 30 days, or both.¹⁰⁵¹ Additionally, employers (including certain individuals exercising control over the employee) may be liable for attorneys’ fees.¹⁰⁵²

Any person who violates the child labor provisions of the FLSA, or any regulation issued under that section, is subject to a civil penalty of up to \$10,000 for each employee who was the victim of such a violation.¹⁰⁵³ The FLSA also provides for criminal penalties, including fines of up to \$10,000 and imprisonment of up to six months.¹⁰⁵⁴ Washington’s child labor law provides for fines up to \$1,000 and criminal penalties.¹⁰⁵⁵ California’s Labor Code provides for penalties for child labor violations of up to \$10,000 and authorizes criminal penalties.¹⁰⁵⁶ Minnesota’s Child Labor Standards Act provides for fines ranging from \$500 to \$5,000 as well as criminal penalties. Violations are misdemeanors and repeated violations are gross misdemeanors.¹⁰⁵⁷ Utah provides for administrative penalties of up to \$500 per violation as well as misdemeanor criminal penalties.¹⁰⁵⁸

SECTION 5.13 CLASS ACTIONS

An increasingly utilized method of enforcing rights under the FLSA is the class action lawsuit, which can result in substantial liability for employers. Wage claims are particularly suitable for class actions because employees often meet the “similarly situated” requirement for class action status.¹⁰⁵⁹ An individual who

¹⁰⁴⁶ *Bates v. City of Richland*, 112 Wn. App 919 (2002).

¹⁰⁴⁷ Cal. Lab. Code § 210(a).

¹⁰⁴⁸ Cal. Lab. Code § 210(b). *See Jones v. Wal-Mart Stores Inc.*, No. 07-00374 (Cal. Super. Ct. Aug. 14, 2007) (Wal-Mart agreed to pay \$3.9 million in overtime, late payment penalties, and interest to employees, plus nearly \$200,000 in civil penalties to the state, under a settlement agreement. This lawsuit followed a similar suit earlier in the year based on federal wage and hour violations, which resulted in a \$33 million settlement).

¹⁰⁴⁹ Minn. Stat. § 177.27, subd. 7.

¹⁰⁵⁰ Cal. Lab. Code §§ 215-16.

¹⁰⁵¹ Cal. Lab. Code § 1199.

¹⁰⁵² *See, e.g.*, Cal. Lab. Code § 218.5 (in any action brought for the non-payment of wages, fringe benefits, or health and welfare or pension fund contributions, the court shall award reasonable attorneys’ fees and costs to the prevailing party if any party to the action requests attorneys’ fees and costs upon the initiation of the action); *Online Power v. Mazur*, 149 Cal. App. 4th 1079 (2007) (holding the Cal. Lab. Code § 218.5 is not limited to hourly employees).

¹⁰⁵³ 29 U.S.C. § 216(e).

¹⁰⁵⁴ 29 U.S.C. § 216(a).

¹⁰⁵⁵ RCW 49.12.390, 49.12.410.

¹⁰⁵⁶ Cal. Lab. Code §§ 1287-88.

¹⁰⁵⁷ Minn. Stat. § 181A.12.

¹⁰⁵⁸ Utah Code Ann. §§ 34-23-401 to 402.

wishes to be a part of a plaintiff class under the FLSA must “opt in” by signing a written consent with the court.¹⁰⁶⁰

Class actions to enforce rights under the WMWA also require workers to be similarly situated to constitute a class. The members of the class must demonstrate that there are questions of law or fact common to the class, but it is not necessary that the shared questions be identical.¹⁰⁶¹ For class actions based on WMWA, however, class members must affirmatively “opt out” to be excluded from the class.¹⁰⁶²

To certify a class action in California, the plaintiffs must establish by a preponderance of the evidence that the class action proceeding is superior to alternate means for a fair and efficient adjudication of the litigation. The court will focus on whether the theory of recovery advanced by the plaintiff is likely to prove amenable to class treatment.¹⁰⁶³ Due to the potential for costly judgments, some California employers have requested that their employees sign class action waivers. California law permits class action waivers under certain circumstances. In determining the enforceability of a class action waiver, courts will consider: (1) the size for the potential individual recovery; (2) the potential for retaliation against members of the class; (3) whether absent members of the class may not be informed about their rights; and (4) other “real world” obstacles to the vindication of class members’ right to overtime pay through individual arbitration.¹⁰⁶⁴ If a waiver makes it unlikely that an employee will be able to vindicate his or her rights as a sole plaintiff, it is also unlikely that a court will enforce the waiver.

Employees in California may also bring representative suits, which allow an aggrieved employee to bring an action on behalf of other employees without complying with the requirements of a class action. In *Arias v. Super. Ct. of San Joaquin County*, the court allowed a former employee to sue his former employer on behalf of himself and current and other former employees, claiming in part that the company failed to provide habitable housing for its employees.¹⁰⁶⁵

Employers should consult the laws or counsel to ensure compliance and try to minimize potential class action liabilities.

¹⁰⁵⁹ 29 U.S.C. § 216(b).

¹⁰⁶⁰ This FLSA “opt in” feature differs from other class action lawsuits under the Federal Rules of Civil Procedure, FRCP 23 (*e.g.*, discrimination), which requires class members to affirmatively “opt out” to be excluded from the lawsuit.

¹⁰⁶¹ *Miller v. Farmer Bros. Co.*, 115 Wn. App. 815, 823-25 (2003). While there is also no minimum number of members needed to certify a class, the class must be large enough that the class action is the most practicable way of addressing the claims of the potential class members. *Id.* at 822-23.

¹⁰⁶² Washington Civil Rule 23(c)(2).

¹⁰⁶³ *Jaimes v. DAIOWS USA, Inc.*, 181 Cal. App. 4th 1286 (2010) (class action appropriate where uniform corporate practices regarding overtime, meal and rest breaks, and paystubs confirm predominance of common legal and factual issues that make case more amenable to class treatment).

¹⁰⁶⁴ *Gentry v. Super. Ct. (Circuit City)*, 42 Cal. 4th 443 (2007).

¹⁰⁶⁵ *Arias v. Super. Ct. of San Joaquin County*, 63 Cal. Rptr. 3d 272 (Cal. Ct. App.), *aff'd by, Arias v. Super. Ct. of San Joaquin County*, 46 Cal. 4th 969 (2009) (representative claim may be brought under state’s labor code but claims under California’s Unfair Competition Law must be brought as a class action).

CHAPTER VI

LEAVES-OF-ABSENCE AND TIME-OFF POLICIES

SECTION 6.1 INTRODUCTION

With both federal and state laws regulating employee leave, responding to employee leave-of-absence requests is extremely complex. A 2007 survey of over 600 human resource professionals across the United States found the following:¹⁰⁶⁶

- over eighty percent of employers have problems tracking intermittent leave;
- nearly two-thirds of human resources professionals have had problems in determining when to grant “chronic leave” under the Family and Medical Leave Act (“FMLA”);
- fifty-one percent of human resource professionals have faced “significant challenges” in implementing FMLA leave;
- four out of 10 human resources professionals said that they had to grant FMLA requests they believed were not legitimate because of the law’s regulations;
- fifty-seven percent found it somewhat or very difficult to determine if a health condition is a “serious health condition”; and
- forty-seven percent had difficulties administering episodic FMLA leave for employees with serious health conditions.

To ensure compliance with this complicated area of law, employers should keep some general principles in mind.

First, avoid tunnel vision. Most state and federal leave laws require an employer to comply with other statutes, to the extent that they apply. For example, an employee requesting a leave of absence for pregnancy disability or illness is entitled to time off under Washington law and is entitled to job protection and benefits under the Federal FMLA.

Similarly, an employee with a workers’ compensation injury is entitled to some protection under that statute, but also may be entitled to job protection as a reasonable accommodation under either the Americans with Disabilities Act (“ADA”) or Washington Law Against Discrimination (“WLAD”).¹⁰⁶⁷

In addition, an employee requesting vacation in order to undergo required surgery is entitled to have his or her paid vacation run concurrently with unpaid FMLA. In fact, most leave of absence statutes across the United States impose overlapping, sometimes conflicting obligations on employers. Accordingly, it is very important to carefully analyze each potential statute, both for the extent to which it might apply in a particular circumstance, and the extent to which it is affected by other leaves of absence for which the employee qualifies.

Second, carefully analyze terminations during or related to an employee’s leave of absence. For example, an employer may be liable for an employee’s discriminatory termination where the reason for termination was

¹⁰⁶⁶ 2007 joint survey conducted by the National Coalition to Protect Family Leave and the Society for Human Resource Management.

¹⁰⁶⁷ The state and federal disability rights statutes, including leaves of absence as a reasonable accommodation, are discussed in detail in Chapter IX.

the employee's leaves of absence, which qualified under the FMLA.¹⁰⁶⁸ If an employee has taken time off for a statutorily-protected illness (*e.g.*, childcare, workers' compensation, disability leave, or family and medical leave), the employee may be protected by: (1) a right provided by statute; (2) a direct anti-retaliation provision of the statute; or (3) the "public policy tort for wrongful discharge in violation of public policy."¹⁰⁶⁹

Third, don't limit your flexibility. Employers should carefully review the extent to which policies grant the company a right to require employees to take various types of leave concurrently. In most circumstances, an employee may be on a single leave that qualifies under multiple statutes and handbook or contract provisions.¹⁰⁷⁰ For example, an employee could be taking sick leave or paid time off ("PTO") during the course of her pregnancy, while at the same time taking federal family and medical leave.

In some circumstances, an employer cannot require the employee to take the leaves of absence concurrently. It is essential that employers carefully analyze the extent to which each potential statute might apply in a particular circumstance, and the extent to which it can be coordinated with other leaves of absence for which the employee qualifies.¹⁰⁷¹

SECTION 6.2 FAMILY AND MEDICAL LEAVE ACT OF 1993

The FMLA requires covered employers to grant eligible employees up to 12 weeks of job-protected unpaid leave; or to substitute appropriate paid leave if the employee has earned or accrued it for family and medical reasons in a given 12-month period.¹⁰⁷²

The Department of Labor's ("DOL") Wage and Hour Division published a Final Rule under the FMLA on November 17, 2008. The revised Final Regulations respond to over 4,600 public comments received in response to the Department's February 2008 Notice of Proposed Rulemaking ("NPRM"), which proposed changes to the current FMLA regulations. The NPRM was developed in response to several U.S. Supreme Court and lower court cases invalidating portions of the current regulations, the passage of amendments to the FMLA included as Section 585(a) of the National Defense Authorization Act for Fiscal Year 2008 ("NDAA 2008") (Public Law 110-181), and a comprehensive review of the Department's 15 years of experience administering the FMLA. The Final Regulations update the FMLA regulations and implements new military family leave entitlements. The Final Rule became effective on January 16, 2009.

The FMLA and its accompanying regulations are technical and quite complex.¹⁰⁷³ Because of the complexity of the statute and the regulations, this Guide attempts to organize and condense the regulations in a way that is useful. Much of the language in this chapter is taken directly from the statute and/or the Final Rule.

(a) Covered Employers and Eligible Employees

A "covered employer" is an employer who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year.¹⁰⁷⁴ Any employee whose

¹⁰⁶⁸ *Bachelder v. Am. W. Airlines, Inc.*, 259 F.3d 1112 (9th Cir. 2001). *See, e.g., Stevenson v. Hyre Elec. Co.*, 505 F.3d 720 (7th Cir. 2007) (former employee fired for missing work after she had extreme emotional and physical response to stray dog entering her workplace may proceed with her FMLA claim based on genuine issues of fact as to whether her unusual behavior on several days, including yelling and swearing at her superiors and calling the police, gave her employer constructive notice of her need for FMLA leave); *see also Andonissamy v. Hewlett-Packard Co.*, 547 F.3d 841 (7th Cir. 2008) (employee's conduct did not put employer on notice of his need for FMLA leave because there was no sudden or dramatic change in his behavior).

¹⁰⁶⁹ Public policy torts are discussed in detail in Chapter X.

¹⁰⁷⁰ Vacation and sick leave are discussed in Chapter V.

¹⁰⁷¹ 29 C.F.R. § 825.702 (describing interaction between the FMLA, the ADA and other statutes).

¹⁰⁷² 29 C.F.R. § 825.100(a).

¹⁰⁷³ The FMLA is found at 29 U.S.C. §§ 2601 *et seq.* and its accompanying regulations at 29 C.F.R. pt. 825.

¹⁰⁷⁴ 29 C.F.R. § 825.104(a).

name appears on the employer's payroll will be considered employed each working day of the week, and must be counted whether or not any compensation is received for the week.¹⁰⁷⁵ Employees on paid or unpaid leave, including FMLA leave, leaves of absence, disciplinary suspension, etc., are counted as long as the employer has a reasonable expectation that the employee will later return to active employment.¹⁰⁷⁶ Part-time employees, like full-time employees, are considered to be employed each working day of the calendar week, as long as they are maintained on the payroll.¹⁰⁷⁷

An "eligible employee" is an employee who: (1) has been employed by the employer for at least 12 months (months need not be consecutive or continuous, but employers do not generally have to count employment periods prior to a break in service of seven years or more); and (2) has worked at least 1,250 hours during the 12-month period immediately preceding the requested leave; and (3) is employed at a worksite where the employer employs 50 or more employees within 75 miles of the worksite.¹⁰⁷⁸ An employee who takes leave for a FMLA qualifying reason before he or she is eligible may become eligible during his or her absence, and in that event, any part of the leave taken after the eligibility requirement is met would be FMLA protected.¹⁰⁷⁹

(b) Reasons for FMLA Leave

An eligible employee is entitled to a total of 12 workweeks of leave during any 12-month period for any of the following reasons:¹⁰⁸⁰

- birth of a son or daughter or placement of a son or daughter¹⁰⁸¹ for adoption or foster care, and to care for such child after birth or placement;
- care for a parent,¹⁰⁸² spouse,¹⁰⁸³ or son or daughter with a "serious health condition";
- employee's own "serious health condition" which makes the employee unable to perform the functions of his or her position; or
- to attend to any qualifying exigency arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on covered active duty (or has been notified of an impending call or order to covered active duty) in the Armed Forces.¹⁰⁸⁴

¹⁰⁷⁵ 29 C.F.R. § 825.105(b).

¹⁰⁷⁶ 29 C.F.R. § 825.105(c).

¹⁰⁷⁷ *Id.*; see also *Walters v. Metro. Educ. Enters.*, 519 U.S. 202 (1997) (adopting payroll method for determining Title VII coverage).

¹⁰⁷⁸ 29 C.F.R. §§ 825.110(a)(1)-(3)(b)(1); 29 U.S.C. § 2611(2). On December 21, 2009, President Obama signed into law the Airline Flight Crew Technical Corrections Act (Pub. L. No. 111-119) that amends the FMLA to allow flight attendants and crewmembers to meet the hours-of-service requirement if they have (1) worked at least 504 hours during the 12 months preceding a leave request; and (2) worked at least sixty percent of the minimum number of hours for which their employer scheduled them for any given month.

¹⁰⁷⁹ 29 C.F.R. § 825.110(d).

¹⁰⁸⁰ 29 C.F.R. §§ 825.200(a)(1)-(5).

¹⁰⁸¹ "[S]on or daughter" means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is—(A) under 18 years of age; or (B) 18 years of age or older and incapable of self-care because of a mental or physical disability." 29 U.S.C. § 2611(12). The DOL recently clarified the definition of "son or daughter" as it applies to an employee standing "*in loco parentis*" to a child. The DOL broadened the definition of "*in loco parentis*" to include anyone who intends to provide day-to-day care and/or financial support of a child, including unmarried partners, stepparents, same-sex partners, grandparents, etc. Therefore, according to the DOL, the definition of "*in loco parentis*" should be "construed to ensure that an employee who actually has day-to-day responsibility for caring for a child is entitled to leave even if the employee does not have a biological or legal relationship to that child." Wage and Hour Administrator's Interpretation, No. 2010-3 (Dep't of Labor June 22, 2010).

¹⁰⁸² "Parent means a biological, adoptive, step or foster father or mother, or any other individual who stood *in loco parentis* to the employee" when the employee was under age 18, or age 18 or older and "incapable of self-care because of a mental or physical disability." A "parent" does not include parents "in law." 29 C.F.R. §§ 825.122(b)-(c).

¹⁰⁸³ "Spouse means a husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides, including common law marriage in States where it is recognized." 29 C.F.R. § 825.122(a).

¹⁰⁸⁴ See Section 6.2(c) of this Chapter for more information on leave for family of a service member.

The term “care for” includes both physical and psychological care of a family member or service member.¹⁰⁸⁵ For example, it includes a situation where, because of a serious health condition, the family member is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety, or is unable to transport himself or herself to the doctor.¹⁰⁸⁶ The term “needed to care for” also includes providing psychological comfort and reassurance which would be beneficial to a child, spouse or parent with a serious health condition who is receiving in-patient or home care.¹⁰⁸⁷

Not all psychological care is protected by the FMLA. The Court of Appeals for the Ninth Circuit held that an employee, who called his wife to offer psychological reassurance during her pregnancy difficulties, did not qualify for FMLA leave because he was on a cross-country road trip to retrieve the family vehicle at the time of the phone call.¹⁰⁸⁸ While the employee’s actions during his trip may have provided psychological reassurance to his wife, that was merely an indirect benefit of an otherwise unprotected activity (traveling away from the person needing care). Consequently, the employee’s absence from employment during his cross-country trip was not protected by the FMLA.¹⁰⁸⁹

The FMLA defines a “serious health condition” as an illness, injury, impairment, or physical or mental health condition that involves in-patient care or continuing treatment by a health care provider.¹⁰⁹⁰ “In-patient care” means an overnight stay in a hospital, hospice, or residential medical care facility.¹⁰⁹¹ A serious health condition involving continuing treatment by a health care provider includes any one or more of the following:¹⁰⁹²

- incapacity and treatment; or
- pregnancy or prenatal care; or
- chronic conditions; or
- permanent or long-term conditions; or
- conditions requiring multiple treatments; or
- absences attributable to incapacity due to pregnancy or prenatal care or chronic conditions.

“Treatment” includes an examination to determine if a serious health condition exists and evaluation of the condition. Treatment does not include routine physical examinations, eye examinations, or dental examinations. A “regimen of continuing treatment” includes a course of prescription medication or therapy requiring special equipment to resolve or alleviate the health condition.¹⁰⁹³ A regimen of continuing treatment that includes the taking of over-the-counter medications, bed rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider, is not, by itself, sufficient to constitute a regimen of continuing treatment for the purposes of FMLA leave.¹⁰⁹⁴

A “serious health condition” does not include:¹⁰⁹⁵

¹⁰⁸⁵ 29 C.F.R. § 825.124(a); 29 C.F.R. § 825.113.

¹⁰⁸⁶ 29 C.F.R. § 825.124(a).

¹⁰⁸⁷ *Id.*; *Scamiborn v. Gen. Truck Drivers*, 282 F.3d 1078, 1088 (9th Cir. 2002) (holding that DOL “regulations clearly contemplate not only the physical but, just as important, also the psychological care that seriously ill parents often require from their care-giving children”).

¹⁰⁸⁸ *Tellis v. Alaska Airlines, Inc.*, 414 F.3d 1045-46, 1088 (9th Cir. 2005).

¹⁰⁸⁹ *Id.* at 1088.

¹⁰⁹⁰ 29 C.F.R. § 825.113(a).

¹⁰⁹¹ 29 C.F.R. § 825.114; *see Baucom v. Cabarrus Eye Ctr.*, No. 06-209, 2008 WL 5191921 (M.D.N.C. Dec. 10, 2008).

¹⁰⁹² 29 C.F.R. § 825.115. Refer to the Code of Federal Regulations for a complete explanation of “[a] serious health condition involving continuing treatment by a health care provider.”

¹⁰⁹³ 29 C.F.R. § 825.113(c); *see also Marchisbeck v. San Mateo Cnty.*, 199 F.3d 1068 (9th Cir. 1999) (restricting definition of “treatment” in context of request for leave to relocate son).

¹⁰⁹⁴ 29 C.F.R. § 825.113(c).

- a condition for which cosmetic treatments are administered, unless in-patient hospital care is required or unless complications develop; or
- common cold, flu, earaches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc., unless complications arise.

(c) Leave for Family of Service Member

On January 28, 2008, President Bush signed into law the National Defense Authorization Act for Fiscal Year 2008 (“NDAA 2008”), adding two new qualifying circumstances for which eligible employees may take FMLA leave. These two new qualifying circumstances are (1) qualifying exigency leave; and (2) military caregiver leave, also known as “covered service member leave.”¹⁰⁹⁶ On October 28, 2009, President Barack Obama signed into law the National Defense Authorization Act for Fiscal Year 2010 (“2010 Amendments”), which further expanded military family leave entitlements under the FMLA.¹⁰⁹⁷

(i) Covered Service Member Leave

Under the FMLA, an eligible employee is able to take up to 26 workweeks of FMLA leave during the designated 12-month period to care for a service member who is receiving medical treatment or is recuperating or undergoing therapy for a serious injury or illness incurred in the line of duty.¹⁰⁹⁸ Prior to the passage of the 2010 Amendments, a qualifying employee included the “spouse, son, daughter, parent, or next of kin”¹⁰⁹⁹ of a current member of the U.S. Armed Forces, including a member of the National Guard or Reserves, who was undergoing medical treatment, recuperation or therapy; was otherwise on outpatient status; or was otherwise on the temporary disability retired list. Under the 2010 Amendments, the definition of a “covered service member” has been expanded to include a veteran who is undergoing medical treatment, recuperation or therapy for a serious injury or illness and who was a member of the Armed Forces at any time during the five-year period preceding the date on which the veteran undergoes that treatment.

The NDAA 2008 provided that military caregiver leave could only be taken with respect to a serious injury or illness that occurred while on active duty. The 2010 Amendments expanded military caregiver leave coverage to those conditions that existed before the beginning of the member’s active duty and were aggravated by active duty service.

Service member leave is a form of FMLA leave, therefore, the same eligibility requirements apply to service member family leave as apply to all other FMLA leave. To be eligible for service member family leave, an employee must have worked for the employer a minimum of 12 months and must have worked at least 1,250 hours during the immediately preceding 12-month period.¹¹⁰⁰ In addition, the employee must work for an employer that has at least 50 employees in a 75-mile radius of the employee’s workplace.¹¹⁰¹

The “single 12-month period” during which an eligible employee is entitled to 26 workweeks begins on the first day the employee takes leave and ends 12 months after that date, regardless of how the employer normally calculates the 12-month period for other FMLA-qualifying reasons.¹¹⁰² Military caregiver leave is not provided in addition to the 12 weeks of standard FMLA leave.¹¹⁰³ Rather, it is combined with all other

¹⁰⁹⁵ 29 C.F.R. § 825.113(d).

¹⁰⁹⁶ Pub. L. No. 110-181, amending 29 U.S.C. §§ 2601 *et seq.*

¹⁰⁹⁷ Pub. L. No. 111-84, amending 29 U.S.C. §§ 2601 *et seq.*

¹⁰⁹⁸ 29 C.F.R. § 825.127.

¹⁰⁹⁹ Next of kin “is the nearest blood relative, other than the covered servicemember’s spouse, parent, son, or daughter, in the following order of priority: blood relatives who have been granted legal custody of the servicemember . . . , brothers and sisters, grandparents, aunts and uncles and first cousins. . . .” 29 C.F.R. § 825.127(b)(3).

¹¹⁰⁰ 29 U.S.C. § 2611(2)(A).

¹¹⁰¹ 29 U.S.C. § 2611(2)(B)(ii).

¹¹⁰² 29 C.F.R. § 825.127(c)(1).

types of FMLA qualifying leave during the “single 12-month period.”¹¹⁰⁴ Although an eligible employee is limited to an aggregated total of 26 weeks for all FMLA leave taken during this period, the employee is not entitled to more than 12 weeks of leave for reasons other than military care giving.¹¹⁰⁵ However, because the “single 12-month period” for military caregiver leave is not activated until the first day of leave, an employee who takes standard FMLA leave and then requests service member family leave is allowed the full 26 weeks.¹¹⁰⁶

Military caregiver leave is available on a per service member, per injury basis.¹¹⁰⁷ Therefore, an eligible employee may be entitled to take more than one period of 26 workweeks to care for different service members or for the same service member with a subsequent injury or illness. However, leave is still limited to 26 workweeks within a single 12-month period.

(ii) Qualifying Exigency

Qualifying Exigency Leave entitles eligible employees to 12 weeks of leave in a 12-month period to tend to “any qualifying exigency . . . arising out of the fact that the spouse, son, daughter, or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces in support of a contingency operation.”¹¹⁰⁸ “Qualifying exigency” is defined as one or more of the following: short-notice deployment; military events and related activities; childcare and school activities; financial and legal arrangements; counseling; rest and recuperation; post-deployment activities; and additional activities.¹¹⁰⁹ Additional activities include activities “[t]o address other events which arise out of the covered military member’s active duty or call to active duty status provided that the employer and the employee agree that such leave shall qualify as an exigency, and agree to both the timing and duration of such leave.”¹¹¹⁰

Prior to the passage of the 2010 Amendments to the NDAA, qualifying exigency leave was only available to the family members of National Guard or Reservists called to active federal duty, and did not apply to family members of the Regular Armed Forces, retired members of state Reserve or National Guard units or those called to active duty by state rather than federal government. As a result of the 2010 Amendments, qualified exigency leave was extended to eligible family members of any member of the Armed Forces who is on active duty in a foreign country or is called to active duty in a foreign country.

An employer may require that a request for leave be supported by a certification: (1) issued by the health care provider of the eligible employee or of the son, daughter, spouse, or parent of the employee, or of the next of kin of an individual, in the case of leave taken to care for a service member;¹¹¹¹ or (2) issued at such time and in such manner as the Secretary of Labor may by regulation prescribe, in the case of leave taken for any qualifying exigency.¹¹¹²

These 2010 and 2008 Amendments do not affect the majority of FMLA provisions, including those addressing employer coverage, employee eligibility requirements, health insurance continuation, and

¹¹⁰³ 29 C.F.R. § 825.127(c)(3).

¹¹⁰⁴ *Id.*

¹¹⁰⁵ *Id.*

¹¹⁰⁶ This example is provided in the Military Family Leave Provisions of the FMLA Frequently Asked Questions and Answers document found at <https://www.dol.gov/whd/fmla/finalrule/MilitaryFAQs.pdf>.

¹¹⁰⁷ 29 C.F.R. § 825.127(c)(2).

¹¹⁰⁸ 29 U.S.C. § 2612(a)(1)(E); 29 C.F.R. § 825.126.

¹¹⁰⁹ *Id.*

¹¹¹⁰ 29 C.F.R. § 825.126(a)(8).

¹¹¹¹ 29 U.S.C. § 2613(a).

¹¹¹² 29 U.S.C. § 2613(f).

reinstatement rights. An employer who employs both a husband and a wife, entitled to either type of leave described above, may aggregate the husband and wife's leave.¹¹¹³

(d) Calculating the 12-Month Period

An employer may choose any of the following methods for determining an FMLA 12-month period:¹¹¹⁴

- calendar year;
- any fixed 12-month leave year, such as a fiscal year or a year starting on an employee's anniversary date;
- twelve-month period measured forward from the date an employee's first FMLA leave begins; or
- rolling 12-month period measured backward from the date an employee uses FMLA leave.

Employers should specifically identify and communicate to employees the 12-month period they use to determine eligibility for family and medical leave. In particular, employers should include a clear definition of 12-month period in their employee handbook.

In *Bachelder v. Am. W. Airlines, Inc.*, the employer did not identify in its written communication to employees the 12-month period it used to determine eligibility for family and medical leaves of absence.¹¹¹⁵ The employee-plaintiff took a series of FMLA-protected leaves in 1994 and 1995. In February 1996, the employee again was absent from work for a total of three weeks. After a month of perfect attendance, she called in sick one day to care for her ill baby; she was immediately fired upon her return. At issue during trial was whether the February 1996 absences were protected by the FMLA, or whether they were unprotected because she had exhausted her FMLA-qualifying leave the previous calendar year.

The company argued that its handbook (stating that employees were "entitled to up to 12 weeks of unpaid leave within any 12-month period") implied the employer's choice of the rolling method for calculating leave eligibility, under which the employee had used up all of her statutory leave. The court disagreed on the basis that the handbook did not expressly state which 12-month period it used when calculating FMLA leave. Because the company had neglected to notify employees of its choice to use the rolling year method, the definition of 12-month period most beneficial to the employee was applied.¹¹¹⁶ Accordingly, employers should specifically identify the 12-month period they use in their communications to employees, particularly in the employee handbook.

(e) Unpaid/Paid Leave

Generally, FMLA leave is unpaid.¹¹¹⁷ However, an employer may require, or an employee may request, that an employee's accrued paid vacation or personal leave, or sick/medical leave run concurrently with FMLA leave.¹¹¹⁸ An employee's ability to substitute accrued paid leave is determined by the terms and conditions of the employer's normal leave policy.¹¹¹⁹ An employer is not required to provide paid sick leave or paid medical leave in any situation in which the employer would not normally provide such paid leave.¹¹²⁰

¹¹¹³ *Id.*

¹¹¹⁴ 29 C.F.R. § 825.200(b).

¹¹¹⁵ *Bachelder v. Am. W. Airlines, Inc.*, 259 F.3d 1112 (9th Cir. 2001).

¹¹¹⁶ *Id.* at 1126-28.

¹¹¹⁷ 29 C.F.R. § 825.207(a). As discussed in Section 6.3 of this Chapter, this FMLA regulation must be viewed in the context of Washington's sick leave statute.

¹¹¹⁸ 29 C.F.R. § 825.207(a).

¹¹¹⁹ *Id.*

¹¹²⁰ 29 U.S.C. § 2612(d)(2)(B).

Neither the employee or the employer may require the substitution of paid leave in a workers' compensations case. However, employers and employees may agree, where state law permits, to have paid leave supplement workers' compensation benefits, such as in the case where workers' compensation only provides replacement income for two-thirds of an employee's salary.¹¹²¹ Furthermore, if the treating health care provider certifies that the employee is able to return to a light-duty job, but is unable to return to the same or equivalent job, the employee may decline the light-duty job, thereby forfeiting workers' compensation payments and still be entitled to remain on unpaid FMLA leave until the 12-week entitlement is exhausted.¹¹²²

Where bonuses are concerned, an employer may prorate production bonuses to be paid to an employee who has taken FMLA leave by the amount of any lost production (whether by hours or other quantifiable productivity measure) caused by FMLA leave taken.¹¹²³

(f) Intermittent or Reduced Schedule Leave

FMLA leave may be taken "intermittently or on a reduced leave schedule" under certain circumstances.¹¹²⁴ Intermittent or reduced leave taken due to the birth of a healthy child or placement of a healthy child for adoption or foster care, may only be taken if the employer agrees.¹¹²⁵ On the other hand, an employer must allow an employee to take FMLA leave to care for a family member, a covered service member or an employee's own serious health condition on an intermittent or reduced schedule when medically necessary.¹¹²⁶ Intermittent leave is FMLA leave taken in separate blocks of time due to a single qualifying reason.¹¹²⁷ A reduced leave schedule is a leave schedule that reduces an employee's usual number of working hours per workweek, or hours per workday.¹¹²⁸

If an employee needs intermittent or reduced schedule leave and such leave is foreseeable based on planned medical treatment, the employer may require the employee to "transfer temporarily during the period that the intermittent or reduced leave schedule is required, to an available alternative position of which the employee is qualified and which better accommodates recurring periods of leave than does the employee's regular position."¹¹²⁹ The alternative position must have equivalent pay and benefits.¹¹³⁰ An employer may make deductions from the employee's salary for any hours taken as intermittent or reduced FMLA leave within a workweek without affecting the exempt status of the employee under the FLSA.¹¹³¹

When spouses are employed by the same employer, the 12-week FMLA leave entitlement may be limited to a combined total of 12 weeks of leave during any 12-month period if the leave is taken due to the birth of a child, placement of a child for adoption or foster care, or to care for a parent who has a serious health condition.¹¹³²

¹¹²¹ 29 C.F.R. § 825.207(e).

¹¹²² *Id.*

¹¹²³ *See Sommer v. The Vanguard Group*, 461 F.3d 397 (3d Cir. 2006).

¹¹²⁴ 29 C.F.R. § 825.202(a).

¹¹²⁵ 29 C.F.R. § 825.202(c).

¹¹²⁶ 29 U.S.C. § 2612(b)(1); 29 C.F.R. § 825.202(b).

¹¹²⁷ 29 C.F.R. § 825.202(a).

¹¹²⁸ *Id.*

¹¹²⁹ 29 C.F.R. § 825.204(a). Note that the transfer may only last for the period of intermittent or reduced schedule leave.

¹¹³⁰ 29 C.F.R. § 825.204(c).

¹¹³¹ 29 C.F.R. § 825.206(a); *Rowe v. Laidlaw Transit, Inc.*, 244 F.3d 1115 (9th Cir. 2001). FLSA requirements are discussed in detail in Chapter V.

¹¹³² 29 U.S.C. § 2612(b)(1); 29 C.F.R. § 825.201(b).

(g) Employee Notice of Need for FMLA Leave

An employee must provide an employer with notice of requested FMLA leave 30 days in advance or as soon as is practicable.¹¹³³ “As soon as practicable” means as soon as both possible and practical, taking into account all of the facts and circumstances of the individual case.¹¹³⁴ Additionally, an employer may require any employee to comply with the employer’s usual notice and procedural requirements for requesting leave, absent unusual circumstances.¹¹³⁵ Where an employee does not comply with the employer’s usual notice and procedural requirements, and no unusual circumstances justify the failure to comply, FMLA-protected leave may be delayed or denied.¹¹³⁶ The employer may request an explanation if an employee fails to provide 30-days’ notice in cases of foreseeable leave.¹¹³⁷ An employer may delay onset of FMLA leave for up to 30 days for failure to provide 30-day notice, but only if the employer has itself complied with its own posting requirements and the leave is truly foreseeable.¹¹³⁸ In addition, an employer cannot delay or deny an employee’s FMLA leave if the employer’s policy requires more than 30-days’ notice for a foreseeable leave and notice as soon as practicable for an unforeseeable leave.¹¹³⁹

When planning medical treatment, an employee must consult with the employer and make a reasonable effort to schedule the leave so as not to unduly disrupt the employer’s operations.¹¹⁴⁰ If an employee who requests intermittent leave for planned medical treatment neglects to consult with the employer regarding a reasonable schedule, the employer may initiate discussions with the employee and require the employee to attempt to make reasonable arrangements, subject to the approval of the health care provider.¹¹⁴¹ When an employee seeks leave for the first time for a FMLA-qualifying reason, the employee need not expressly assert rights under the FMLA or even mention the FMLA.¹¹⁴² When an employee seeks leave due to a FMLA-qualifying reason, for which the employer has previously provided FMLA-protected leave, the employee must specifically reference the qualifying reason for leave or the need for FMLA leave.¹¹⁴³

(h) Employer FMLA Notice and Designation

A covered employer must prominently post a notice explaining FMLA provisions and providing information regarding the procedures for filing complaints of FMLA violations with DOL Wage and Hour Division. Covered employers must post this general notice even if no employees are eligible for FMLA leave.¹¹⁴⁴ An employer that willfully violates the posting requirement may be assessed a civil money penalty by the Wage and Hour Division not to exceed \$110 for each separate offense.¹¹⁴⁵ If a covered employer has any eligible employees, it must also administer this notice to each employee by including it in the employee handbook or other written guidance regarding employee benefits or leave policy, or by providing a copy of the general notice to each new employee upon hire.¹¹⁴⁶ If a significant portion of the

¹¹³³ 29 U.S.C. § 2612(e)(2)(B); 29 C.F.R. § 825.302(a).

¹¹³⁴ 29 C.F.R. § 825.302(b).

¹¹³⁵ 29 C.F.R. § 825.302(d).

¹¹³⁶ *Id.*

¹¹³⁷ 29 C.F.R. § 825.302(a).

¹¹³⁸ 29 C.F.R. § 825.304(b).

¹¹³⁹ *Id.*

¹¹⁴⁰ 29 C.F.R. § 825.302(e).

¹¹⁴¹ *Id.*

¹¹⁴² 29 C.F.R. § 825.302(c).

¹¹⁴³ *Id.*

¹¹⁴⁴ 29 C.F.R. § 825.300(a).

¹¹⁴⁵ *Id.*

¹¹⁴⁶ 29 C.F.R. § 825.300(a)(3).

work force is comprised of workers who are not literate in English, an employer may be required to provide the notice in another language.¹¹⁴⁷

An employer is always responsible for designating leave as FMLA-qualifying and giving notice of the designation to the employee, even if the employee's request for leave does not mention FMLA.¹¹⁴⁸ The employer must notify the employee whether the leave will be designated and will be counted as FMLA leave within five business days absent extenuating circumstances.¹¹⁴⁹ Notification of eligibility may be oral or in writing. If the employee is not eligible for FMLA leave, the notice must state at least one reason why the employee is not eligible.¹¹⁵⁰

When the employer does not have enough information about why an employee is taking leave, the employer may inquire further as to whether the leave is potentially an FMLA-qualifying leave.¹¹⁵¹ Such inquiries must be narrowly tailored to avoid the ADA's prohibition against medical inquiries. When an employee is taking FMLA-qualifying leave for a situation in which the employee is "*in loco parentis*," a simple statement asserting that the requisite family relationship exists is all that is needed.¹¹⁵²

Employers must provide written notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations.¹¹⁵³ Notice must inform the employee of the following:¹¹⁵⁴

- that the leave may be designated and counted against the employee's annual FMLA leave entitlement;
- any requirements for the employee to furnish medical certification of a serious health condition and the consequences of failing to do so;
- the employee's right to substitute paid leave, whether the employer will require substitution of paid leave, the conditions related to any substitution, and the employee's entitlement to take unpaid FMLA leave if the employee does not meet the conditions for paid leave;
- any requirement for the employee to make premium payments to maintain health benefits during the leave, the arrangement for making such payments, and the possible consequences of failure to make such payments on a timely basis;
- the employee's status as a "key employee" and the potential consequence that restoration may be denied following FMLA leave;
- employee's rights to maintenance of benefits during the FMLA leave and restoration to the same or an equivalent job upon return from FMLA leave; and
- the employee's potential liability for payment of health insurance premiums paid by the employer during the employee's unpaid FMLA leave if the employee fails to return to work after taking FMLA leave.¹¹⁵⁵

¹¹⁴⁷ 29 C.F.R. § 825.300(c).

¹¹⁴⁸ 29 C.F.R. § 825.300(a); *see also Slanaker v. Accesspoint Empl. Alternatives, LLC*, No. 07-11024, 2008 WL 686235 (E.D. Mich. Mar. 13, 2008) (plaintiff sued her former employer for non-compliance and interference with FMLA after she was terminated for taking maternity leave. The court found in the plaintiff's favor because, after the employee gave notice that she needed to take maternity leave, the defendant did not inform her that maternity leave was FMLA-qualifying. The fact that defendants did not believe plaintiff intended to exercise her FMLA rights was irrelevant to the court's interference analysis).

¹¹⁴⁹ 29 C.F.R. § 825.300(b).

¹¹⁵⁰ *Id.*; *but see Viera v. Costco Wholesale Corp.*, No. 07-5010 (E.D. Wash. 2009) (failure of employer to notify employee-plaintiff that he was not eligible for FMLA leave does not estop employer from arguing ineligibility in pursuant legal dispute).

¹¹⁵¹ 29 C.F.R. § 825.301(a).

¹¹⁵² DOL Administrator's Interpretation No. 2010-3 (June 22, 2010).

¹¹⁵³ Standard eligibility notice model form is available at <http://www.dol.gov/whd/fmla/finalrule/WH381.pdf>.

¹¹⁵⁴ 29 C.F.R. § 825.300(c).

An employer may retroactively designate leave as FMLA leave with appropriate notice to the employee,¹¹⁵⁶ provided that the employer's failure to timely designate leave does not cause harm or injury to the employee.¹¹⁵⁷ For example, if an employer mistakenly approves FMLA leave, it is not barred from asserting ineligibility as a legal defense if the employee did not detrimentally rely on the employer's misstatement of FMLA eligibility.¹¹⁵⁸ In all cases where leave would qualify for FMLA protections, an employer and an employee can mutually agree that leave be retroactively designated as FMLA leave.¹¹⁵⁹

If there is a dispute between an employer and an employee as to whether leave qualifies as FMLA leave, it should be resolved through discussions between the employee and the employer. Such discussions and the decision must be well documented.¹¹⁶⁰

(i) Medical Certification

An employer may require that an employee submit medical certification, issued by a health care provider, of the serious health condition of the employee or of the employee's spouse, child, or parent.¹¹⁶¹ No additional medical information may be required of employees.¹¹⁶² The information on medical certification must relate only to the serious health condition for which the current need for leave exists.¹¹⁶³

An employer who has reason to doubt the validity of a medical certification may require the employee to obtain a second opinion at the employer's expense.¹¹⁶⁴ An employer may designate the health care provider who will furnish the second opinion, but the health care provider may not be employed on a regular basis by the employer.¹¹⁶⁵ Pending receipt of an additional medical opinion, the employee is conditionally entitled to FMLA leave.¹¹⁶⁶ If the opinions of the employee's and employer's designated health care providers differ, the employer may require the employee to obtain certification from a third health care provider at the employer's expense.¹¹⁶⁷ The third health care provider must be approved by both the employer and the employee, and the third opinion is final and binding.¹¹⁶⁸

Alternatively, after an employee submits a complete and sufficient certification signed by a health care provider, the employer may contact the health care provider to clarify and authenticate the medical certification for FMLA leave.¹¹⁶⁹ The employer may not request additional information from the health

¹¹⁵⁵ 29 C.F.R. § 825.213. Under limited conditions an employee may be liable for payment of the employer's portion of health benefits if the employee does not return to work.

¹¹⁵⁶ Appropriate notice as required by 29 C.F.R. § 825.300.

¹¹⁵⁷ 29 C.F.R. § 825.301(d); see also *Ragsdale v. Wolverine Worldwide, Inc.*, 535 U.S. 81 (2002).

¹¹⁵⁸ See *Dobrowski v. Jay Dee Contractors Inc.*, 571 F.3d 551 (6th Cir. 2009).

¹¹⁵⁹ 29 C.F.R. § 825.301(d).

¹¹⁶⁰ 29 C.F.R. § 825.301(c).

¹¹⁶¹ 29 C.F.R. § 825.305(a). The DOL has developed two optional forms (Form WH-380-E and Form WH-380-F, as revised and found at: <http://www.dol.gov/whd/forms/WH-380-E.pdf> and www.dol.gov/whd/forms/WH-380-F.pdf) for use in obtaining medical certification, including second and third opinions, from health care providers that meet FMLA's certification requirements. See 29 C.F.R. pt. 825, App. B.

¹¹⁶² 29 C.F.R. § 825.306(b).

¹¹⁶³ *Id.* An unpublished 2005 case illustrates the interrelationship between the FMLA and Washington's protections against disability discrimination under the WLAD. In *Litaker v. Qwest Corp.*, No. 04-2069, 2005 WL 2671354 (W.D. Wash. Oct. 19, 2005), plaintiff's medical certification for FMLA leave was sufficient to raise a factual issue as to whether plaintiff had a disability under WLAD, and satisfied WLAD's notice requirement. See Chapter IX for more information on disability discrimination.

¹¹⁶⁴ 29 C.F.R. § 825.307(b)(1).

¹¹⁶⁵ 29 C.F.R. § 825.307(b)(2).

¹¹⁶⁶ 29 C.F.R. § 825.307(b)(1).

¹¹⁶⁷ 29 C.F.R. § 825.307(c).

¹¹⁶⁸ *Id.*

care provider, and it must provide the employee with an opportunity to fix any deficiencies in his or her certification before contacting the health care provider.¹¹⁷⁰ Such contact can only be initiated by certain employer representatives, such as human resource professionals and leave administrators, and under no circumstances can be done by the employee's direct supervisor.¹¹⁷¹

An employer must give notice of the requirement for medical certification each time a certification is required.¹¹⁷² In most cases, an employer's request for medical certification should be made at the time an employee gives notice of the need for leave or within five business days thereafter. In the case of an unforeseen leave, a request for medical certification should be made within five business days after the leave commences.¹¹⁷³ The employer may request certification at some later date if the employer later has reason to question the appropriateness of the leave or its duration.¹¹⁷⁴ The employee must provide the requested certification to the employer within 15 days after the employer's request unless it is not practicable under the particular circumstance to do so, despite the employee's diligent, good faith efforts or the employer provides more than 15 days to return the requested certification.¹¹⁷⁵

In most situations, an employer may not request medical recertification before the minimum duration of the condition stated on the certification has passed or more often than every 30 days, whichever is a longer period of time, unless: (1) the employee requests an extension of leave; or (2) circumstances described by the previous certification have changed significantly; or (3) the employer receives information that casts doubt upon the employee's stated reason for the absence or the continuing validity of the certification.¹¹⁷⁶ An employer must give an employee at least 15 calendar days after the employer's request to submit the recertification form.¹¹⁷⁷ In all cases, an employer may request a recertification of a medical condition every six months in connection with an absence by the employee.¹¹⁷⁸ An employer also may require an employee on FMLA leave to report periodically on the employee's status and intent to return to work.¹¹⁷⁹

An employer is not required to accept an incomplete medical certification and an employer may lawfully require an employee to explain his or her use of medication while at work.¹¹⁸⁰ An employee's refusal to provide this information is not a protected act under the FMLA. An employer is within its rights to consider the employee's failure to cooperate in its decision to terminate for insubordination.¹¹⁸¹

At the conclusion of an employee's FMLA leave, an employer may require a fitness-for-duty certification if the leave was taken for the employee's own health condition and if the employer notified the employee of such requirement when the leave began.¹¹⁸² If required, a fitness-for-duty certificate must be a uniformly-applied policy or practice and must be limited to the particular health condition that caused the employee's

¹¹⁶⁹ 29 C.F.R. § 825.307(a).

¹¹⁷⁰ *Id.*

¹¹⁷¹ *Id.*

¹¹⁷² 29 C.F.R. § 825.305(b).

¹¹⁷³ *Id.*

¹¹⁷⁴ *Id.*

¹¹⁷⁵ *Id.*

¹¹⁷⁶ 29 C.F.R. §§ 825.308(a)-(b).

¹¹⁷⁷ 29 C.F.R. § 825.308(d).

¹¹⁷⁸ 29 C.F.R. § 825.308(b).

¹¹⁷⁹ 29 C.F.R. § 825.311(a).

¹¹⁸⁰ *Bailey v. Sw. Gas Co.*, 275 F.3d 1181, 1186 (9th Cir. 2002) (citing *Marbisbeck v. San Mateo Cnty.*, 199 F.3d 1068 (9th Cir. 1999)).

¹¹⁸¹ *Id.*

¹¹⁸² 29 C.F.R. § 825.312(a).

need for FMLA leave.¹¹⁸³ No second or third opinions on a fitness-for-duty certification may be required.¹¹⁸⁴

(j) Group Health Plan Coverage

While FMLA leave is technically not “paid,” an employer must maintain an employee’s group health plan coverage during leave on the same conditions and level as would have been provided if the employee had been continuously employed during the entire leave.¹¹⁸⁵ An employee is required to continue paying any employee portion of the group health plan premiums that the employee paid prior to going on FMLA leave.¹¹⁸⁶ However, if the FMLA leave is substituted paid leave, the employee’s share of the premiums must be paid by the method normally used during any paid leave (*e.g.*, payroll deduction).¹¹⁸⁷ The employer must provide the employee with advance written notice of the terms and conditions under which the employee’s premium payments must be made.¹¹⁸⁸

An employee may choose not to continue group health plan coverage during his or her FMLA leave.¹¹⁸⁹ However, when the employee returns from FMLA leave, the employer must reinstate the employee to the same health plan coverage as the employee received prior to taking the leave, without requiring any qualifying period, physical examination, or exclusion of pre-existing conditions.¹¹⁹⁰ As a practical matter, employers may need to continue providing coverage in order to immediately reinstate the employee to the same benefits upon return to work.

In the absence of an established employer policy providing a longer grace period, an employer’s obligation to maintain health insurance coverage under the FMLA ceases if an employee’s premium payment is more than 30 days late.¹¹⁹¹ In order to drop the coverage for an employee whose premium payment is late, the employer must provide written notice to the employee that the payment has not been received and that the coverage will be dropped on a specified date at least 15 days after the date of the letter unless the payment has been received by that date.¹¹⁹²

An employer may recover its share of health plan premiums from an employee during a period of unpaid FMLA leave if the employer had to maintain health coverage by paying the employee’s share after the premium payment is missed.¹¹⁹³ An employer also may recover its share of health plan premiums if the employee fails to return to work, unless the reason the employee does not return to work is due to: (1) the continuation, recurrence, or onset of a serious health condition of the employee or the employee’s family member, or a serious injury or illness of a covered service member, which would otherwise entitle the

¹¹⁸³ 29 C.F.R. § 825.312(b).

¹¹⁸⁴ 29 C.F.R. 825.312(b); *see also Brownfield v. City of Yakima*, 612 F.3d 1140 (9th Cir. 2010) (after employee was placed on FMLA leave when examination revealed psychological issues making employee unfit for duty, employer did not violate prohibition against second or third opinions on fitness-for-duty certification when employee’s physician refused to defer to or disagree with psychological diagnosis from initial examination, stating only that employee was physically fit to return to work, and employer asked for a fitness-for-duty examination in order to address employee’s psychological issues).

¹¹⁸⁵ 29 C.F.R. § 825.209(a).

¹¹⁸⁶ 29 C.F.R. § 825.210(a).

¹¹⁸⁷ 29 C.F.R. § 825.210(b).

¹¹⁸⁸ 29 C.F.R. § 825.210(d).

¹¹⁸⁹ 29 C.F.R. § 825.209(e).

¹¹⁹⁰ *Id.*

¹¹⁹¹ 29 C.F.R. § 825.212(a)(1).

¹¹⁹² *Id.*

¹¹⁹³ 29 C.F.R. § 825.212(b).

employee to leave under FMLA; or (2) circumstances beyond the employee's control.¹¹⁹⁴ An employee has "returned to work" if the employee returns to work for at least 30 calendar days.¹¹⁹⁵

(k) Other Benefits

An employee's entitlement to benefits, other than group health benefits, during FMLA leave should coincide with an employer's established policy for providing such benefits when employees are on other forms of leave.¹¹⁹⁶ Once again, an employer must reinstate an employee at the same level of benefits the employee received prior to taking FMLA leave.¹¹⁹⁷ Therefore, the employer may need to continue coverage in order to avoid a lapse in coverage. In such a case, an employer may recover the costs incurred for paying the employee's share of any premiums regardless of whether the employee returns to work.¹¹⁹⁸

(l) Restoration to Same Position

Upon return from FMLA leave, an employee is entitled to be restored to the same position the employee held when FMLA leave commenced, or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment.¹¹⁹⁹ An employee is entitled to any unconditional pay increases which may have occurred during the FMLA leave, such as cost of living increases.¹²⁰⁰ However, if a bonus or other payment is based on the achievement of a specified goal, such as hours worked, products sold or perfect attendance, and the employee has not met the goal due to FMLA leave, the payment may be denied, unless otherwise paid to employees on an equivalent leave status for a reason that does not qualify as FMLA leave. For example, if an employee who used paid vacation leave for a non-FMLA purpose would receive the payment, then the employee who used paid vacation leave for an FMLA-protected purpose also must receive the payment.¹²⁰¹ Additionally, FMLA absences cannot be counted as absences under a no-fault attendance policy.¹²⁰²

An employee may, but is not entitled to, accrue any additional benefits or seniority during unpaid FMLA leave.¹²⁰³ All benefits accrued at the time leave began must be available to an employee upon return from FMLA leave.¹²⁰⁴ With respect to pensions and other retirement plans, any period of unpaid FMLA leave shall not be treated or accounted toward a break in service for purposes of vesting and eligibility to participate.¹²⁰⁵

An employer may deny job restoration if it can show that an employee would not otherwise have been employed at the time reinstatement is requested (*e.g.*, reduction-in-force).¹²⁰⁶ In addition, an employer may deny job restoration to "key employees" if such a denial is necessary to prevent substantial and grievous economic injury to the operations of the employer.¹²⁰⁷

¹¹⁹⁴ 29 C.F.R. §§ 825.213(a)(1)-(2).

¹¹⁹⁵ 29 C.F.R. § 825.213(c).

¹¹⁹⁶ 29 C.F.R. § 825.209(h).

¹¹⁹⁷ 29 C.F.R. § 825.215(d)(1).

¹¹⁹⁸ 29 C.F.R. § 825.213(b).

¹¹⁹⁹ 29 C.F.R. § 825.214(a); *see also Breneisen v. Motorola, Inc.*, 512 F.3d 972 (7th Cir. 2008) (employer liable for failing to reinstate employee to his former position or an equivalent one upon returning from leave, where employee received the same pay and benefits but was given more manual tasks with "less prestige and visibility").

¹²⁰⁰ 29 C.F.R. § 825.215(c)(1).

¹²⁰¹ 29 C.F.R. § 825.215(c)(2).

¹²⁰² 29 C.F.R. § 825.220(c).

¹²⁰³ 29 C.F.R. § 825.215(d)(2).

¹²⁰⁴ *Id.*

¹²⁰⁵ 29 C.F.R. § 825.215(d)(4).

¹²⁰⁶ 29 C.F.R. § 825.216(a).

A “key employee” is among the highest paid ten percent of all the employees who are employed by the employer within 75 miles of the worksite.¹²⁰⁸ An employer who believes that reinstatement may be denied to a key employee, must give written notice to the employee at the time the employee gives notice of the need for FMLA leave (or when FMLA leave commences, if earlier), that he or she qualifies as a key employee.¹²⁰⁹ As soon as an employer makes a good faith determination that substantial and grievous economic injury will result, the employer must notify the employee in writing of its determination that it cannot deny FMLA leave but that it intends to deny job restoration upon completion of the FMLA leave.¹²¹⁰ Employers should ordinarily be able to give such notice prior to the employee starting FMLA leave and this notice must be served either in person or by certified mail.¹²¹¹ This notice must explain the basis for the employer’s finding that substantial and grievous economic injury will result and, if leave has commenced, must provide the employee a reasonable time in which to return to work, taking into account the circumstances, such as the length of the leave and the urgency of the need for the employee to return.¹²¹² If the employee does not return to work in response to notification of the employer’s intent to deny restoration, the employee continues to be entitled to maintenance of health benefits until the 12-week entitlement is completed, and the employer may not recover its cost of health benefit premiums after the leave has been completed.¹²¹³

Even though an employer has no FMLA obligation to reinstate an employee if the employee is not able to return to work after 12 weeks of leave, an employer may have additional obligations to the employee under the ADA or the Washington Law Against Discrimination (“WLAD”). For example, if an employee’s own serious health condition qualifies as a disability under the ADA or the WLAD, an employer may need to provide the employee with additional unpaid leave as a reasonable accommodation.¹²¹⁴ Because an employer’s legal obligations to an employee, who is on leave due to the employee’s own serious health condition, may not end after expiration of the 12-week FMLA leave, an employer should not automatically terminate an employee who cannot return to work at the conclusion of FMLA leave.¹²¹⁵

(m) Written FMLA Policy

If an employer has any written guidance for employees concerning benefits or leaves, such as an employee handbook, information regarding FMLA rights and employee obligations under the FMLA must be included.¹²¹⁶ If an employer does not have written policies, the employer must still provide employees with written notice detailing the specific expectations and obligations of the employee and explaining any consequences for failing to meet those obligations.¹²¹⁷

(n) Employer Prohibitions

An employer is prohibited from discriminating or retaliating against an employee or prospective employee for having exercised, or attempted to exercise, FMLA rights.¹²¹⁸ Employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions, or disciplinary measures. In

¹²⁰⁷ 29 C.F.R. § 825.216(b).

¹²⁰⁸ 29 C.F.R. § 825.217(c).

¹²⁰⁹ 29 C.F.R. § 825.219(a).

¹²¹⁰ 29 C.F.R. § 825.219(b).

¹²¹¹ *Id.*

¹²¹² *Id.*

¹²¹³ 29 C.F.R. § 825.219(c).

¹²¹⁴ Disability rights benefits are addressed in detail in Chapter IX.

¹²¹⁵ *See generally* 29 C.F.R. § 825.702.

¹²¹⁶ 29 C.F.R. § 825.300(a)(3).

¹²¹⁷ 29 C.F.R. § 825.300(c)(1).

¹²¹⁸ 29 U.S.C. § 2615; 29 C.F.R. § 825.220(c); *Liu v. Amway Corp.*, 347 F.3d 1125 (9th Cir. 2003).

order to avoid potential discrimination suits, an employer should create generally applicable FMLA policies (*e.g.*, whether medical certification is required, whether employees are required to exhaust PTO during FMLA leave) and then apply them uniformly to all employees. Additionally, employees cannot prospectively or retrospectively waive their FMLA rights, nor can they be forced to waive their rights.¹²¹⁹

(o) Employee Legal Actions

An employee who believes that his or her rights under the FMLA have been violated may file, or have another person file on his or her behalf, a complaint with the Secretary of Labor, or file a private lawsuit.¹²²⁰ A private lawsuit must be commenced within two years after the last action that the employee alleges was in violation of the FMLA, or within three years if the violation was willful.¹²²¹ If an employer violates one or more provisions of the FMLA, an employee may receive one or more of the following: wages, employment benefits, and other compensation denied or lost by an employee due to the violation.¹²²² In addition, the employee may be entitled to liquidated damages, interest, and appropriate equitable relief, such as employment, reinstatement, front pay,¹²²³ or promotion, as well as reasonable attorneys' fees and expert witness fees.¹²²⁴

Authorities are split on whether the FMLA definition of "employer" includes individual supervisors, and thus creates the potential for individual liability for FMLA violations.¹²²⁵ The DOL regulations specifically provide for individual liability of supervisors.¹²²⁶ While most courts agree that supervisors can be held individually liable, the Ninth Circuit and Washington courts have yet to rule on this issue.

(p) School Employees

Special FMLA regulations apply to school employees, and school districts need to be aware of these regulations.¹²²⁷

SECTION 6.3 NURSING MOTHER BREAK TIME UNDER FEDERAL LAW

Under the Fair Labor Standards Act ("FLSA"), an employer must provide a non-exempt employee with a reasonable break time to express breast milk for her nursing child for one year after the child's birth each time such employee has need to express the milk. The employer must also provide "a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may

¹²¹⁹ 29 C.F.R. § 825.220(d); *Taylor v. Progress Energy, Inc.*, 493 F.3d 454 (4th Cir. 2007), *cert. denied*, 554 U.S. 909 (2008) (interpreting the text of 29 C.F.R. § 825.220(d) to state plainly that employees cannot waive their rights under FMLA, and that the word "waive" has both a prospective and retrospective connotation); *see also Jann v. Interplastic Corp.*, 631 F. Supp. 2d 1161 (D. Minn. 2009) (by agreeing to arbitration of FMLA claims, plaintiff-employee did not waive her substantive rights as provided by 29 C.F.R. § 825.220(d)).

¹²²⁰ 29 C.F.R. § 825.400.

¹²²¹ *Id.*

¹²²² *Furrell v. Tri-Cnty. Metro. Transp. Dist.*, 530 F.3d 1023 (9th Cir. 2008) (employee truck driver awarded FMLA damages for days of work that he missed because of stress, anxiety, and depression resulting from the wrongful denial of FMLA leave).

¹²²³ *Traxler v. Multnomah Cnty.*, 596 F.3d 1007, 1011 (9th Cir. 2010) (under the FMLA, front pay is an equitable remedy that must be determined by the court, both as to the availability of the remedy and the amount of any award).

¹²²⁴ 29 U.S.C. § 2617(a)(1).

¹²²⁵ *See, e.g., Darby v. Bratch*, 287 F.3d 673 (8th Cir. 2002) (if an individual meets the definition of "employer" under the FMLA, then that person should be subject to individual liability); *Mercer v. Borden*, 11 F. Supp. 2d 1190 (C.D. Cal. 1998); *Lader v. Endicott*, 253 F.3d 1020 (7th Cir. 2001); *but see Wascara v. Carver*, 169 F.3d 683 (11th Cir. 1999) (holding public officials in their individual capacities are not employers under the FMLA).

¹²²⁶ 29 C.F.R. § 825.104(d) ("As under the FLSA, individuals such as corporate officers 'acting in the interest of an employer' are individually liable for any violations of the requirements of FMLA").

¹²²⁷ *See generally* 29 C.F.R. §§ 825.600 *et seq.*

be used by an employee to express breast milk.”¹²²⁸ An employer with less than 50 employees will not be subject to these provisions if compliance will pose an “undue hardship” on the employer.¹²²⁹

SECTION 6.4 LEAVE UNDER WASHINGTON LAW

(a) Washington Family Leave Act

In 1989, Washington was among the first states in the United States to enact a comprehensive family leave statute. The Washington State Family Leave Act (“Washington State FLA”) builds on the existing benefits currently available under the Federal FMLA.

The Washington State FLA requires employers that have 50 or more employees within 75 miles of the employee’s worksite to provide family leave to their employees.¹²³⁰ In addition, to be eligible for the leave of absence, the employee must work for the employer for at least 12 months (those months need not be consecutive) and have worked for at least 1,250 hours during the last 12 months before the leave.¹²³¹

If eligible, an employee is entitled to take 12 weeks of unpaid leave in any 12-month period for one of the following:¹²³²

- leave for birth of a child of the employee and in order to care for the child;
- leave for placement of a child with the employee for adoption or foster care;
- leave to care for an employee’s family member who has a serious health condition; or
- leave because the employee has a serious health condition that makes the employee unable to perform the functions of his or her position.

The employee may take leave on a reduced schedule, but only with the employer’s approval.¹²³³ Similar to the FMLA, if spouses are employed by the same employer, they are entitled to a combined total of 12 weeks leave if leave is taken for the birth or placement of a child or for a parent’s serious health condition.¹²³⁴

Upon completion of the leave, an employee is entitled to return to his or her position held prior to the leave, or to an equivalent position at a worksite within 20 miles of the employee’s workplace when leave commenced.¹²³⁵

Similar to the FMLA, the Washington State FLA contains an exception for “key employees,” whereas restoration of the employee after leave may be denied if: (1) denial is necessary to prevent substantial and grievous economic injury to the operations of the employer; (2) the employer notifies the employee of the intent of the employer to deny restoration on such basis at the time the employer determines that the injury would occur; and (3) the leave has commenced and the employee elects not to return to employment after receiving the notice.¹²³⁶

Other than the right to reinstatement, the employee is not entitled to any pay or other benefits while on a leave of absence. However, during any period of leave taken under the Washington State FLA, if the

¹²²⁸ 29 U.S.C. § 207(r)(1).

¹²²⁹ 29 U.S.C. § 207(r)(3).

¹²³⁰ RCW 49.78.020(4).

¹²³¹ *Id.*

¹²³² RCW 49.78.220.

¹²³³ RCW 49.78.230.

¹²³⁴ RCW 49.78.260.

¹²³⁵ RCW 49.78.280(1).

¹²³⁶ RCW 49.78.280(2).

employee is not eligible for any employer contribution to medical or dental benefits under an applicable collective bargaining agreement or employer policy during any period of leave, an employer must allow the employee to continue, at the employee's expense, medical or dental insurance coverage.¹²³⁷

An employee does not have a private right of action to sue under the Washington State FLA.¹²³⁸ However, an employee who is terminated for exercising his or her rights under the Washington State FLA, or who is terminated while eligible for protected leave, may be able to sue for wrongful discharge in violation of public policy.¹²³⁹

(b) Washington Pregnancy Disability Leave

Regulations issued under the authority of WLAD require employers to provide a woman with a leave of absence for the period of time that she is sick or temporarily disabled because of pregnancy or childbirth.¹²⁴⁰ Employers must treat a woman on pregnancy related leave the same as other employees on leave for sickness or other temporary disabilities. This means that employers must provide the same disability leave benefits to women who are pregnant or have recently given birth as they provide to any other employee. This also means that disabilities related to pregnancy or childbirth cannot be excluded from an employer's other leave or benefits policies. This rule applies whether or not those employees qualify for Federal FMLA or state FLA. This leave for pregnant women is in addition to their other benefits for family leave purposes.¹²⁴¹

Pregnancy disability leave applies directly to all Washington employers with at least eight or more employees.¹²⁴² It applies to all women, regardless of their position, number of hours worked, or tenure with the company. Upon a health care provider's certification of an employee's need for a specified period of leave due to a pregnancy or childbirth-related disability, the employer must provide such leave for the specified period.¹²⁴³ Unlike leaves of absence under the FMLA or relevant disability statutes, there is no limit to the number or duration of maternity leaves an employee may request, and there is no "undue hardship" limitation.

An employee who takes a leave of absence for pregnancy or related medical conditions is entitled to return to the same position, or a similar position of at least the same pay.¹²⁴⁴ The employer is not required to provide pay or other benefits during the leave, unless it provides such pay or benefits to other temporarily disabled employees.¹²⁴⁵ In addition, if the employee is terminated during the leave of absence, she may be entitled to sue for wrongful termination in violation of public policy.¹²⁴⁶

Combining Washington law and the FMLA, women suffering sickness or temporary disability due to pregnancy or childbirth are entitled to a greater period of family and medical leave than are non-pregnant women or men. For example, a man or woman with a serious medical condition is entitled to 12 weeks of leave under federal and state family and medical leave laws. However, a pregnant woman, if suffering from a pregnancy-related sickness or disability, is entitled to a leave for as long as her health care provider recommends, plus an additional 12 weeks of leave under the FMLA.¹²⁴⁷

¹²³⁷ RCW 49.78.290.

¹²³⁸ *Blomster v. Nordstrom, Inc.*, 103 Wn. App. 252 (2000).

¹²³⁹ More information on public policy claims can be found in Chapter X.

¹²⁴⁰ WAC 162-30-020(5).

¹²⁴¹ WAC 162-30-020(4).

¹²⁴² RCW 49.60.040(3). Under the tort of wrongful discharge in violation of public policy, this requirement arguably applies to *all* employers.

¹²⁴³ WAC 162-30-020(4)(a).

¹²⁴⁴ WAC 162-30-020(5)(c); *see also Johnson v. Goodyear Tire & Rubber Co.*, 790 F. Supp. 1516 (E.D. Wash. 1992).

¹²⁴⁵ WAC 162-30-020(6).

¹²⁴⁶ *See Roberts v. Dudley*, 140 Wn.2d 58 (2000). More information on public policy termination claims can be found in Chapter X.

Because Washington law does not provide for benefits continuation, it is recommended that an employer begin designating leave as FMLA leave at the start of the sickness or disability and then add the additional time the woman was sick or disabled upon the expiration of the 12 weeks. By initially designating the pregnancy disability leave as FMLA leave, the employer will continue to pay benefits under the FMLA for 12 weeks, as provided above. After 12 weeks, if the employee is still on leave, the employer may cease to provide benefits. Upon the employee's return to work, the employer must restore her benefits as required under the FMLA.

(c) Washington Parental Leave for Adoptive and Step-Parents

If an employer in Washington extends child care leave to biological parents, the employer is required to grant the same amount of leave to fathers, adoptive parents and step-parents to care for a newborn or newly-adopted child under the age of six.¹²⁴⁸ Employers may restrict leave to those living with the child at the time of the birth or initial placement.¹²⁴⁹ The length of leave is tied to the employer's policy for maternity/paternity leave and is not set by statute. Likewise, the employer's policy with respect to biological parents will control whether the leave is paid or unpaid, and whether the employee is entitled to continued benefits while on leave.

(d) Leave for Care of Family Members

All Washington employers¹²⁵⁰ that provide sick leave or other PTO (including vacation leave and/or personal holiday and certain disability plans) must allow employees to use any or all of that leave to care for: (1) a child with a health condition that requires treatment or supervision; or (2) a spouse, parent (biological or adoptive), parent-in-law, or grandparent who has a "serious health condition or an emergency condition."¹²⁵¹ *It is the employee's choice whether to use sick leave or other PTO*, but leave may not be taken "in advance," before it has been earned.¹²⁵² The term "child" includes a biological, adopted, foster, or step-child, a legal ward, or a child of a person standing *in loco parentis* who is: (1) under 18 years old; or (2) 18 years of age or older and incapable of self-care because of mental or physical disability.¹²⁵³

For a child, "health conditions" that require treatment or supervision include: any medical conditions requiring treatment or medication that the child cannot self-administer; any medical or mental health conditions that would endanger the child's safety or recovery without the presence of a parent or guardian; or any condition warranting treatment or preventive health care, such as physical, dental, optical, or immunization services, when a parent must be present to authorize and when sick leave may otherwise be used for the employee's preventative health care.¹²⁵⁴ A "health condition" does not include a healthy newborn.

For other family members, "serious health conditions" include: an illness, injury, impairment, or physical or mental conditions involving incapacity or in-patient treatment in a hospital, hospice, or residential medical care facility, and any subsequent period of incapacity, treatment, or recovery; or continuing treatment by a health care provider.¹²⁵⁵ An "emergency condition" is a health condition that is a sudden, generally unexpected occurrence, or set of circumstances demanding immediate action.¹²⁵⁶ The family care

¹²⁴⁷ RCW 49.78.390.

¹²⁴⁸ RCW 49.12.360. This statute applies to all employers.

¹²⁴⁹ RCW 49.12.360(1).

¹²⁵⁰ RCW 49.12.005(3). The Washington Department of Labor and Industries published a "Frequently Asked Questions About The Family Care Rules" which can be found at <http://www.lni.wa.gov/workplacerrights/files/policies/esc10.pdf>.

¹²⁵¹ RCW 49.12.270; WAC 296-130-020(4).

¹²⁵² RCW 49.12.270.

¹²⁵³ RCW 49.12.265.

¹²⁵⁴ WAC 296-130-020(10).

¹²⁵⁵ WAC 296-130-020(11).

statute does not require establishment of a sick time program, nor any specific length of leave, nor does it require pay or continued benefits during the leave.

Employers must post, in a conspicuous place, a current edition of a poster from the DOL describing Washington's family care law.¹²⁵⁷ If employers have their own leave policies those also must be posted in a conspicuous place.¹²⁵⁸ Failure to comply with the posting requirements is punishable by a \$200 fine for first offenses.¹²⁵⁹ Fines for subsequent violations may be as high as \$1,000 per violation.¹²⁶⁰

An employer is prohibited from discriminating against employees who ask for or use family care leave, or employees who file or assist with complaints regarding family care leave.¹²⁶¹

(e) Washington's Family Leave Insurance Program

In 2007, Washington adopted the Family Leave Insurance ("FLI") program in order to provide benefits for parents who take leave from work to care for a newborn or newly adopted child.¹²⁶² Originally scheduled for October 2009, due to the state's budget shortfall, the program is now scheduled for implementation in October 2012.

FLI complements existing federal and state laws, and paid leave benefits provided through employer policies or collective bargaining agreements. Features of FLI include:

- up to five weeks off work to care for a newborn or newly adopted child;¹²⁶³
- entitle qualified full-time employees to state-paid family leave benefits of up to \$250 per week for five weeks for the care of the employee's newborn or newly adopted child. To qualify for state-paid leave, the employee must have: (1) worked at least 680 hours during the previous four calendar quarters; and (2) provided written notice of the intent to take leave. Employees who work fewer than 35 hours per week will receive a prorated amount. The employee is entitled to a maximum of six weeks of family leave during the application year, five weeks of paid family leave and one week of unpaid family leave. The week of unpaid family leave occurs during the first seven calendar days of leave, during which paid benefits are unavailable;¹²⁶⁴ and
- require all employers with 26 or more employees to restore a qualified employee returning from family leave: (1) to the same job he or she had before taking leave; or (2) to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment at a workplace within 20 miles of the employee's workplace when leave commenced. To qualify for job restoration, the employee must have: (1) been with the employer at least 12 months; and (2) worked at least 1,250 hours during the immediately preceding 12-month period. The employer's job restoration obligation continues through the six weeks of family leave available to an employee in an application year.¹²⁶⁵

Any leave taken under the new law would have to be taken concurrently with any unpaid leave under the FMLA or under the Washington State FLA.¹²⁶⁶ Employers would also be able to require that leave be taken

¹²⁵⁶ WAC 296-130-020(12).

¹²⁵⁷ RCW 49.12.275; WAC 296-130-050.

¹²⁵⁸ *Id.*

¹²⁵⁹ WAC 296-130-080.

¹²⁶⁰ *Id.*

¹²⁶¹ RCW 49.12.287.

¹²⁶² RCW 49.86.005; RCW 49.86.030.

¹²⁶³ RCW 49.86.010(8); RCW 49.86.050.

¹²⁶⁴ RCW 49.86.060.

¹²⁶⁵ RCW 49.86.090.

concurrently or otherwise coordinated with any leave allowed under the terms of a collective bargaining agreement or other employer policy.¹²⁶⁷ Employers would have to give employees written notice of this requirement.¹²⁶⁸ If spouses or state registered domestic partners are employed by the same employer, the employer would be able to require that they not take leave concurrently.¹²⁶⁹

This law recognizes the importance of allowing parents time to bond with a newborn or newly placed child, separate from childbirth.¹²⁷⁰ Washington law already entitles a woman who is disabled by pregnancy, childbirth, or both to all the leave needed for the disability. Parental leave under the FLI is in addition to pregnancy disability leave and would be available to men, as well as women.

An employee wishing to take leave pursuant to this law would have to provide the employer with written notice of the intent to take family leave in the same manner as an employee is required to provide notice under the Washington State FLA.¹²⁷¹

(f) Domestic Violence Leave

Washington State has enacted legislation guaranteeing “reasonable leave” for victims of domestic violence, sexual assault and stalking.¹²⁷² The law went into effect April 1, 2008.¹²⁷³ All Washington employers,¹²⁷⁴ regardless of size must provide domestic violence leave regardless of whether the individual is employed on a part-time, full-time or temporary basis. The purpose of the law is to “reduce the devastating economic consequences” for victims of domestic violence, sexual assault and stalking and to better protect their safety.¹²⁷⁵

The law protects victims as well as their family members. Family members include children, spouses, parents, parents-in-law, grandparents, and individuals with whom the employee has a “dating relationship.”¹²⁷⁶

An employee is entitled to job-protected leave in order to:¹²⁷⁷

- seek legal or law enforcement assistance or remedies to ensure the health and safety of the employee or employee’s family members;
- seek treatment by a health care provider for physical or mental injuries caused by domestic violence, sexual assault, or stalking, or to attend to health care treatment for a victim who is the employee's family member;
- obtain or assist a family member in obtaining services from a domestic violence shelter, rape crisis center, or other social services program;
- obtain or assist a family member in obtaining mental health counseling related to an incident of domestic violence, sexual assault, or stalking; or

¹²⁶⁶ RCW 49.86.140(1)(a).

¹²⁶⁷ RCW 49.86.140.

¹²⁶⁸ *Id.*

¹²⁶⁹ RCW 49.86.100.

¹²⁷⁰ *See* RCW 49.86.005.

¹²⁷¹ RCW 49.86.030.

¹²⁷² RCW 49.76.040.

¹²⁷³ RCW 49.76.900.

¹²⁷⁴ Washington Domestic Violence Leave applies to all employers except temporary staffing agencies.

¹²⁷⁵ RCW 49.76.010.

¹²⁷⁶ RCW 49.76.020(5).

¹²⁷⁷ RCW 49.76.030; WAC 296-135-020.

- participate, for the employee's own self or for the employee's family members, in safety planning, temporary or permanent relocation, or take other actions to increase the safety of the employee or employee's family members from future domestic violence, sexual assault, or stalking.

Employees seeking domestic violence leave are required to provide the employer with advance notice of their intention to take leave.¹²⁷⁸ When advance notice is not possible, notice must be provided no later than the end of the first day that the employee takes such leave. An employer may request that the employee provide timely verification that the employee or the employee's family member is a victim of domestic violence, sexual assault, or stalking.¹²⁷⁹ Verification must come from the employee and may be in the form of a police report, a court document, or a statement from an advocate for victims of domestic violence, an attorney, a member of the clergy, a medical or other professional or the employee's written statement.¹²⁸⁰

If the victim is the employee's family member, verification of the familial relationship between the employee and the victim may include, but is not limited to, a statement from the employee, a birth certificate, a court document, or other similar documentation.¹²⁸¹

(g) Jury Duty Leave

Under Washington law, an employer is required to provide its employees with "a sufficient leave of absence from employment to serve as a juror when that employee is summoned" to serve.¹²⁸² In addition, employers may not deprive any employee of employment, or threaten, coerce, or harass an employee because the employee responds to a summons, serves as a juror, or attends court for prospective jury service.¹²⁸³ An employee may bring a civil action for damages resulting from a violation of the statute, and may request an order of reinstatement. If the employee prevails, the employee is entitled to reasonable attorney fees.¹²⁸⁴ A terminated employee also may be able to establish a claim for wrongful discharge in violation of public policy.¹²⁸⁵

Employers are not required to pay or provide continued benefits for employees taking jury duty leave. However, if the employee is classified as an exempt employee, the employee's weekly salary should not be docked for jury duty leave in less than full workweek increments.¹²⁸⁶

(h) Military Leave

Military leave in Washington State is governed by the Federal Uniformed Services Employment and Reemployment Rights Act ("USERRA"),¹²⁸⁷ the Washington Veterans Employment and Reemployment Act and Washington Military Family Leave Act.¹²⁸⁸ The statutes apply to all employers,¹²⁸⁹ and all regular employees are entitled to a leave of absence for uniformed service.

¹²⁷⁸ RCW 49.76.040(1).

¹²⁷⁹ RCW 49.76.040(2).

¹²⁸⁰ RCW 49.76.050(4).

¹²⁸¹ RCW 49.76.050(5).

¹²⁸² RCW 2.36.165(1).

¹²⁸³ RCW 2.36.165(2).

¹²⁸⁴ RCW 2.36.165(4).

¹²⁸⁵ See, e.g., *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn.2d 46 (1991); *Dicomes v. State of Wash.*, 113 Wn.2d 612 (1989).

¹²⁸⁶ 29 C.F.R. § 541.602(b)(3). See Chapter V for additional information on the salary pay element of overtime exempt status.

¹²⁸⁷ 38 U.S.C. §§ 4301 *et seq.*

¹²⁸⁸ RCW 73.16 *et seq.*; RCW 49.77 *et seq.*

¹²⁸⁹ 38 U.S.C. § 4303(4); RCW 73.16.

Leave is available for both voluntary and involuntary service of various kinds under each statute. Under USERRA, employees are entitled to leave for uniformed service, including active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard duty, and absence for a fitness for duty examination and public health service.¹²⁹⁰ Similarly, Washington law requires employers to provide a leave of absence for voluntary and involuntary services in the armed forces, the Washington National Guard, and the public health service.¹²⁹¹ The amount of leave to which employees are entitled varies under state and federal law. USERRA requires employers to provide leave for a total of five years, subject to certain extensions.¹²⁹² Washington law requires employers to provide up to four years of leave, also subject to extensions in certain circumstances.¹²⁹³

Both statutes require employees to be offered the same benefits and other terms and conditions of employment as other employees on leaves of absence.¹²⁹⁴ Under USERRA, employees have a right to elect continued health benefits coverage, even if the employer is too small to be covered by the federal benefits continuation statute (“COBRA”).¹²⁹⁵ The leave of absence is unpaid, but employers should not dock exempt employees for partial workweeks missed. In addition, the DOL takes the position that any months and hours the employee would have worked, but for his or her military service, should be combined with the months and hours actually worked when determining FMLA eligibility.¹²⁹⁶

After the leave of absence, employees are entitled to reinstatement into their previous (or a similar) position, so long as they remain in service or were honorably discharged from service.¹²⁹⁷ An employer may avoid reinstatement if circumstances have significantly changed, making it impossible, unreasonable, or against the public interest for the employer to reinstate the employee.¹²⁹⁸ Under both statutes, employees who are reinstated following service are protected from discharge without cause for up to one year following their reinstatement.¹²⁹⁹

The Veterans Benefits Improvement Act of 2004 amended several provisions of USERRA.¹³⁰⁰ Employers are required to post or otherwise provide notice of USERRA rights, benefits and obligations “to persons entitled to rights and benefits.”¹³⁰¹ The text of the required notice is available on the DOL website.¹³⁰²

In 2008, Washington passed the Washington Military Family Leave Act which allows an employee whose spouse is a member of the United States armed forces (active duty), National Guard, or reserves who has been notified of an impending deployment or order to active duty, or who has been deployed and is on

¹²⁹⁰ 38 U.S.C. § 4303(13).

¹²⁹¹ RCW 73.16.033.

¹²⁹² 38 U.S.C. § 4312(c).

¹²⁹³ RCW 73.16.035(4).

¹²⁹⁴ 38 U.S.C. § 4316(b)(1)(B); RCW 73.16.051.

¹²⁹⁵ 38 U.S.C. § 4317.

¹²⁹⁶ *Protection of Uniformed Service Members’ Rights to Family and Medical Leave*, U.S. Department of Labor Memorandum (July 22, 2002).

¹²⁹⁷ 38 U.S.C. §§ 4304, 4313; RCW 73.16.035, 73.16.051; *see also* *Leisek v. Brightwood Corp.*, 278 F.3d 895 (9th Cir. 2002) (affirming summary judgment for employer of USERRA reemployment rights claim because employee’s absence was not authorized by military orders).

¹²⁹⁸ 38 U.S.C. § 4312(d)(1); RCW 73.16.033.

¹²⁹⁹ 38 U.S.C. § 4316(c) (protecting employees the first 180 days of reemployment after completing between 31 and 180 days of military service, or for the first year of reemployment after more than 180 days of service); RCW 73.16.051 (protecting from discharge without cause for one year after reinstatement).

¹³⁰⁰ Pub. L. No. 108-454 (2004).

¹³⁰¹ 38 U.S.C. § 4334(a).

¹³⁰² *See* <http://www.dol.gov/vets/programs/userra/poster.htm>.

leave from deployment, a total of 15 days of unpaid leave per deployment to spend time with their spouse.¹³⁰³ This leave may not be used after the deployment has ended.

(i) Leave for Volunteer Firefighters, Reserve Officers and Civil Air Patrol Members

Washington law prohibits employers from discharging or disciplining an employee that is: (1) a volunteer firefighter or reserve officer that takes leave related to an alarm of fire or an emergency call; or (2) a civil air patrol member that takes leave related to an emergency service operation.¹³⁰⁴ If an employee is discharged or disciplined in violation of this statute, the employee may seek reinstatement or withdrawal of the discipline by filing a complaint with the director of the Washington Department of Labor and Industries within 90 days of the alleged violation.¹³⁰⁵

(j) Seattle Paid Sick and Safe Time¹³⁰⁶

Beginning September 1, 2012, employers are required to provide paid sick and safe time to their employees working within Seattle.¹³⁰⁷ Employees are eligible for paid sick and safe time if work is performed on a full-time, part-time or temporary basis, including employees who occasionally work in Seattle more than 240 hours per calendar year.

Paid sick and safe time may be used for:

- illness, injury or health condition or for preventative care for an employee or an employee's partner or family members;
- reasons related to domestic violence, sexual assault, or stalking; or
- school or workplace closure by a public official to limit health hazards.

Tier	Employer Size	Accrual	Use	Carry Over
Not Covered	4 or fewer employees	No accrual, use or carry over requirement. Notice and anti-retaliation provisions apply.		
1	More than 4 to 49 employees	1 hour for every 40 hours worked	40 hours per calendar year	40 hours per calendar year
2	More than 49 to 249 employees	1 hour for every 40 hours worked	56 hours per calendar year	56 hours per calendar year
3	250 or more employees	1 hour for every 30 hours worked	72 hours per calendar year	72 hours per calendar year
	250 or more employees (with PTO policy)	1 hour for every 30 hours worked	108 hours per calendar year	108 hours per calendar year
Employers must notify employees of available paid sick and safe time each time wages are paid.				

¹³⁰³ RCW 49.77 *et seq.*

¹³⁰⁴ RCW 49.12.460(1). The RCW was amended in 2010 to add protection for civil air patrol members.

¹³⁰⁵ RCW 49.12.460(2).

¹³⁰⁶ Information regarding the ordinance can be found at: <http://www.cityofseattle.net/civilrights/SickLeave.htm>.

¹³⁰⁷ Seattle, Wa., Code ch. 14.16 (effective Sept. 1, 2012).

SECTION 6.5 LEAVE UNDER CALIFORNIA LAW

(a) California Family Rights Act

The California Family Rights Act (“CFRA”)¹³⁰⁸ predates the Federal FMLA. Since passage of the FMLA in 1993, the CFRA has been amended to conform to the FMLA in most respects. Even though employee leaves should be analyzed identically under federal and state law, employers must identify employee leaves as qualifying separately under federal and state laws. California employers also must recognize registered domestic partners under the category of “spouse” for the purpose of FMLA/CFRA leave benefits.¹³⁰⁹

If an employer gives written guidance to employees regarding employee benefits in an employee handbook, a provision on FMLA/CFRA must also be included.¹³¹⁰ Both the FMLA and CFRA require posting of notices in conspicuous places.¹³¹¹

The CFRA prohibits retaliation for an individual’s exercise of his or her right to family care and medical leave and interference with an employee’s right to obtain leave.¹³¹² Unlike in Washington, California courts recognize a private cause of action under the CFRA.¹³¹³ It is also unlawful for an employer to interfere with an employee’s use of CFRA leave.¹³¹⁴ Aside from claims of direct violation of the CFRA, the Act may serve as a basis for wrongful discharge in violation of public policy.¹³¹⁵

On February 5, 2007, San Francisco adopted a regulation requiring paid sick leave to employees. The regulation states in pertinent part:¹³¹⁶

An employee may use paid sick leave not only when he or she is ill or injured or for the purpose of the employee’s receiving medical care, treatment, or diagnosis, . . . but also to aid or care for the following persons when they are ill or injured or receiving medical care, treatment, or diagnosis: Child; parent; legal guardian or ward; sibling; grandparent; grandchild; and spouse, registered domestic partner under any state or local law, or designated person. The employee may use all or any percentage of his or her paid sick leave to aid or care for the aforementioned persons. The aforementioned child, parent, sibling, grandparent, and grandchild relationships include not only biological relationships but also relationships resulting from adoption; step-relationships; and foster care relationships. “Child” includes a child of a domestic partner and a child of a person standing *in loco parentis*.

If the employee has no spouse or registered domestic partner, the employee may designate one person as to whom the employee may use paid sick leave to aid or care for the person. . . .

For employees working for an employer on or before the operative date of this Chapter, paid sick leave shall begin to accrue as of the operative date of this Chapter. For employees hired by an employer after the operative date of this Chapter, paid sick leave shall begin to accrue 90 days after the commencement of employment with the employer.

¹³⁰⁸ Cal. Gov’t Code § 12945.2.

¹³⁰⁹ Cal. Code Regs. tit. 2, § 7297.0(p).

¹³¹⁰ 29 C.F.R. § 825.300(a); Cal. Code Regs. tit. 2, § 7297.9(a).

¹³¹¹ *Id.*; 29 U.S.C. § 2619.

¹³¹² Cal. Gov’t Code § 12945.2(1).

¹³¹³ *See Dudley v. Dep’t of Transp.*, 90 Cal. App. 4th 255 (2001).

¹³¹⁴ Cal. Gov’t Code § 12945.2(t).

¹³¹⁵ *See Nelson v. United Technologies*, 74 Cal. App. 4th 25 (2001).

¹³¹⁶ S.F., Cal., Administrative Code §§ 12W.3-4.

For every 30 hours worked after paid sick leave begins to accrue for an employee, the employee shall accrue one hour of paid sick leave. Paid sick leave shall accrue only in hour-unit increments; there shall be no accrual of a fraction of an hour of paid sick leave.

For employees of small businesses, there shall be a cap of 40 hours of accrued paid sick leave. For employees of other employers, there shall be a cap of 72 hours of accrued paid sick leave. Accrued paid sick leave for employees carries over from year to year (whether calendar year or fiscal year), but is limited to the aforementioned caps.

If an employer has a paid leave policy, such as a paid time off policy, that makes available to employees an amount of paid leave that may be used for the same purposes as paid sick leave under this Chapter and that is sufficient to meet the requirements for accrued paid sick leave . . . the employer is not required to provide additional paid sick leave.

(b) Family Temporary Disability Insurance

Effective July 1, 2004, California workers may qualify for up to six weeks of *paid* family leave every 12 months under the Family Temporary Disability Insurance program,¹³¹⁷ known as Paid Family Leave (“PFL”).¹³¹⁸ The program applies to all employers, regardless of the number of employees, and provides PTO to bond with a new child by birth, adoption, or foster-care placement, or to care for a seriously ill¹³¹⁹ child, spouse, domestic partner, or parent.¹³²⁰ PFL benefits are funded by payroll taxes paid by employees. All employees who are covered by the State Disability Insurance program may qualify for PFL, and there is no minimum hours worked requirement. The program is administered by the Employment Development Department.¹³²¹

Unlike leaves under FMLA or CFRA, employees must submit an application with the state Employment Development Department to receive PFL benefits. The program imposes a seven-day waiting period after leave is taken before an employee may begin receiving benefits.¹³²² PFL runs concurrently with CFRA and FMLA leave, and employers may require employees to take up to two weeks’ vacation leave prior to the employee’s initial receipt of PFL benefits.¹³²³ Employees taking PFL are not entitled to reinstatement. However, if an employee is taking CFRA/FMLA leave concurrently with PFL, then CFRA/FMLA reinstatement rights apply.

(c) Pregnancy Disability Leave

Under California law, an employer must provide up to four months disability leave for a woman who is disabled due to pregnancy, childbirth, or a related medical condition.¹³²⁴ Unlike the CFRA and FMLA, all employers are covered regardless of the number of employees. A female employee is eligible for pregnancy disability leave regardless of the length of time she has worked for the employer, and regardless of whether

¹³¹⁷ Cal. Unemp. Ins. Code § 3301(a).

¹³¹⁸ Cal. Unemp. Ins. Code § 3300(b).

¹³¹⁹ The FTIDI uses the same standard for “serious health condition” as used under the FMLA/CFRA. Cal. Unemp. Ins. Code § 3302(h).

¹³²⁰ Cal. Unemp. Ins. Code § 3301(a).

¹³²¹ See <http://www.edd.ca.gov>.

¹³²² Cal. Unemp. Ins. Code § 3303.

¹³²³ Cal. Unemp. Ins. Code § 3303.1.

¹³²⁴ Cal. Gov’t Code § 12945(b)(2); Cal. Code Regs. tit. 2, § 7291.9(a). If an employer has a more generous leave policy for other temporary disabilities than four months, it is required to provide the same benefits to employees temporarily disabled by pregnancy. Cal. Code Regs. tit. 2, § 7291.9(b).

she is a full-time or part-time employee.¹³²⁵ Although the duration of pregnancy-related disability leave is limited to four months, there is no limit to the number of leaves an employee may take.

A female employee must actually be disabled by pregnancy, childbirth, or a related medical condition to qualify for pregnancy disability leave.¹³²⁶ Whether a pregnancy or childbirth-related condition rises to the level of disability must be determined by medical opinion. Qualifying leave could include time off for prenatal care, severe morning sickness, doctor-ordered bed rest, childbirth, recovery from childbirth or any related medical condition. Pregnancy disability leave does not require that a female employee be completely incapacitated or confined to bed. As a general rule, a woman must be unable to perform one or more essential functions of her job without undue risk to herself, to other persons, or to a successful completion of her pregnancy.¹³²⁷

Pregnancy disability leave and FMLA/CFRA leave do not run concurrently.¹³²⁸ This means that a woman who is eligible for CFRA leave could take up to four months of pregnancy disability leave for a qualifying condition in addition to taking 12 weeks of FMLA/CFRA leave to bond with a baby or for some other qualifying event.¹³²⁹ The four months of pregnancy disability leave need not be taken at one time. If an employee's health care provider advises intermittent leave or a reduced work schedule, an employer may require the employee to transfer to an alternative position that better accommodates the advised schedule as long as it has an equivalent rate of pay and benefits and the employee is qualified for the position.¹³³⁰ Employers are required to provide reasonable accommodations to a pregnant employee when requested upon the advice of the employee's health care provider.¹³³¹

Employees taking pregnancy disability leave are entitled to reinstatement unless the employer proves one of the following: (1) the employee would not otherwise have been employed in her same position at the time reinstatement is requested for a legitimate business reason, or (2) the means of preserving the job or duties would substantially undermine the employer's ability to operate the business safely and efficiently.¹³³² Employers are further required to provide health care insurance coverage for women on pregnancy disability leave on the same terms it would have been provided if the employee had continued in employment continuously for the duration of the leave.¹³³³

(d) Kin Care

California law requires employers that provide paid sick leave for employees to permit use of accrued and available sick leave to attend to an illness of a child, parent, spouse, or domestic partner.¹³³⁴ This leave is commonly referred to as "kin care" leave. Employees may use their accrued and available sick leave "in an amount not less than the sick leave that would be accrued during six months at the employee's then current rate of entitlement."¹³³⁵ All conditions and restrictions placed by the employer upon an employee's sick leave also applies to the employee's leave to attend to an illness of their child, parent, spouse, or

¹³²⁵ Cal. Code Regs. tit. 2, §§ 7291.9(a), (c).

¹³²⁶ *Id.*

¹³²⁷ Cal. Code Regs. tit. 2, § 7291.2(f).

¹³²⁸ Cal. Code Regs. tit. 2, § 7291.13.

¹³²⁹ *Id.*

¹³³⁰ Cal. Code Regs. tit. 2, § 7297.3(e)(1).

¹³³¹ Cal. Gov't Code § 12945(b)(1).

¹³³² Cal. Code Regs. tit. 2, §§ 7291.10(c)(1)(A)-(B); *see DFEH v. Stone Insur. Servs., Inc.*, FEHC Dec. No. 99-11, 1999 WL 1276682 (Cal. F.E.H.C. Nov. 9, 1999).

¹³³³ Cal. Gov't Code § 12945(a)(2)(A). Employers can recover from the employee the premium that the employer paid during this leave if the employee fails to return from leave and this failure to return is not one of the special circumstances enumerated in the law. *Id.*

¹³³⁴ Cal. Lab. Code § 233(a).

¹³³⁵ *Id.*

domestic partner. Employers who provide a paid sick leave benefit are prohibited from disciplining or terminating employees because they use kin care leave.¹³³⁶

California's kin care leave does not apply to every sick leave policy. In *McCarther v. Pac. Telesis Group*, the California Supreme Court found that kin care leave does not apply to an employer with an uncapped sick leave policy, as the employer did not provide accrued increments of compensated leave and it would be impossible to determine the sick leave an employee might be entitled to in a six-month period.¹³³⁷

(e) Leave for Civil Air Patrol Members

Under California's Civil Air Patrol Leave Act, an employer must provide no less than 10 days per calendar year of unpaid leave to an employee member of the civil air patrol to respond to emergency operational missions.¹³³⁸ Additionally, an employer shall not discriminate against or discharge from employment a member of the civil air patrol because of such membership.¹³³⁹ Although a leave extension may be granted by the government agency authorizing the emergency mission (if also approved by the employer), a leave for a single emergency operational mission may not exceed three (3) days.¹³⁴⁰ Civil air patrol leave is unpaid, and an employer may not require an employee to use any accrued benefit such as vacation, paid time off, or any other form of leave that may be available.¹³⁴¹ An employee must be returned to the same or similar position, status, benefits and terms and conditions of employment held when the leave began unless the employer would not have restored the employee to this position for reasons unrelated to the leave.¹³⁴² To be eligible for such leave, an employee must have been employed for at least a 90-day period immediately preceding the commencement of leave.¹³⁴³

The Civil Air Patrol Leave Act applies to employers with 15 or more employees.¹³⁴⁴

(f) Leave for Organ and Bone Marrow Donation

California employers with 15 or more employees must provide paid leave for employees to donate bone marrow or organs.¹³⁴⁵ Employers must provide up to thirty (30) days of paid leave for an organ donation and up to five (5) business days of paid leave for a bone marrow donation.¹³⁴⁶ However, employers may require employees to use up to five (5) days of earned but unused sick or vacation leave or paid time off for bone marrow donation and up to two (2) weeks of earned but unused sick or vacation leave or paid time off for organ donation, unless doing so would violate the provisions of an applicable collective bargaining agreement.¹³⁴⁷ This leave does not run concurrently with FMLA or CFRA leave.¹³⁴⁸ This leave of absence is not a break in the employee's continuous service for the purpose of the employee's right to salary adjustments, paid time off, or seniority.¹³⁴⁹

¹³³⁶ Cal. Lab. Code § 233(c).

¹³³⁷ *McCarther v. Pac. Telesis Group*, 48 Cal. 4th 104 (2010).

¹³³⁸ *Id.*

¹³³⁹ *Id.* § 1502.

¹³⁴⁰ *Id.* § 1503(a).

¹³⁴¹ *Id.* §§ 1503(a), (c).

¹³⁴² *Id.* § 1504(a).

¹³⁴³ *Id.* § 1501(b).

¹³⁴⁴ *Id.* § 1501(d).

¹³⁴⁵ Cal. Lab. Code §§ 1508-13.

¹³⁴⁶ *Id.* § 1510(a)(2).

¹³⁴⁷ *Id.* § 1510(f).

¹³⁴⁸ *Id.* § 1510(g).

¹³⁴⁹ *Id.* § 1510(c).

Employees returning from organ or bone marrow donation leave must be returned to the same or equivalent position, status, benefits, pay and terms and conditions of employment held when the leave began, unless the employer declines to restore the employee because of conditions unrelated to the employee's use of such leave.¹³⁵⁰ An employer may not interfere with or restrain an employee's right to take bone marrow or organ donation leave, nor may the employer discriminate against any such employee.¹³⁵¹

SECTION 6.6 LEAVE UNDER MINNESOTA LAW

(a) Pregnancy Leave

For the duration of a pregnancy, the Minnesota Human Rights Act ("MHRA") may impact a pregnant employee's right to an accommodation, a job modification, or a leave of absence.¹³⁵² Note that under Minnesota law, the accommodation provisions apply to employers with at least 15 employees, while the discrimination provisions apply to all employers.¹³⁵³ With regard to employees returning from maternity leave, the Minnesota Parenting Leave Act ensures that they must be given the same opportunities to return to their prior positions as employees returning from other medical disability leaves.¹³⁵⁴

(b) Parenting Leave Act

The Minnesota Parenting Leave Act requires certain employers to grant an eligible employee, who is a natural or adoptive parent, six weeks of unpaid leave in conjunction with the birth or adoption of a child which can run concurrently with FMLA leave.¹³⁵⁵ This law applies to any employer with 21 or more employees. An eligible employee is a person who performs services for an employer for: (1) at least twelve consecutive months immediately preceding the request; and (2) an average number of hours per week equal to one-half the full-time equivalent position in the employee's job classification during those twelve months.¹³⁵⁶ The leave may begin not more than six weeks after the birth or adoption of a child. However, if a child must remain in the hospital longer than the mother, the leave may begin not more than six weeks after the child leaves the hospital.¹³⁵⁷

While on leave, the employee is entitled to continue coverage under any group insurance policy, group subscriber contract, or health care plan for the employee and any dependents. An employer, however, does not have to pay the cost of the coverage while the employee is on leave.¹³⁵⁸ Additionally, parental leave may be reduced by any period of paid parental or disability leave provided by the employer but may not be reduced by any accrued sick leave.¹³⁵⁹

An employee who is on a leave for longer than one month must notify the employer of his or her return at least two weeks prior to returning from leave. An employee returning from parental leave is entitled to return to the employee's former position or a position of comparable duties, number of hours, and pay. An employee also is entitled to any automatic adjustments in the employee's pay scale that occurred during the leave period.¹³⁶⁰

¹³⁵⁰ *Id.* § 1511.

¹³⁵¹ *Id.* § 1512.

¹³⁵² Minn. Stat. § 363A.08, subd. 5.

¹³⁵³ Minn. Stat. §§ 363A.03 & 363A.08.

¹³⁵⁴ Minn. Stat. § 181.942.

¹³⁵⁵ Minn. Stat. § 181.941, subd. 1.

¹³⁵⁶ Minn. Stat. § 181.940.

¹³⁵⁷ Minn. Stat. § 181.941, subd. 2.

¹³⁵⁸ Minn. Stat. § 181.941, subd. 4.

¹³⁵⁹ Minn. Stat. § 181.943.

¹³⁶⁰ Minn. Stat. § 181.942.

An employer may not retaliate against an employee for requesting or obtaining a parental leave of absence.¹³⁶¹ To the extent that an employer's policy permits paid or unpaid maternity or paternity leave to biological parents, the policy must apply equally to adoptive parents.¹³⁶²

An employee injured by a violation of this Act may bring a civil action to obtain injunctive relief or recover damages, as well as reasonable attorneys' fees.¹³⁶³

(c) Sick or Injured Child Care Leave

A Minnesota employer who employs 21 or more employees must allow an eligible employee to use his or her personal sick leave benefits for absences due to the illness or injury of the employee's child on the same terms the employee is able to use the sick leave benefits for his or her own illness or injury.¹³⁶⁴ An eligible employee is a person who performs services for an employer for: (1) at least twelve consecutive months immediately preceding the request; and (2) an average number of hours per week equal to one-half the full-time equivalent position in the employee's job classification during those twelve months.¹³⁶⁵

(d) School Conference and Activities Leave

Any Minnesota employer who employs *one* or more employees must grant an employee leave for up to 16 hours during any 12-month period to attend school conferences or school-related activities related to the employee's child, provided the conferences or the school-related activities cannot be scheduled during non-work hours.¹³⁶⁶ If the employee's child receives child care services or attends a pre-kindergarten regular or special education program, the employee may use this leave time to attend a conference or activity related to the employee's child or to observe the services, provided that the activity cannot be scheduled during non-work hours. When the need for the leave is foreseeable, the employee must provide reasonable prior notice. This leave does not need to be paid, but an employee must be able to substitute any accrued paid vacation time or other appropriate paid leave for any part of this leave.¹³⁶⁷

(e) Bone Marrow and Organ Donation Leave

An employer who employs 20 or more employees in at least one site must grant a paid leave of absence of up to 40 work hours to an eligible employee who is undergoing a medical procedure to donate bone marrow, an organ, or part of an organ.¹³⁶⁸ The leave hours do not need to be consecutive, and the employer may require medical verification of the purpose and length of the leave. An eligible employee is one who works an average of 20 or more hours per week. An employer may not retaliate against an employee for requesting or obtaining such a leave.¹³⁶⁹

(f) Blood Donation Leave

An employer may grant paid leave from work to an employee to allow the employee to donate blood.¹³⁷⁰

¹³⁶¹ Minn. Stat. § 181.941, subd. 3.

¹³⁶² Minn. Stat. § 181.92.

¹³⁶³ Minn. Stat. § 181.944.

¹³⁶⁴ Minn. Stat. § 181.9413.

¹³⁶⁵ Minn. Stat. § 181.940, subd. 2.

¹³⁶⁶ Minn. Stat. §§ 181.9412 & 181.940, subd. 3.

¹³⁶⁷ Minn. Stat. § 181.9412.

¹³⁶⁸ Minn. Stat. §§ 181.945 & 181.9456.

¹³⁶⁹ Minn. Stat. §§ 181.945, subd. 3 & 181.9456, subd. 3.

¹³⁷⁰ Minn. Stat. § 181.9458.

(g) Voting and Election-Judge Leave

Minnesota employees are entitled to be absent from work for the time necessary to vote in a regularly scheduled state primary or general election or an election for a U.S. or state senator or representative, including elections to fill vacancies.¹³⁷¹ An employer may not penalize an employee or deduct from the employee's salary or wages because of the absence. An employer who violates this section is guilty of a misdemeanor. Additionally, an employer must provide an individual with paid time off to serve as an election judge; however, an employer may reduce the employee's wages by the amount paid to the election judge by the election authority.¹³⁷²

(h) Military Leave

A Minnesota employer must allow unpaid leave for an employee who is a member of the national guard or any military or naval forces of the state or the United States who is engaged in active service in time of emergency.¹³⁷³

(i) Civil Air Patrol Service Leave

A Minnesota employer with 20 or more employees must grant an unpaid leave of absence to an eligible employee who is requested to serve as a member of the civil air patrol, unless the leave would unduly disrupt the employer's operations.¹³⁷⁴ An eligible employee is one who works an average of 20 or more hours per week.¹³⁷⁵

(j) Military Family Leaves

Employers must provide up to 10 days of unpaid leave to an employee whose parent, child, grandparent, sibling or spouse, as a member of the United States armed forces, has been injured or killed while engaged in active service. This period may be reduced by any period of paid leave provided by the employer.¹³⁷⁶

Employers must grant up to one day of unpaid leave per calendar year to an employee to attend a send-off or homecoming ceremony for an immediate family member who, as a member of the United States armed forces, has been ordered into active service in support of a war or other national emergency, unless the leave would unduly disrupt the employer's operations. "Immediate family member" includes the employee's grandparent, parent, legal guardian, sibling, child, grandchild, spouse, fiancé, or fiancée.¹³⁷⁷

(k) Jury Duty Leave

Under Minnesota law, employees must be allowed to report for jury duty or respond to a summons without adverse employment action by the employer.¹³⁷⁸ Violation of this statute is punishable by a fine of up to \$700 and imprisonment up to six months, and may require reinstatement of the employee, payment of back wages of up to six weeks, and attorneys' fees.

(l) Victim-Witness and Domestic Abuse Leave

Minnesota employers must allow an employee who is a victim of a crime and who is subpoenaed or requested by a prosecutor to attend a court proceeding for the purpose of giving testimony to do so.¹³⁷⁹

¹³⁷¹ Minn. Stat. § 204C.04.

¹³⁷² Minn. Stat. § 204B.195.

¹³⁷³ Minn. Stat. § 192.261.

¹³⁷⁴ Minn. Stat. § 181.946.

¹³⁷⁵ Minn. Stat. §§ 181.946 & 181.945.

¹³⁷⁶ Minn. Stat. § 181.947.

¹³⁷⁷ Minn. Stat. § 181.948.

¹³⁷⁸ Minn. Stat. § 593.50.

Victims of crimes, as well as their spouses and immediate family members, must be allowed reasonable time off to attend proceedings related to their cases.¹³⁸⁰ Employers also must allow employees reasonable time off to obtain or attempt to obtain a restraining order or protective order in a domestic abuse situation.¹³⁸¹ An employer may not retaliate against an employee for taking time off in these situations.¹³⁸² An employer who violates these sections is guilty of a misdemeanor.

(m) Nursing Mother Accommodation

Under Minnesota law, employers with *one* or more employees must provide a reasonable unpaid break time to nursing employees who need to express milk during the workday, unless providing the break would unduly disrupt the employer's operations. The break time must, if possible, run concurrently with any break time already provided to the employee. The employer also must make reasonable efforts to provide a room or other location that is not a toilet stall, where the employee can express her milk in privacy.¹³⁸³

SECTION 6.7 LEAVE UNDER UTAH LAW

Utah has no family or medical leave requirements beyond those required by federal law.

(a) Pregnancy Leave

Under Utah law, there is no special pregnancy leave. The UADA, however, provides that an employer may not discriminate based on pregnancy.¹³⁸⁴ Utah state employees are granted up to 12 weeks of leave for the birth or adoption of a child.¹³⁸⁵

(b) Organ and Blood Marrow Donation

State employees who serve as a bone marrow donor shall be granted up to seven days paid leave.¹³⁸⁶ A state employee who serves as an organ donor shall be granted up to 30 days of paid leave.¹³⁸⁷

(c) Jury Duty Leave

Under Utah law, an employee may not be required to use vacation or sick leave to respond to a summons for jury duty.¹³⁸⁸ An employer also may not take any adverse employment action against an employee because an employee receives or responds to a summons for jury service.¹³⁸⁹ An employer who violates this requirement is guilty of criminal contempt and may be fined up to \$500 or imprisoned up to six months.¹³⁹⁰ Further, if an employer discharges an employee based on jury service, the employee may bring a civil action for recovery of lost wages and an order for reinstatement.¹³⁹¹

¹³⁷⁹ Minn. Stat. § 611A.036.

¹³⁸⁰ *Id.*

¹³⁸¹ Minn. Stat. §§ 518B.01 & 609.748.

¹³⁸² Minn. Stat. §§ 611A.036, 518B.01, & 609.748.

¹³⁸³ Minn. Stat. § 181.939.

¹³⁸⁴ Utah Code Ann. § 34A-5-106.

¹³⁸⁵ Utah Admin. Code r. 477-7-15.

¹³⁸⁶ Utah Code Ann. § 67-19-14.5(1).

¹³⁸⁷ Utah Code Ann. § 67-19-14.5(2).

¹³⁸⁸ Utah Code Ann. § 78B-1-116(2).

¹³⁸⁹ Utah Code Ann. § 78B-1-116(1).

¹³⁹⁰ Utah Code Ann. § 78B-1-116(3).

¹³⁹¹ Utah Code Ann. § 78B-1-116(4).

(d) Military Leave

Any member of a reserve component of the United States armed forces who, pursuant to military orders, enters active duty, active duty for training, inactive duty training, or state active duty, shall be granted a leave of absence of up to five years.¹³⁹² Upon release from service or hospitalization incident to service, the member shall be permitted to return to his prior employment with the seniority, status, pay, and vacation he would have had if he had not been absent for military purposes.¹³⁹³ An employer who willfully deprives an employee of leave or of the benefits he would have accrued had the employee not been in a reserve component of the armed forces, or discriminates in any way based on membership in a reserve component of the armed forces shall be guilty of a misdemeanor.¹³⁹⁴

(e) Voting Leave

An employer must allow an employee to be absent for up to two hours between the time that the polls open and close on an election day and may not deduct from the employee's usual salary or wages because of the absence.¹³⁹⁵ The employee must apply for leave before election day.¹³⁹⁶ An employee is not entitled to special leave on election day, however, if he has three or more hours between the time the polls open and close during which the employee is not employed on the job.¹³⁹⁷ An employer who violates this section is guilty of a misdemeanor.¹³⁹⁸

SECTION 6.8 WORKERS' COMPENSATION

This Guide does not discuss workers' compensation in detail. However, this brief overview is provided to alert employers to "leave issues" when an employee makes a workers' compensation claim.

Most states, including Washington, California, and Utah, have adopted laws that require all employers, regardless of size, to provide employees with workers' compensation insurance.¹³⁹⁹ Under these laws, a worker who suffers a workplace injury or an occupational illness, regardless of fault, is entitled to five basic types of benefits: (1) medical care; (2) temporary disability benefits; (3) permanent disability benefits; (4) vocational rehabilitation services/supplemental job displacement benefits; and (5) death benefits. In return, employees are generally prevented from suing an employer for damages related to the injury or illness.

Washington and California's workers' compensation laws do not require an employer to provide a leave of absence or reinstatement for workplace injuries or illnesses. However, where an injury or illness results in a disability, the employee is entitled to the same leave and benefits provided to employees under other types of unpaid disability leave. An employee also may be eligible for leave under the FMLA or applicable state family and medical leave laws.¹⁴⁰⁰ Employers are cautioned that retaliation against an employee for filing a workers' compensation claim is prohibited, and inconsistent application of an absenteeism policy or a failure to return an employee to his or her previous position after an absence due to a workplace related injury or illness may be viewed as retaliation.¹⁴⁰¹

¹³⁹² Utah Code Ann. § 39-1-36(1).

¹³⁹³ Utah Code Ann. § 39-1-36(2).

¹³⁹⁴ Utah Code Ann. § 39-1-36(3).

¹³⁹⁵ Utah Code Ann. § 20A-3-103.

¹³⁹⁶ Utah Code Ann. § 20A-3-103(1)(b).

¹³⁹⁷ Utah Code Ann. § 20A-3-103(2).

¹³⁹⁸ Utah Code Ann. § 20A-3-103(3).

¹³⁹⁹ Washington Industrial Insurance Act, RCW 51 *et seq.*, WAC 297-17 *et seq.*, RCW 51.08.070 (Industrial Insurance Act applies to all Washington employers regardless of size); California Workers' Compensation Act, Cal. Lab. Code §§ 3200 *et seq.*; Utah Code Ann. § 34A-1-103.

¹⁴⁰⁰ See above discussion of FMLA, and Washington, Minnesota and California leave laws, generally.

In Washington, employees who are injured on the job may separately qualify for leave under the FMLA, the ADA, or the WLAD. In addition, employees are protected from retaliation by statute and, if terminated, may be entitled to sue for wrongful discharge in violation of public policy.¹⁴⁰²

Wages owed an employee under workers' compensation statutes do not include an employer's payments for Social Security and Medicare, nor an employer's premium payments for industrial insurance benefits. In addition, wages owed do not include an employer's premium payments for accidental health and dismemberment or disability insurance, because, at the time of injury, they are not critical to the employee's basic health and survival.¹⁴⁰³

Furthermore, awards of workers' compensation for occupational diseases contracted in the course of employment must be provided according to the benefits schedule in place on the date of the last injurious exposure.¹⁴⁰⁴ Alternative time calculations also come into play in the case of seasonal workers. The calculation of monthly wages for lost compensation of an injured seasonal worker must be based on the worker's intent to work year-round and the fact that he or she was always looking for work, and not based solely on the time he or she actually worked.¹⁴⁰⁵

Employers may obtain certain incentives provided by the state for rehiring employees who go on leave due to a workplace injury or occupational illness. Washington provides an incentive to employers who rehire "preferred workers" who suffered a work-related injury or illness under the Preferred Worker Program. Under this program, an employer does not have to pay Accident Fund or Medical Aid premiums after the approved hiring date and within that preferred worker's certification period, or until that preferred work leaves that employment, whichever comes first. The employer will pay only the supplemental pension premium.¹⁴⁰⁶

California's return to work incentive program applies to employers with 50 or fewer workers who make modifications to a workplace to bring an employee injured on or after January 1, 2004, back to the job. Such employers can be reimbursed for up to \$2,500 in expenses.¹⁴⁰⁷ Employers with 50 or more employees who offer injured employees regular, modified, or alternative work will pay fifteen percent lower weekly permanent disability benefits once the offer is made, while those who do not make a return to work offer will pay fifteen percent more.

California employers must post a notice in a conspicuous location frequented by all employees that includes: (1) the name of the workers compensation carrier; (2) how an employee can obtain medical treatment; (3) emergency information and assistance phone numbers; (4) a description of the types of illnesses and injuries covered by workers compensation; (5) a notice as to the types of injuries not covered (*i.e.* off duty social and recreational); (6) description of employee's right to designate a physician and receive medical care; (7) a description of disability benefits; (8) a description of certain protections against discrimination for injured workers; and (9) time limits for and identification of persons to whom injuries must be reported.¹⁴⁰⁸ Employers who utilize a Medical Provider Network ("MPN") must create an MPN notice which includes what a MPN is, the effective date of the MPN, the predesignation exemption from the MPN, when an employee must begin to use a physician from the MPN, and how to request information about using a MPN. The MPN contact telephone number, address and, if available, the MPN website address/URL shall be included.

¹⁴⁰¹ RCW 51.48.025; see *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn.2d 46, 68-69 (1991).

¹⁴⁰² RCW 49.48.050; *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn.2d 46 (1991).

¹⁴⁰³ See *Erakovic v. Dep't of Labor and Indus.*, 132 Wn. App. 762 (2006).

¹⁴⁰⁴ See *Harry v. Buse Timber & Sales, Inc.*, 166 Wn.2d 1 (2009).

¹⁴⁰⁵ See *Watson v. Dep't of Labor and Indus.*, 133 Wn. App. 903 (2006).

¹⁴⁰⁶ See <http://www.lni.wa.gov/ClaimsIns/Insurance/Reduce/HirePrevIW/>.

¹⁴⁰⁷ Employers who qualify must fill out a DWC reimbursement form, available at http://www.dir.ca.gov/DWC/dwc_home_page.htm.

¹⁴⁰⁸ Cal. Code Regs. tit. 8, §§ 9810 *et seq.*

California employers must also distribute a written notice to new employees that contains substantially this same information.¹⁴⁰⁹

¹⁴⁰⁹ *Id.*

CHAPTER VII

EMPLOYEE BENEFITS (ERISA, COBRA & HIPAA)

SECTION 7.1 FEDERAL REGULATION UNDER ERISA

Employee benefit plans, with the exception of those sponsored by churches or government entities, are generally subject to a complex federal regulatory scheme under the Employee Retirement Income Security Act of 1974 (“ERISA”). Employee benefit plans include pension plans (such as 401(k), 403(b), profit sharing, defined benefit, and deferred compensation plans), and welfare benefit plans (such as health, dental, health care reimbursement, life, disability, and severance plans).¹⁴¹⁰

ERISA applies to any employee benefit plan established or maintained by an employer engaged in commerce, or in any industry or activity affecting commerce, or by an employee organization or organizations representing employees engaged in commerce, or in an industry or activity affecting commerce.¹⁴¹¹ Employee benefit plans established by governmental entities and churches fall outside of ERISA’s coverage.¹⁴¹²

(a) ERISA Requirements

ERISA¹⁴¹³ does not require that employers provide benefits to their employees. Benefits required under other laws, such as Social Security, Workers’ Compensation, the Family and Medical Leave Act (“FMLA”), and state-mandated disability benefits, are explicitly excluded from ERISA. However, once an employer chooses to provide benefits that are covered by ERISA, administrative and fiduciary burdens are imposed on the employer.

(i) Written Plan

ERISA requires that every employee benefit plan be in writing.¹⁴¹⁴ Beware! If a plan is not in writing that does not mean the plan is not covered by ERISA, it merely means that it is not in compliance, and may be subject to penalties. Therefore, employers should be careful in providing any informal benefits to employees.

(ii) Reporting and Disclosure

For many employee benefit plans, ERISA requires that employers file annual reports with the Department of Labor (“DOL”).¹⁴¹⁵ It mandates that employers provide their employees with summary information about the benefit plans in which they participate.¹⁴¹⁶ ERISA also requires that employers provide summary

¹⁴¹⁰ 29 U.S.C. § 1002(3).

¹⁴¹¹ 29 U.S.C. § 1003(a).

¹⁴¹² 29 U.S.C. § 1002(3).

¹⁴¹³ The major requirements of ERISA are discussed in this Guide. The requirements of ERISA go beyond those listed here and a complete discussion of such requirements is beyond the scope of this Guide. Employers should consult an experienced employee benefits attorney for additional information.

¹⁴¹⁴ 29 U.S.C. § 1102.

¹⁴¹⁵ 29 U.S.C. § 1023.

¹⁴¹⁶ 29 U.S.C. § 1022.

annual reports, notice when a plan is being amended, notice when trading restrictions are placed on a retirement plan, and other notices to employers.

(iii) Fiduciary Duties

ERISA requires that employers, and others that have discretionary authority in the administration of employee benefit plans, act prudently, and in the best interests of the plan participants and beneficiaries in the course of administering their plans.¹⁴¹⁷ This may create tension, because an employer's bottom line and the interests of employees are not always aligned. For some kinds of plans, it may be possible for employers to transfer most of these fiduciary duties to other entities, such as insurance companies. However, even if an employer is able to transfer most fiduciary duties, the employer is likely to have a duty to monitor the entity performing the fiduciary duties. Common breaches of fiduciary duty are:

- failure to place employee contributions in trust as soon as they can reasonably be segregated from an employer's general assets;
- failure to adequately supervise service providers; or
- failure to prudently select and monitor plan investments.

(b) ERISA Benefits for Employers

While ERISA imposes burdens on employers, ERISA also provides benefits to employers. When disputes arise between employees and employers as to their benefits under ERISA plans, employers can generally remove such cases to federal district court, where there are no jury trials for benefits claims.¹⁴¹⁸ If employers structure their benefit plans in such a way that the plan grants the employer or administrator "discretion" to make determinations as to benefits, the court will generally only find in favor of the employee if the unfavorable determination was "arbitrary and capricious."¹⁴¹⁹ In addition, ERISA limits recovery to "equitable" remedies, which generally mean that an employee's recovery will be limited to the amount of benefit to which he or she was originally entitled, and there will be no punitive damages.¹⁴²⁰

(c) ERISA Pre-emption of State Law Claims

ERISA is said to "preempt" any state laws that "relate to" benefit plans.¹⁴²¹ Congress intended that employers, and particularly employers that operate in different states, not be subject to a patchwork of state laws that would make it more difficult to administer benefit plans, making it less attractive for employers to offer benefit plans to their employees. However, because states have traditionally regulated insurance, state insurance laws are specifically "saved" from preemption.¹⁴²² Generally, ERISA includes an exception from this savings clause for self-funded benefit plans, providing such plans shall not be deemed to be insurance.¹⁴²³

(d) Penalties for ERISA Non-Compliance

ERISA contains both criminal and civil penalties for employers who fail to comply with its requirements. Criminal penalties may be imposed if violations are willful. Criminal penalties imposed against individuals may include fines of \$100,000 and imprisonment of not more than 10 years. For corporations, potential fines are \$500,000.¹⁴²⁴

¹⁴¹⁷ 29 U.S.C. § 1104.

¹⁴¹⁸ 29 U.S.C. § 1132(e)(1).

¹⁴¹⁹ See *Firestone Tire & Rubber v. Bruch*, 489 U.S. 101 (1989).

¹⁴²⁰ See *Merters v. Hewitt Assocs.*, 508 U.S. 248 (1993).

¹⁴²¹ See 29 U.S.C. § 1144; see also *Shaw v. Delta Airlines*, 463 U.S. 85, 100 (1983).

¹⁴²² 29 U.S.C. § 1144; see also *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355 (2002); *Pilot Life Ins. v. Dedeaux*, 481 U.S. 41, 57 (1987).

¹⁴²³ 29 U.S.C. § 1144.

Civil penalties may be recovered by the DOL for breaches of fiduciary duty, failure to file required annual reports and other failures or omissions. If a fiduciary is found to have breached his duty, and the DOL recovers a sum of money for the plan, the DOL may impose an additional twenty percent.¹⁴²⁵ If a plan administrator (usually the employer) fails to file required annual reports, the DOL is authorized to assess penalties of as much as \$1,000 per day for non-compliance.¹⁴²⁶ In addition, employers are liable to individual participants for up to \$100 per day for each day (beyond 30 days) that they fail to provide a summary plan description, or other required disclosures on request.¹⁴²⁷

(e) The Relation Between ERISA and the Internal Revenue Code

Many ERISA plans are tax-favored, meaning they provide tax advantages to employers, employees, or both. ERISA itself contains certain provisions that became a part of the Internal Revenue Code (“IRC”). In addition, there are many parallel provisions under the IRC and ERISA that amended labor laws.¹⁴²⁸ As a result, employers must be cautious when dealing with employee benefit plans of all kinds, because failure to properly create, modify, administer or terminate employee benefit plans may result in penalties imposed under ERISA, as well as the loss of tax benefits or the imposition of excise taxes.¹⁴²⁹

(f) Non-Discrimination Requirements

The IRC generally prohibits discriminating in favor of highly compensated employees in employer-provided retirement plans, medical plans, tuition reimbursement plans, and cafeteria plans. For instance, tax-qualified retirement plans are only eligible for tax advantages if they pass the IRC’s non-discrimination requirements. This includes requirements related to coverage,¹⁴³⁰ “top-heavy” rules,¹⁴³¹ non-discrimination in contributions, and benefits rights and features.¹⁴³² There also are requirements for 401(k) plans including Actual Deferral Percentage (“ADP”) and Actual Contribution Percentage (“ACP”) tests.¹⁴³³ Some of these tests can be avoided through plan design that precludes or reduces the possibility of discrimination. Generally these tests must be performed regularly, and if failed, must be corrected promptly.

(g) Blackout Period Regulations

When an employer-provided retirement plan, such as a 401(k) plan, makes administrative changes, there is typically a “blackout period.” During this period, employees cannot direct their investments or take distributions from their accounts. ERISA requires that employers generally provide notice to employees of a blackout period that extends for more than three business days. Regulations provide guidance regarding the content of the notice, the time, form, and manner of providing the notice, and civil penalties for failing to provide notice.¹⁴³⁴ If an employer has a blackout period under one of its retirement plans, and that plan allows employees to invest in employer securities, the blackout period may trigger restrictions on the ability

¹⁴²⁴ 29 U.S.C. § 1131.

¹⁴²⁵ See 29 U.S.C. § 1132(1).

¹⁴²⁶ See 29 U.S.C. § 1132(c); 29 C.F.R. § 256.502c-4.

¹⁴²⁷ 29 U.S.C. § 1132(c).

¹⁴²⁸ For example, both ERISA and the IRC prohibit certain transactions between plans and related parties, which are breaches of fiduciary duty under ERISA, and result in excise taxes under the IRC.

¹⁴²⁹ For example, failure to place employee 401(k) deferrals in trust as soon as they can reasonably be segregated from the general assets of the employer may be viewed as an impermissible loan from the plan to the employer, which is a prohibited transaction which is subject to an excise tax under IRC § 4975, and which is a breach of fiduciary duty under ERISA § 406 (29 U.S.C. § 1106).

¹⁴³⁰ 26 U.S.C. § 410(b).

¹⁴³¹ 26 U.S.C. § 416.

¹⁴³² 26 U.S.C. § 401(a)(4).

¹⁴³³ 26 U.S.C. §§ 401(k)(10), 401(m)(8). ADP/ACP tests provide a limit on the amount that certain benefits provided under the plan to highly compensated employees may exceed the benefits provided to non-highly compensated employees.

¹⁴³⁴ 29 C.F.R. § 2520.101-3.

of corporate insiders to trade employer securities under other equity and non-qualified plans. In such a case, securities laws require the employer to provide a special notice to such corporate insiders and the Securities and Exchange Commission (“SEC”).¹⁴³⁵ Concerned employers who anticipate an upcoming blackout period should consult an experienced benefits attorney to ensure they satisfy the regulation’s requirements.

SECTION 7.2 EMPLOYEE BENEFITS AFTER TERMINATION

Under federal and state law, employers who provide group health coverage for employees and their dependents must offer employees the right to continue the group coverage under certain circumstances.

In addition, federal and state laws mandate employers follow health coverage portability, privacy, and security laws.

(a) COBRA Continuation Coverage

The Consolidated Omnibus Budget Reconciliation Act of 1985 (“COBRA”)¹⁴³⁶ requires that employer group health plans permit a qualified beneficiary to elect continuation of coverage for a specific period upon the occurrence of a “qualifying event” which would otherwise result in the loss of coverage.¹⁴³⁷ Employers who have fewer than 20 employees are generally exempt from COBRA.¹⁴³⁸ Employees counted include both full-time and part-time workers.¹⁴³⁹ It should be noted that COBRA applies to both insured and self-funded group health plans. In addition to COBRA, state health continuation coverage mandates may apply to insured group health plans.

The following information provides a brief overview of the laws. Due to the complexity of the law, employers are advised to consult an attorney knowledgeable in COBRA law.

(i) Definitions

“Qualifying events” include the following:¹⁴⁴⁰

- employee’s death;
- employee’s termination (except for gross misconduct by the employee), or reduction of employee’s hours;
- employee’s divorce or legal separation;
- employee becoming eligible for Medicare benefits;
- dependent child ceasing to be a dependent child under the group health plan; or
- filing of a bankruptcy petition by the employer.

A “qualified beneficiary” is an individual who is covered under the employer’s group health plan because he or she is performing services as an employee or is the spouse or dependent child of an employee.¹⁴⁴¹ Certain non-employees, such as partners, directors, or independent contractors, may be covered employees if they receive benefits under the group plan.¹⁴⁴² A child born to an employee or adopted or placed with

¹⁴³⁵ See 17 C.F.R. § 245.

¹⁴³⁶ 29 U.S.C. §§ 1161-1168; 26 U.S.C. § 4980B(f); see 26 C.F.R. § 54.4980B (containing IRS regulations); (DOL regulations codified at 29 C.F.R. § 2590.606).

¹⁴³⁷ 29 U.S.C. § 1163; 26 U.S.C. § 4980B(f)(3).

¹⁴³⁸ 29 U.S.C. § 1161(b). Smaller employers should be aware that certain states imposed COBRA-like duties on employers of less than 20 employees. See, e.g., Cal. Ins. Code § 10128.53(a).

¹⁴³⁹ 26 C.F.R. § 54.4980B-2, Q&A-5(c).

¹⁴⁴⁰ 29 U.S.C. § 1163.

¹⁴⁴¹ 29 U.S.C. § 1167(3).

the employee during a period of continuation coverage is considered a “qualified beneficiary” if the child is timely enrolled for COBRA continuation coverage.¹⁴⁴³

(ii) Duration of COBRA Continuation Coverage Periods

COBRA continuation coverage must begin when a qualified beneficiary loses coverage under the plan due to a qualifying event and must continue as follows:¹⁴⁴⁴

QUALIFYING EVENT	PERSONS WHO MAY ELECT COBRA	CONTINUATION COVERAGE PERIOD
Employee’s termination of employment (for reasons other than gross misconduct)	Employee, employee’s spouse and dependent children	18 months
Employee becomes “benefits ineligible” due to a reduction in hours	Employee, employee’s spouse and dependent children	18 months
Employee’s termination of employment or reduction in hours after employee becomes entitled to Medicare	Employee’s spouse and dependent children	36 months from the date of eligibility for Medicare or, if later, 18 months (29 months if there is a disability extension) from the date of the termination of employment or reduction in hours
Disability of employee, employee’s spouse or dependent child	Employee, employee’s spouse and dependent children	29 months (original 18 months plus additional 11 months)
Divorce or legal separation	Employee’s spouse and dependent children	36 Months
Employee’s death	Employee’s spouse and dependent children	36 Months
Loss of dependent status (a dependent child ceasing to be a dependent child under the plan)	Ineligible dependent child	36 Months
Second Qualifying Event after a termination or reduction in hours (<i>i.e.</i> , death, divorce, legal separation, or loss of dependent status)	Employee’s spouse and dependent children	36 months (original 18 months plus additional 18 months)

In addition, in the case of a Chapter 11 bankruptcy of the employer, continuation coverage must be provided to retired employees *until their death* if the retirees elected continuation coverage under the plan at the time of, or preceding, the bankruptcy proceeding. Similarly, coverage must be continued until the death

¹⁴⁴² 26 C.F.R. § 54.4980B-3, Q&A-2. Note that covering non-employees can raise multiple employer welfare arrangement compliance issues.

¹⁴⁴³ 26 U.S.C. § 4980B(g)(1)(A).

¹⁴⁴⁴ 29 U.S.C. § 1162(2); 26 U.S.C. § 4980B(f)(2). A shorter period may apply if the continuation coverage is for a health flexible spending arrangement.

of a surviving spouse of a retiree if the spouse elected lifetime coverage at the time of the bankruptcy proceeding.¹⁴⁴⁵

1) Second Qualifying Events

If the spouse or dependent of an employee elects continuation coverage following the employee's termination of employment or reduction in hours, and during the 18 months of continuation coverage the spouse or dependent experiences a second qualifying event, the spouse or dependent will be entitled to elect a total of 36 months of continuation coverage beginning from the date the initial 18-month continuation coverage period began. To receive this additional continuation coverage, the employee's family members must notify the employer of the second qualifying event within 60 days of the event.¹⁴⁴⁶

2) Medicare

If the employee becomes entitled to Medicare and coverage is lost due to the employee's termination of employment or reduction in hours of employment, the employee's spouse or dependent will be entitled to continuation coverage until the later of the date which is: (1) 36 months from the date the employee became entitled to Medicare; or (2) 18 months from the date of the employee's termination of employment or reduction in hours of employment.¹⁴⁴⁷

3) Disability

An additional 11 months of continuation coverage may be purchased if any qualified beneficiary (*i.e.*, the employee, spouse or dependent children) who elected continuation coverage is determined to be disabled by the Social Security Administration at the time or within 60 days of the employee's termination of employment or reduction in hours of employment.

To purchase the additional 11 months of continuation coverage, the employee, spouse or dependent child must contact the employer within 60 days of the date such a determination is made by the Social Security Administration and within the first 18 months of continuation coverage. At that time, the disabled qualified beneficiary also must provide proof of the Social Security Administration's determination of disability.

If the Social Security Administration determines that the previously determined disabled person is no longer disabled, the employee, spouse or dependent child must contact the employer within thirty days of the date of such determination.¹⁴⁴⁸

(iii) Early Termination of COBRA Continuation Coverage

The following events will generally cause the continuation coverage periods to terminate immediately:¹⁴⁴⁹

- the employer no longer provides any group health plan to any of its employees;
- the qualified beneficiary(ies) fails to make a timely premium payment (*i.e.*, within 30 days of the due date), unless the failure is the failure to pay an amount that is not significantly less than the required amount;¹⁴⁵⁰

¹⁴⁴⁵ 29 U.S.C. § 1162(2)(A)(iii); 26 U.S.C. § 4980B(f)(2)(B)(III).

¹⁴⁴⁶ 29 U.S.C. § 1162(2)(A)(ii); 26 U.S.C. § 4980B(f)(2).

¹⁴⁴⁷ 29 U.S.C. § 1162(A)(v); 26 U.S.C. § 4980B(f)(2).

¹⁴⁴⁸ 29 U.S.C. § 1162(2); 26 U.S.C. § 4980B(f)(2).

¹⁴⁴⁹ *Health Care Continuation Coverage*, 69 Fed. Reg. 30,108 (May 26, 2004) (codified at 29 C.F.R. § 2590).

¹⁴⁵⁰ 26 C.F.R. § 54.4980B-8, Q&A-5(d) (providing that if an employee or qualified beneficiary pays an amount that is not significantly less than the required amount, then the amount is deemed to satisfy the payment requirement unless the plan notifies the qualified beneficiary of the underpayment and provides "a reasonable period of time for payment of the deficiency to be made").

- the qualified beneficiary(ies) becomes covered under any other group health plan which does not contain any exclusion or limitation with respect to any preexisting condition applicable to such covered individual; or
- the qualified beneficiary(ies) becomes entitled to benefits under Medicare. Other COBRA beneficiaries, such as the spouse or dependents, retain their COBRA rights if they are not also entitled to Medicare benefits.

Additionally, if coverage has been extended due to a disability, continuation coverage will terminate as of the first day of the month beginning 30 days after the Social Security Administration determines that the qualified beneficiary is no longer disabled.¹⁴⁵¹

(iv) Applicable Premiums

Generally, under COBRA, a group health plan may require payment of a premium of up to one hundred and two percent of the actual cost of the coverage, and the qualifying beneficiary may elect to pay the premium monthly.¹⁴⁵² In the case of disabled beneficiaries and their family members, employers may charge up to one hundred and fifty percent of the applicable premium for coverage during the disability extension. The initial premium must be received within 45 days of the date on which COBRA continuation coverage was elected. Thereafter, each monthly premium must be sent no later than 30 days after the due date established by the employer.¹⁴⁵³

(v) Notice Requirements

Much of the litigation under COBRA relates to the notice requirements and whether a participant has received an initial notice or sufficient information regarding COBRA. The DOL has issued guidance on notice obligations under COBRA.¹⁴⁵⁴ The guidance provides model notices for the general (initial) notice and election notice.¹⁴⁵⁵ In addition, the guidance and prior summary plan description regulations mandate certain COBRA language in its group health plan summary plan descriptions.

Employers and employees have the following notice requirements:

- **General (Initial) Notice.** Plan administrators (often employers) must notify new employees and qualified beneficiaries of their COBRA continuation rights when the employee is first employed or becomes eligible for the group health plan. The DOL has provided a model notice, but plan administrators must customize the form to their plans, providing detailed information on the procedures to elect COBRA continuation coverage and deleting information that is not applicable.¹⁴⁵⁶
- **Election Notice.** Plan administrators must notify employees and qualified beneficiaries of their right to elect COBRA coverage when an employee loses coverage due to the employee's death, termination of employment, or reduction in hours, or the employer's declaration of bankruptcy.¹⁴⁵⁷

When the qualifying event is a divorce or legal separation or a loss of dependent status, the *employee or a qualifying beneficiary* must give the employer notice of the qualifying event within 60 days after the loss of coverage or the qualifying event, whichever is later. In all other situations, the *employer* must notify the *plan administrator* within 30 days of the qualifying event. The *plan administrator* must notify each qualified

¹⁴⁵¹ 29 U.S.C. § 1162(2)(E).

¹⁴⁵² 29 U.S.C. § 1162(3); 29 U.S.C. § 1164.

¹⁴⁵³ 29 U.S.C. § 1162.

¹⁴⁵⁴ *Health Care Continuation Coverage*, 69 Fed. Reg. 30,084 (May 26, 2004) (codified at 29 C.F.R. § 2590).

¹⁴⁵⁵ *Id.* at 30,099 (model general notice); *id.* at 30,106 (model election notice).

¹⁴⁵⁶ Appendix to 29 C.F.R. § 2590.606-1.

¹⁴⁵⁷ 29 U.S.C. § 1166(c); 29 C.F.R. § 2590.606-4(b).

beneficiary of the COBRA continuation rights within 14 days after receiving notice of a qualifying event. When the employer is the plan administrator, for qualifying events other than divorce, legal separation, or loss of dependent status, the *employer* must give notice to qualified beneficiaries within 44 days after the qualifying event.

The DOL has provided a model notice that plan administrators may use with employees and qualified beneficiaries. However, plan administrators must customize the form to their plans, including providing detailed information on the procedures to elect COBRA continuation coverage, deleting information that is not applicable, and providing information on payments. In addition, plan administrators should review the model notice language, which commentators have suggested could be clarified on several points.¹⁴⁵⁸

- **Unavailability Notice.** If an employee or qualified beneficiary request COBRA continuation coverage but are not eligible, the plan administrators must provide to such individual an explanation as to why the individual is not entitled to continuation coverage.¹⁴⁵⁹ The unavailability notice stating that the individual is not eligible for COBRA continuation coverage must be written in a manner to be understood by the average plan participant and must be provided within 14 days after receiving any notice from an employee or a qualified beneficiary of a qualifying event, a second qualifying event, or a determination of disability.¹⁴⁶⁰ For example, notice must be provided if an employee or qualified beneficiary provides late notice of a qualifying event. The plan administrator must respond with a notice of unavailability, explaining that COBRA coverage will not be provided because the notice of qualifying event was too late.

The DOL has not provided a model unavailability notice.¹⁴⁶¹

- **Termination Notice.** Plan administrators must notify employees and qualified beneficiaries that COBRA continuation coverage is being terminated “as soon as practicable following the administrator’s determination that continuation coverage shall terminate.”¹⁴⁶² The notice must state the reason COBRA continuation coverage is being terminated earlier than the maximum period, the date of the termination of continuation coverage, and the rights (if any) to elect alternative coverage.¹⁴⁶³

The DOL has not provided a model termination notice. However, many employers already provide such a notice to prevent claims by a qualified beneficiary.¹⁴⁶⁴

(vi) Election Requirements

A qualified beneficiary has a 60-day “election period” within which to elect COBRA continuation coverage. The 60-day election period begins on the date the notice is provided, or the date on which coverage would otherwise be lost, whichever is latest. If a qualified beneficiary does not elect to continue coverage before the end of the 60-day period, there is no further right to elect COBRA coverage.

Each qualified beneficiary has a separate right to elect COBRA continuation coverage.¹⁴⁶⁵ In addition, an employee or an employee’s spouse may elect COBRA continuation coverage on behalf of other qualified

¹⁴⁵⁸ *Health Care Continuation Coverage*, 69 Fed. Reg. 30,084, 30,109 (May 26, 2004) (codified at 29 C.F.R. § 2590).

¹⁴⁵⁹ 29 C.F.R. § 2590.606-4(c)(1).

¹⁴⁶⁰ 29 C.F.R. § 2590.606-4(c)(2).

¹⁴⁶¹ 29 C.F.R. § 2590.606-4(c).

¹⁴⁶² 29 C.F.R. § 2590.606-4(d)(3).

¹⁴⁶³ 29 C.F.R. § 2590.606-4(d)(2).

¹⁴⁶⁴ 29 C.F.R. § 2590.606-4(d).

¹⁴⁶⁵ *See* 29 U.S.C. § 1161(a); 26 C.F.R. § 54.4980B-6, Q&A-6.

beneficiaries.¹⁴⁶⁶ A covered employee may not waive coverage on behalf of his or her spouse or dependents.¹⁴⁶⁷

(vii) Penalties for COBRA Violations

The IRC provides for excise taxes of up to \$100 per day for non-compliance with COBRA for each qualified beneficiary (\$200 per day for non-compliance with respect to multiple qualified beneficiaries in one family).¹⁴⁶⁸ Form 8928 must be filed with the IRS to self-report excise taxes for COBRA violations if no exception to filing applies. In addition, employees and beneficiaries may sue and recover statutory penalties under ERISA of up to \$110 per day for each violation.¹⁴⁶⁹

(b) HIPAA Portability

The Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) places many requirements on employers. HIPAA applies to employer-sponsored plans that provide health care benefits. Unlike COBRA, which exempts small groups, HIPAA portability rules apply to all employer-sponsored health plans that cover two or more employees.¹⁴⁷⁰

HIPAA is intended to make health insurance more portable and, to that end, requires plans and health insurers to issue certificates of creditable coverage to those who lose coverage under the plan: (1) at the time the coverage is lost; (2) when COBRA coverage ends; *and* (3) whenever requested by the previously covered individual within two years of the loss of coverage. Every individual whose coverage ceases is entitled to a certificate, whether or not the individual experiences a “qualifying event” under COBRA. Time limits for issuing certificates mirror the time limits for COBRA qualifying event notices.¹⁴⁷¹

HIPAA places restrictions on how a plan may limit coverage for preexisting conditions and requires that subsequent plans or insurers honor the certificates when applying preexisting condition limitations. HIPAA requires that group health plans and insurers allow special mid-year enrollments for certain employees and dependents who lose other coverage, or become eligible by virtue of birth, adoption or marriage.¹⁴⁷² HIPAA bans “evidence of insurability” requirements for group health plans and prohibits delayed enrollment or premium surcharges based on health status.¹⁴⁷³

HIPAA does not require that an employer provide health insurance, nor does HIPAA mandate specific benefits or contribution rates for those employers that do provide health insurance.

The DOL, IRS, and the Department of Health and Human Services have previously issued final regulations regarding HIPAA portability, providing a model certificate of credible coverage.¹⁴⁷⁴

(c) HIPAA Privacy and Security

In addition to the portability requirements, HIPAA contains rules governing the privacy and security of health information obtained under an employer’s group health plan. HIPAA’s privacy rules regulate the use and disclosure of protected health information (“PHI”) held by group health plans. HIPAA’s security

¹⁴⁶⁶ See 29 U.S.C. § 1165(a)(2); 26 C.F.R. § 54.4980B-6, Q&A-6.

¹⁴⁶⁷ 26 C.F.R. § 54.4980B-6, Q&A-6, Example 1(ii).

¹⁴⁶⁸ 26 U.S.C. § 4980B(b); H.R. Rep. No. 1104, 100th Cong., 2d Sess. 26 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5048, 5086.

¹⁴⁶⁹ 29 C.F.R. § 2575.502c-1.

¹⁴⁷⁰ 26 U.S.C. § 9831(a)(2); 29 U.S.C. § 1191(a); 42 U.S.C. § 300gg-21(a).

¹⁴⁷¹ 29 C.F.R. § 2590.701-5(a)(2).

¹⁴⁷² See 29 U.S.C. §§ 1181-1183.

¹⁴⁷³ *Id.*

¹⁴⁷⁴ *Final Regulations for Health Coverage Portability for Group Health Plans and Group Health Insurance Issuers Under HIPAA Titles I & IV*, 69 Fed. Reg. 78,720, 78,726 (Dec. 30, 2004) (providing model certificate of credible coverage).

regulations address how group health plans must protect the confidentiality, integrity, and availability of PHI stored on or transmitted by electronic media.

The American Recovery and Reinvestment Act of 2009 (“ARRA”), signed into law on February 17, 2009, made several important changes with respect to the HIPAA privacy and security rules.¹⁴⁷⁵ When first enacted, HIPAA’s privacy and security rules applied only to health care providers, health plans, and certain other entities. Business associates of covered entities were not subject to these rules.¹⁴⁷⁶ Instead, business associates were required by contract to protect identifiable health information. As a result of ARRA, business associates are now subject to certain portions of the HIPAA privacy and security rules.

Prior to ARRA, the HIPAA rules did not require group health plans to make notifications in the event of a breach of PHI. Under ARRA, a group health plan must notify individuals of any unauthorized acquisition, access, use or disclosure of PHI within 60 days after discovery of the breach. In some cases, the group health plan must immediately notify the Secretary of Health and Human Services (“HHS”) as well as the local media in the area where the individuals reside.

In addition, ARRA significantly strengthened HIPAA’s penalty and enforcement provisions. Prior to ARRA, the penalty was \$100 per violation, up to a maximum amount of \$25,000 for multiple violations in the same calendar year. Under ARRA, each violation of the HIPAA rules may result in penalties ranging from \$100 to \$50,000, while similar violations occurring in a calendar year may result in penalties ranging from \$25,000 to \$1,500,000.

(d) Other Federal Mandates

Numerous other federal laws have applications to employee benefit plans. Employers should review their health plans and summary plan descriptions to ensure that they conform to legislative requirements, including the Mental Health Parity Act (“MHPA”), the Newborns’ and Mothers’ Health Protection Act of 1996, and the Women’s Health and Cancer Rights Act of 1998. Employers should consult a knowledgeable employee benefits attorney if they have any questions or concerns.

- **The Mental Health Parity Act** requires that group health plans provide parity between medical/surgical and mental health benefits in the application of annual dollar limits and aggregate lifetime dollar limits.¹⁴⁷⁷ It generally does not apply to employers who averaged less than 50 employees during the previous year.¹⁴⁷⁸

The extension of the MHPA was set to expire on December 31, 2008. However, as part of the Emergency Economic Stabilization Act of 2008, the MHPA requirements found in ERISA, the Public Health Service Act, and the Internal Revenue Code have been expanded and made permanent as of January 1, 2009.¹⁴⁷⁹

The new law imposes significant substantive requirements that will require the redesign of many employer-sponsored group health plans, particularly self-funded ones. Interim final regulations implementing the law were issued on February 2, 2010¹⁴⁸⁰ by the Secretaries of Labor, Health and Human Services and the Treasury. An employer should consult with a benefits attorney for additional information on changes to the MHPA.¹⁴⁸¹

¹⁴⁷⁵ Pub. L. No. 111-5 (2009).

¹⁴⁷⁶ A “business associate” is any person or entity who performs or helps perform a function or activity on behalf of a covered entity that involves the use or disclosure of identifiable health information. *See* 45 C.F.R. § 160.103.

¹⁴⁷⁷ 29 U.S.C. § 1185a(a).

¹⁴⁷⁸ 29 U.S.C. § 1185a(c).

¹⁴⁷⁹ Pub. L. No. 110-343 (2008).

¹⁴⁸⁰ 75 Fed. Reg. 5410 (Feb. 2, 2010).

¹⁴⁸¹ Refer to http://www.dorsey.com/eupd_mental_health_parity/ for additional information on the new law’s provisions.

California's mental health parity laws, which have been on the books since 1999, mandate mental health coverage under insured plans for certain "severe" mental illnesses (*e.g.*, schizophrenia, schizoaffective disorder, bipolar disorder, major depressive disorders, panic disorder, obsessive-compulsive disorder, etc.) and "serious emotional disturbance" in children.¹⁴⁸² The new MHPA does not affect these provisions; however, it does pre-empt the financial and treatment limit sections of California's laws. Whereas California's laws contain weaker requirements with regard to the financial and treatment limit sections, the new federal law would now prevail.¹⁴⁸³

- **The Newborns' and Mothers' Health Protection Act** generally prohibits group health plans restricting hospital stays in connection with childbirth below certain minimums.¹⁴⁸⁴
- **The Women's Health and Cancer Rights Act of 1998** requires that group health plans provide specific reconstructive surgery benefits for women who undergo mastectomies, to the extent that the plans cover the mastectomies themselves.¹⁴⁸⁵

(e) State Mandates

Some states have statutes that are more generous to employees in the area of continuation coverage.¹⁴⁸⁶ As noted above, federal law generally preempts state law in the area of benefit plans, but state laws that regulate insurance are specifically "saved" from preemption.¹⁴⁸⁷ Usually plans that are "self-insured" by employers are not subject to state insurance law, but plans that provide benefits through insurance policies are. Washington has no statute purporting to expand the requirements that COBRA and HIPAA place on employers. Most state laws that attempt to expand COBRA and HIPAA benefits beyond the scope of the federal mandates are written to apply only to insurers and thus to avoid preemption; however, employers with employees in other states should consult a benefits attorney regarding any special requirements in that state.¹⁴⁸⁸

SECTION 7.3 RECENT KEY EMPLOYEE BENEFIT ISSUES

(a) Rules For Executive Compensation Legislation¹⁴⁸⁹

(i) Section 409A

The American Jobs Creation Act of 2004, which was signed by President Bush on October 22, 2004, added Section 409A to the IRC, which imposes a number of new restrictions on deferred compensation and imposes a twenty percent penalty on deferred compensation that fails to comply with the requirements.¹⁴⁹⁰ Section 409A defines "deferred compensation" as including certain bonus payments, severance payments, and retention awards, in addition to traditional non-qualified deferred compensation and equity awards. In addition, Section 409A applies to employees, directors and independent contractors.

On December 5, 2008, shortly in advance of the December 31, 2008, deadline for non-qualified deferred compensation arrangements to comply with the documentary requirements violations of Section 409A,

¹⁴⁸² Cal. Health & Safety Code §§ 1374.72(a), (d)-(e).

¹⁴⁸³ *See id.*; Pub. L. No. 110-343 (2008).

¹⁴⁸⁴ 29 U.S.C. § 1185(a).

¹⁴⁸⁵ 29 U.S.C. § 1185(b).

¹⁴⁸⁶ *See, e.g.*, Cal. Ins. Code § 10128.53(a). These statutes are generally referred to as "mini-COBRA" laws. For a complete list of such laws see Paul M. Hamburger, *Mandated Health Benefits: The COBRA Guide* ¶ 2000 (Thompson Pub. 2002).

¹⁴⁸⁷ 29 U.S.C. § 1144.

¹⁴⁸⁸ *But see* RCW 48.21.250.

¹⁴⁸⁹ *See* Chapter I for information on individual employment agreements. *See* Chapter XII for additional information on Section 409A.

¹⁴⁹⁰ 26 U.S.C. § 409A.

the IRS issued Notice 2008-113, providing relief for certain operational violations of Section 409A. The IRS has not provided an extension of the documentary compliance deadline and has not given relief for good faith compliance with the Section 409A regulation. Subsequently, the IRS has created a limited correction program for certain documentary failures of Section 409A.¹⁴⁹¹

Although there are a number of exceptions under Section 409A, an employer should consult with a benefits attorney regarding the scope of impact of Section 409A on its plans.

(ii) Say-on-Pay

The Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”)¹⁴⁹² was signed into law on July 21, 2010. The Dodd-Frank Act imposes certain requirements on the executive pay practices of publicly traded companies. Companies required to comply with the Dodd-Frank Act now must submit to non-binding shareholder votes: (1) their named executive officers’ compensation (“Say-on-Pay”), (2) the frequency of future Say-on-Pay votes, and (3) in some circumstances, certain “golden parachute”-related compensation. The Dodd-Frank Act also requires enhanced compensation disclosure and the implementation of clawback provisions providing for the recoupment of compensation in certain circumstances.

(iii) Executive Health

A minor provision in the 2010 health care reform¹⁴⁹³ implies major changes to executive health care in the near future. The practice of providing deluxe executive health care through fully insured health plans, thereby avoiding ERISA’s nondiscrimination requirements, appears to be on the way out. A common practice for providing executives with better health care than rank-and-file employees involved offering a self-funded group health plan to the employees and providing the executives with a fully insured group health plan that provided better coverage. Health care reform imposes new non-discrimination testing requirements on fully insured group health plans which would appear to render this practice untenable. This is an area of developing law, however, as regulations under this provision of health care reform have not yet been issued.

(b) Genetic Information Nondiscrimination Act of 2008

On May 21, 2008, President Bush signed the Genetic Information Nondiscrimination Act of 2008 (“GINA”). GINA generally prohibits employers, employment organizations and labor organizations from discriminating against employees or prospective employees on the basis of genetic information.¹⁴⁹⁴ GINA also sets forth new non-discrimination prohibitions that apply to group health plans, health insurance companies and employers. GINA applies to group health plans for plan years beginning at least one year after the date of enactment (*i.e.*, for calendar year plans January 1, 2010). GINA establishes a number of new prohibitions, including:¹⁴⁹⁵

- currently, the HIPAA non-discrimination regulations prevent group health plans from taking into account genetic information when setting an individual’s premiums. GINA takes this a step further by prohibiting group health plans from adjusting premiums or employer contribution amounts for the group as a whole on the basis of genetic information. However, GINA does not prevent the premium or contribution of the group from being adjusted on the basis of the actual manifestation of any disease or disorder of an individual covered by the plan;

¹⁴⁹¹ IRS Notice 2010-6 and IRS Notice 2010-80.

¹⁴⁹² Pub. L. No. 111-203, § 922 (2010).

¹⁴⁹³ Discussed more comprehensively in subsection (f) (below).

¹⁴⁹⁴ Pub. L. No. 110-233 (2008).

¹⁴⁹⁵ *Id.* § 101.

- group health plans from requesting or requiring an individual or a family member to undergo a genetic test;
- group health plans from requesting, requiring or purchasing genetic information for underwriting purposes. Underwriting is defined to include determination of eligibility for benefits, computation of a premium or contribution under the plan, the application of a pre-existing condition exclusion and other activities relating to the creation, renewal or replacement of coverage; and
- requesting, requiring or purchasing genetic information for any purpose before an individual's enrollment under the plan.

An employer is advised to consult with a benefits attorney regarding specific GINA questions and the scope of impact of GINA to group health plans.

(c) Michelle's Law

On October 9, 2008, President Bush signed into law "Michelle's Law." The new law ensures continuity of medical coverage under parents' plans for college students who take a medically necessary leave of absence from college. Michelle's Law amends the Employee Retirement Income Security Act of 1974, the Public Health Service Act, and the Internal Revenue Code to prohibit a group health plan, or a health insurance issuer that provides health insurance coverage in connection with a group health plan, from terminating coverage of a dependent child due to a qualifying "medically necessary leave of absence," or other change in enrollment at a post-secondary education institution prior to the earlier of: (1) the date that is one year after the first day of the medically necessary leave of absence; or (2) the date on which such coverage would otherwise terminate under the terms of the plan.¹⁴⁹⁶

Michelle's Law does not address COBRA continuation coverage and has left open the question how to apply COBRA during a student's "medically necessary leave of absence."

The law is effective for plan years beginning on or after October 9, 2009, making it effective January 1, 2010 for calendar year plans. Employers should consult with a benefits attorney regarding specific questions about Michelle's Law.¹⁴⁹⁷

(d) 401(k) and Retirement Plan Regulations

The IRS has issued final regulations under sections 401(k) and 401(m) of the IRC, which govern 401(k) plans.¹⁴⁹⁸ The IRS also has issued final regulations regarding Roth accounts in 401(k) plans.¹⁴⁹⁹ Tax-qualified retirement plans (including 401(k) plans) must comply with these final regulations.

(i) Military Service

The DOL has issued final regulations under Uniformed Services Employment and Reemployment Rights Act ("USERRA") as they relate to benefits plans.¹⁵⁰⁰ The final regulations address all aspects of USERRA, including requirements regarding health continuation coverage, retirement plan rules, and 401(k) plan catch up contribution rules for employees who are or have been called to active military service. The final regulations incorporate the change in the law that expands the period for which employers must continue employer-provided health coverage from 18 months to 24 months.¹⁵⁰¹ Congress also passed the HEART Act which amends USERRA and creates additional rights for employees in military service.¹⁵⁰² Many

¹⁴⁹⁶ Pub. L. No. 110-381 (2008).

¹⁴⁹⁷ Refer to: http://www.dorsey.com/michelles_law_eupdate_dec09/ for additional information on the new law's provisions.

¹⁴⁹⁸ Treas. Reg. § 1.401(k); Treas. Reg. § 1.401(m).

¹⁴⁹⁹ Treas. Reg. § 1.401(k).

¹⁵⁰⁰ 20 C.F.R. §§ 1002.1 *et seq.*

¹⁵⁰¹ Veterans Benefits Improvement Act of 2004, Pub. L. No. 108-454, § 201 (2004) (codified at 38 U.S.C. § 4317).

employers have had employees called to active service and these employers should review the benefits required to be provided to such employees.

(ii) Fee Disclosures

In 2010, the DOL adopted new regulations aimed at improving fee transparency with respect to 401(k) and other retirement plans. The regulations adopt a two-part regulatory scheme that ensures that plan administrators must disclose certain fee information to plan participants (“Participant Disclosure Rules”), and service providers, in turn, must disclose similar information to the plan fiduciaries (“Service Provider Disclosure Rules”) (collectively, “Fee Disclosure Rules”). The DOL has imposed serious consequences for failure to comply with the Fee Disclosure Rules: failure to satisfy the Participant Disclosure Rules results in a breach of fiduciary duty under Section 404(a) of ERISA; failure to satisfy the Service Provider Disclosure Rules results in a prohibited transaction under Section 406(a) of ERISA. The Fee Disclosure Rules generally become effective in 2012 for all covered retirement plans.

(e) Retirement Plan Litigation

Litigation involving investment of employer stock in 401(k) plans and the conversion of traditional defined balance plans to cash balance plans continues. Due to the number of cases being brought, this is a developing area of the law.¹⁵⁰³ In addition, because many employees have failed to accumulate retirement income under 401(k) plans, a number of benefits attorneys believe the next generation of litigation involving retirement plans will involve investment selection, fee disclosure, and investment education. Employers (particularly those with plans that permit investment in employer stock) should review their plans and compliance with section 404(c) of ERISA and, as appropriate, take steps to reduce potential exposure.

(f) Federal Health Care Reform

In early 2010, Congress passed the Patient Protection and Affordable Care Act (“PPACA”)¹⁵⁰⁴ and the Health Care and Education Reconciliation Act,¹⁵⁰⁵ collectively “health care reform.” Federal health care reform affects almost all group health plans. Group health plans may be “grandfathered” or “non-grandfathered” depending on what design changes are made to the plan. If a plan is non-grandfathered, then more of the mandates under federal health care reform will apply to the plan. However, even if a plan is grandfathered, some of the provisions of federal health care reform will apply. Federal health care reform contains a number of new requirements that must be incorporated into the design of health plans. For instance, both grandfathered and non-grandfathered plans must eliminate lifetime maximum limits and cover children up to age 26. Other mandates only apply to non-grandfathered plans, such as the requirement to provide an external claims procedure. Many of the mandates of federal health care reform are first applicable for the plan year beginning on or after September 23, 2010 (January 1, 2011 for calendar year plans), but other changes, such as the elimination of all preexisting condition exclusions in 2014, will occur in later years. Additionally, in 2014 the “pay-or-play” mandate will apply to employers with 50 or more full-time employees in the previous year. Under the pay-or-play rules, employers will either have to provide a minimum level of coverage to employees, or pay a penalty. The provisions of federal health care reform are complex and new guidance is being issued frequently. Employers should consult with a benefits attorney regarding how federal health care reform will affect their health plans.

¹⁵⁰² Heroes Earnings Assistance and Relief Act of 2008, Pub. L. No. 110-245 (2008).

¹⁵⁰³ The most well known of the cases involving employer securities is the *ENRON* case. Although the *ENRON* case has been mostly resolved through a settlement, it is nevertheless important to note that the district court in the *ENRON* case issued a ruling that denied most of the defendants’ motions to dismiss on September 30, 2003. See *In re ENRON Corp. Sec.*, 284 F. Supp. 2d 511 (S.D. Tex. 2003). In addition, the *ENRON* case is significant because the DOL has been very active with respect to the case and even filed an amicus brief that argued for fiduciary responsibilities beyond those currently recognized. See [http://www.dol.gov/sol/media/briefs/enron\(A\)-8-30-02.htm](http://www.dol.gov/sol/media/briefs/enron(A)-8-30-02.htm) (providing a copy of the DOL amicus brief).

¹⁵⁰⁴ Pub. L. No. 111-148 (2010).

¹⁵⁰⁵ Pub. L. No. 111-152 (2010).

CHAPTER VIII

AFFIRMATIVE ACTION

SECTION 8.1 INTRODUCTION

The term “affirmative action” refers to a program or policy that promotes the employment or advancement of qualified individuals who are members of traditionally disadvantaged groups. Certain government contractors are required to take affirmative action in employment. Other employers choose voluntarily to implement affirmative action programs or policies. In either case, except in very limited circumstances to remedy past discrimination, employers are not permitted to establish affirmative action programs or policies that grant preferences to employees on the basis of race, sex, or other protected characteristics. Such preferences may constitute prohibited reverse discrimination. Rather, most affirmative action programs and policies, including those required of federal government contractors, simply provide that employers will take affirmative steps (*e.g.*, recruiting, training) to ensure *equal* employment opportunity for all qualified applicants and employees, regardless of their sex, race, or other protected characteristics.¹⁵⁰⁶

SECTION 8.2 REQUIRED AFFIRMATIVE ACTION

(a) Race, Religion, Color, National Origin, and Women

Exec. Order No. 11,246 prohibits federal government contractors and subcontractors from engaging in discrimination on the basis of race, religion, color, sex, or national origin, and requires them to take affirmative action to advance employment opportunities for people in those protected classes.¹⁵⁰⁷ Federal government contractors whose contracts, in the aggregate, do not exceed \$10,000 in any 12-month period, are exempt from this affirmative action requirement.

The Department of Labor’s regulations implementing Exec. Order No. 11,246 require that covered federal government contractors with 50 or more employees have a formal, written affirmative action compliance program addressing employment practices relating to women and minorities. A contractor is subject to this requirement if the contractor:

- has a federal government contract of \$50,000 or more; or
- has federal government bills of lading which total or can be expected to total \$50,000 or more in a 12-month period; or
- is a depository for federal government funds; or
- is a financial institution that is an issuing and paying agent for U.S. savings bonds and savings notes.¹⁵⁰⁸

¹⁵⁰⁶ The University of Michigan cases decided by the Supreme Court in 2003 (*Gratz v. Bollinger*, 539 U.S. 244 (2003); *Gutter v. Bollinger*, 539 U.S. 306 (2003)) will probably have little impact on private employer affirmative action and diversity programs because those cases emphasized the educational setting in which the programs operated. Still significant, however, the Court found that diversity on a college campus could be a compelling government interest, promoted with narrowly-tailored policies.

¹⁵⁰⁷ Two years after it was issued by President Johnson, Exec. Order No. 11,246 was extended to include women. Exec. Order No. 11,375 (1967).

¹⁵⁰⁸ 41 C.F.R. § 60-1.40.

Covered contractors with more than one establishment must develop a separate affirmative action program for each establishment.¹⁵⁰⁹

(b) Individuals with Disabilities and Veterans

Section 503 of the Rehabilitation Act of 1973 (“Rehabilitation Act”) requires that federal contractors and subcontractors with a federal government contract of at least \$10,000 take affirmative action to employ and advance in employment qualified individuals with disabilities.¹⁵¹⁰ The Vietnam Era Veterans Readjustment Assistance Act of 1974 (“VEVRAA”) requires that federal contractors and subcontractors with a federal government contract of at least \$100,000 take affirmative action to employ and advance in employment qualified disabled military veterans, veterans of the Vietnam War era, and other veterans who served on active duty during a war or in a campaign or expedition for which a campaign badge has been authorized.¹⁵¹¹

Under the regulations implementing the Rehabilitation Act and VEVRAA, as under the regulations implementing Exec. Order No. 11,246, a federal contractor having 50 or more employees and a contract of \$50,000 or more is required to have a written affirmative action program covering the disabled individuals and veterans.¹⁵¹² The affirmative action requirements under these regulations are not as extensive as those under Exec. Order No. 11,246 for women and minorities.

(c) Washington Law

In November 1998, Washington voters passed an initiative that expressly prohibits the state from engaging in affirmative action, on the ground that it constitutes “reverse discrimination.” Under this law, the state may not engage in either affirmative action or discrimination on the basis of race, sex, color, ethnicity, or national origin, in public employment, public education, or public contracting.¹⁵¹³ However, action that must be taken to establish or maintain eligibility for any federal program (for example, under Exec. Order No. 11,246, the Rehabilitation Act, or VEVRAA) is not prohibited.¹⁵¹⁴

(d) California Law

In 1996, California voters passed Proposition 209 (the “California Civil Rights Initiative”), which amended the State Constitution to ban the use of race, sex, color, ethnicity, or national origin preferences in public employment, public education, or public contracting.¹⁵¹⁵ Proposition 209 exempts action that must be taken to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the state.

(e) Minnesota Law

The Minnesota Human Rights Act (“MHRA”) requires that a state government contractor or bidder have an affirmative action program to employ and advance in employment qualified minority, female, and disabled individuals, if: (1) the contractor has employed more than 40 full-time employees, whether within Minnesota or not, on a single working day during the 12 months prior to the contractor’s bid or proposal or execution of the contract; and (2) the contract is for an amount in excess of \$100,000.¹⁵¹⁶ Minnesota will

¹⁵⁰⁹ 41 C.F.R. § 60-1.40(c).

¹⁵¹⁰ 29 U.S.C. § 793(a).

¹⁵¹¹ 38 U.S.C. § 4212. The Jobs for Veterans Act, Pub. L. No. 107-288, passed into law Nov. 7, 2002 and effective Dec. 1, 2004, changed the contract amount from \$25,000 to \$100,000. Amendments which took effect October 31, 1998, expanded this law beyond Vietnam veterans.

¹⁵¹² 41 C.F.R. § 60-741.40(a), 41 C.F.R. § 60-250.40(a).

¹⁵¹³ RCW 49.60.040(1).

¹⁵¹⁴ RCW 49.60.400(6).

¹⁵¹⁵ Cal. Const. art. 1, § 31.

allow an employer to bid on a contract prior to having an approved affirmative action program, but requires having an approved plan as a condition of actually awarding the work.¹⁵¹⁷

Covered state contractors must prepare a written affirmative action plan that must be approved by the Commissioner of Human Rights before the contractor is awarded work under a covered state contract. An employer will be allowed to bid on such a contract based on a commitment from the employer that it is in the process of developing a written affirmative action program for approval. Receipt of a certificate of compliance issued by the Commissioner signifies the Commissioner's approval that the plan complies with the affirmative action requirements of the MHRA, and is good for a period of two years; although, approved contractors are required to submit an interim annual statistical report to the Minnesota Department of Human Rights ("MDHR"). Submission of an existing plan that meets federal affirmative action requirements will also suffice for these purposes.¹⁵¹⁸ The MDHR is the state agency responsible for monitoring Minnesota state government contractors' compliance with their affirmative action obligations.

(f) Utah Law

In 2011, the Utah House of Representatives passed HJR24, a resolution urging the adoption of a constitutional amendment banning equal opportunity programs. Although a constitutional amendment has yet to be presented to voters, there is continued talk and activity in the Utah legislature to present such an amendment.

(g) Other Governmental Requirements

Many municipalities have affirmative action requirements applicable to contractors who do business with them. Employers should become familiar with any such requirements when considering whether to enter into contracts with a state or local government.¹⁵¹⁹

(h) Enforcement

The Office of Federal Contract Compliance Programs ("OFCCP") is the federal agency responsible for monitoring federal government contractors' compliance with their affirmative action obligations, principally by conducting audits. This office, which is within the United States Department of Labor, administers and enforces the requirements of Exec. Order No. 11,246, the Rehabilitation Act and VEVRAA, and has issued detailed regulations under those laws.¹⁵²⁰

Government contracts may be suspended or terminated if a contractor is determined not to be in compliance with its affirmative action obligations. Further, a non-complying contractor may be barred from procuring future government contracts.¹⁵²¹

(i) Preparing Affirmative Action Plans

Certain key elements are included in many affirmative action plans, including the following:

- an analysis of minorities and women in the employer's work force compared with the statistical availability of minorities and women in the relevant labor pool;
- the establishment of goals and timetables for the elimination of under- representation in identified job categories;

¹⁵¹⁶ Minn. Stat. § 363A.36.

¹⁵¹⁷ *Id.*

¹⁵¹⁸ *Id.*

¹⁵¹⁹ *See, e.g.*, Minn. Stat. §§ 43A.19-.191; Minn. Stat. §§ 473.143-.144.

¹⁵²⁰ The OFCCP recently solicited public comments on how to strengthen the affirmative action requirements of Section 503 of the Rehabilitation Act. The public comment period ended September 21, 2010.

¹⁵²¹ Exec. Order No. 11,246, § 202 (1965).

- formal communication mechanisms designed to inform employees and the public of the employer's equal employment opportunity and affirmative action policies;
- the appointment of an affirmative action program manager; and
- the development and execution of specific strategies designed to eliminate discrimination and achieve affirmative action goals.

SECTION 8.3 VOLUNTARY AFFIRMATIVE ACTION

Court decisions have held that, under limited circumstances, federal anti-discrimination laws do not prohibit private employers from voluntarily implementing affirmative action plans that provide for the consideration of race or sex or other protected characteristics in making employment decisions.¹⁵²²

The Federal Equal Employment Opportunity Commission (“EEOC”) has gone a step beyond the courts, interpreting federal anti-discrimination laws not only as permitting affirmative action, but also as showing a Congressional *intent* that employers voluntarily undertake affirmative action as a means of improving the condition of minorities and women in the workplace. Accordingly, the EEOC takes the position that employers should not be exposed to liability for voluntarily implementing affirmative action plans, provided the plans comply with certain criteria.¹⁵²³

In order to be valid under Title VII, voluntary affirmative action plans that provide for consideration of protected characteristics in employment decisions must satisfy two principal criteria. First, the employer must have a legitimate reason – also referred to as an adequate “factual predicate” – for adopting a plan. Second, the rights of third-party workers must not be “unnecessarily trammelled.”¹⁵²⁴

(a) Adequate Factual Predicate

Courts have determined that there must be a “manifest” or “conspicuous” imbalance in traditionally segregated job categories to justify affirmative action. For example, when African-Americans are clearly under-represented in an employer’s workforce, there may be an adequate “factual predicate” for establishing an affirmative action plan based on race. Significantly, the imbalance need not be so severe that it supports a *prima facie* case of discrimination under Title VII.¹⁵²⁵

(b) Effect of Voluntary Affirmative Action Plan on Other Workers

An employer’s voluntary affirmative action plan also must not “unnecessarily trammel” the interests of third parties (*e.g.*, non-minority and/or male workers) or act as an absolute bar to their advancement.

While the plan should not foreclose employment or promotion opportunities for third parties, such as white males, employers *may* treat the race or sex of a candidate as a “plus” in choosing among qualified applicants. This means that race cannot be so powerful a factor that an employee or applicant who is not qualified for a particular job is, nevertheless, chosen to fill it. The candidate selected must, at a minimum, be qualified for the job. However, the candidate need not be the *most* qualified.

Plans with quotas have been held to violate Title VII because they “unnecessarily trammel” the interests of third parties. A plan violates Title VII if it establishes a certain level of minority or female representation in the work force and freezes that level indefinitely. Such a practice is considered a *quota* that impermissibly limits the job opportunities of non-protected class workers. An employer may, however, adopt a plan that

¹⁵²² Public employers’ voluntary affirmative action plans have been challenged under the United States Constitution, and courts have found that they are constitutional if certain conditions are met. See *Wygant v. Jackson Bd. Of Educ.*, 476 U.S. 267 (1986).

¹⁵²³ 29 C.F.R. § 1608.1(a).

¹⁵²⁴ See *Johnson v. Transp. Agency*, 480 U.S. 616 (1987); *United Steel Workers v. Weber*, 443 U.S. 193 (1979). Imposing similar, though not identical restrictions, courts require public employers to show that any voluntary affirmative action satisfies the Constitution’s equal protection clause. See, *e.g.*, *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Wygant*, 476 U.S. 267.

¹⁵²⁵ See Chapter IX: Employment Discrimination.

seeks to attain a particular *goal* of minority representation. The duration of an affirmative action plan may be held excessive if, after goals are attained, the plan remains in force unnecessarily.

(c) Affirmative Defense of Good Faith Reliance on EEOC Guidelines

Under Title VII, an employer is relieved of liability for a challenged action if it was made in good faith reliance on EEOC administrative guidance.¹⁵²⁶ The EEOC Guidelines on Affirmative Action (“Guidelines”) are considered a “written interpretation of opinion,” and an employer who implements a voluntary affirmative action plan in good faith conformity with, and in reliance on, the Guidelines can, under appropriate circumstances, invoke this defense.¹⁵²⁷ While it is not normally the employer’s burden to prove the validity of an affirmative action plan, if the employer invokes this defense, it *is* the employer’s burden to demonstrate compliance with the Guidelines.

To establish this defense, employers must point to a *written* and *dated* plan and self-analysis. The employer also should produce a plan that is *current*, as determined by all relevant circumstances, including the progress being made to correct the conditions identified in the self-analysis.

If an employer asserts this defense and the EEOC determines that the employer’s affirmative action plan was, in fact, drafted in reliance on administrative guidance, it will issue a “no probable cause” determination. The affirmative defense may not be asserted, however, where the EEOC finds that an affirmative action plan or program does not exist, or where it is not the basis of the Title VII charge at issue.

SECTION 8.4 DIVERSITY PROGRAMS

The term “diversity program” is applied to a broad range of policies designed to increase diversity. Generally, diversity programs are implemented by private employers not to favor female and/or minority employees or applicants, but to make sure that female and/or minority applicants are well-represented in applicant pools for hiring, training, and promotion, and to provide work environments that are attractive to female and/or minority workers. Diversity programs are generally not as controversial as affirmative action plans. Moreover, diversity programs – provided they do not devolve into favoritism for particular groups – are far less likely to be challenged under federal civil rights laws than affirmative action plans.¹⁵²⁸

¹⁵²⁶ 42 U.S.C. § 2000e-12(b).

¹⁵²⁷ 29 C.F.R. §§ 1608.1(d), 1608.2.

¹⁵²⁸ Guidance has been provided to private employers in the form of the EEOC’s February, 1998, Task Force Report On “Best” Equal Employment Opportunity Policies, Programs, and Practices In The Private Sector, drafted by EEOC Commissioner Reginald E. Jones. This 327-page volume is available in paperback form through both the EEOC and the Equal Employment Advisory Committee (“EEAC”), an organization of private employers. A shortened description of the report is contained in an article by Commissioner Reginald E. Jones, *Are We Witnessing Kinder, Gentler EEOC? The EEOC’s Task Force Report On Best Private Sector EEO And Diversity Practices And Other Agency Trends*, *The Labor Lawyer*, Vol. 14, No. 2, p. 317 (Fall 1998).

CHAPTER IX

EMPLOYMENT DISCRIMINATION

SECTION 9.1 OVERVIEW OF ANTI-DISCRIMINATION LAWS

The principal federal laws prohibiting employment discrimination are: Title VII, Section 1981, the Age Discrimination in Employment Act (“ADEA”), the Americans with Disabilities Act (“ADA”), and the Equal Pay Act (“EPA”). In 2008, the Federal Genetic Information Nondiscrimination Act (“GINA”) was signed into law.

Washington’s principal laws prohibiting employment discrimination are the Washington Law Against Discrimination (“WLAD”) and the equal pay statute.

California’s employment discrimination laws are primarily contained in the Fair Employment and Housing Act (“FEHA”).

Minnesota’s employment discrimination laws are primarily contained in the Minnesota Human Rights Act (“MHRA”).

Utah’s employment discrimination laws are primarily contained in the Utah Antidiscrimination Act (“UADA”).

(a) Federal Laws

(i) Title VII

Title VII of the Civil Rights Act of 1964¹⁵²⁹ (“Title VII”) was the first federal legislation broadly prohibiting discrimination in private sector employment. It is also the statute under which employees most often bring federal discrimination claims. In 2009, Title VII claims alone cost employers \$64.9 million in monetary relief to employees.¹⁵³⁰

Title VII prohibits employer discrimination because of a person’s race, color, religion, sex (including pregnancy), or national origin.¹⁵³¹ Employers are liable for both intentional discrimination and actions not intended to be discriminatory that lead to an unacceptably unequal result.¹⁵³²

Title VII also prohibits employers from retaliating against employees who file charges of discrimination, participate in investigations of alleged discrimination, or oppose discrimination in any way.¹⁵³³

To recover on a Title VII discrimination claim, an employee must demonstrate that he or she was deprived of an economic or tangible employment benefit (*e.g.*, termination, failure to promote, reduced pay), or that he or she suffered a hostile or abusive work environment.¹⁵³⁴

¹⁵²⁹ 42 U.S.C. §§ 2000e *et seq.*

¹⁵³⁰ See EEOC Litigation Statistics, FY 1997 through FY 2009, <http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm>.

¹⁵³¹ These categories are discussed in more detail in this Chapter at Section 9.3: Protected Classes.

¹⁵³² See this Chapter, Section 9.2: Theories of Discrimination.

¹⁵³³ See this Chapter, Section 9.6: Retaliation.

¹⁵³⁴ *Harris v. Forklift Sys., Inc.*, 520 U.S. 17 (1993).

Employers must have more than 15 employees to be covered by Title VII.¹⁵³⁵ “Employee” includes any person on the payroll.¹⁵³⁶ Unpaid persons (volunteers) may be included if they are treated in the same manner as paid persons (*i.e.*, if management assigns work hours, disciplines the unpaid person like an employee, or provides employment benefits, such as insurance). Independent contractors are not “employees” under Title VII.¹⁵³⁷

Title VII is enforced by the Equal Employment Opportunity Commission (“EEOC”). Before filing a lawsuit, employees must file a formal charge with the EEOC.

(ii) Section 1981

Section 1981 is part of the Civil Rights Act of 1866, a post-Civil War law enacted to provide equal contract rights to newly freed African-Americans. Accordingly, Section 1981 applies only to discriminatory actions taken only on the basis of race. The scope of Section 1981 includes failure to hire, termination, and adverse decisions regarding compensation and conditions of employment.¹⁵³⁸

Unlike Title VII, Section 1981 applies to all employers regardless of the number of employees. Independent contractors are also covered because the law applies to all contracts, not just employment contracts.¹⁵³⁹

The EEOC does not enforce Section 1981; employees may proceed directly to court.

(iii) Age Discrimination in Employment Act

The ADEA protects individuals age 40 or over from discrimination in employment on the basis of age.¹⁵⁴⁰ The Act prohibits involuntary retirement because of age¹⁵⁴¹ and establishes minimum statutory requirements for “knowing and voluntary” release of ADEA claims.¹⁵⁴² In most instances the protections afforded persons protected under Title VII and the ADEA are similar.¹⁵⁴³

An employer who employs at least 20 persons is covered by the ADEA.¹⁵⁴⁴

¹⁵³⁵ To be covered under Title VII, an employer need not have 15 employees on the day of the alleged discriminatory act or on the day the claim is filed; an employer is covered if it had 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year.

A Washington court has held that tribal corporations and their subsidiaries are not covered by Title VII based on tribal sovereign immunity. *See Wright v. Cobville Tribal Enter. Corp.*, 159 Wn.2d 108 (2006).

Title VII covers employment agencies, but does not cover an association that represents a group of employers. *See Anderson v. Pac. Mar. Assoc.*, 336 F.3d 924 (9th Cir. 2003) (association was not liable for discrimination that occurred at facilities controlled by the individual employers).

¹⁵³⁶ *Walters v. Metrop. Educ. Enters., Inc.*, 519 U.S. 202 (1997). Part-time workers are counted the same as full-time workers. Persons on paid leave are also counted; persons on unpaid leave or layoff generally are not. “Employee” may include the foreign employees of U.S.-controlled corporations. *See Kang v. U. LimAmerica, Inc.*, 296 F.3d 810 (9th Cir. 2002).

¹⁵³⁷ *See also* WAC 162-16-230. The status of a worker as an independent contractor is discussed in more detail at Chapter I, Section 1.5: Employee vs. Independent Contractor Status. *See also* Chapter I for a general discussion of independent contractor status.

¹⁵³⁸ 42 U.S.C. § 1981 (Section 1981 prohibits discrimination in “the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship”).

¹⁵³⁹ Most federal anti-discrimination laws do not cover independent contractors because the relationship does not form an “employment” contract.

¹⁵⁴⁰ 29 U.S.C. §§ 621-34. There is no upper age limit in the current version of the law.

¹⁵⁴¹ *See Western Air Lines, Inc. v. Criswell*, 472 U.S. 400 (1985) (company’s rule requiring flight engineers to retire at age 60 constituted age discrimination because the age distinction was not justified by a business necessity).

¹⁵⁴² 29 U.S.C. § 626(f); *see also* EEOC regulations at 29 C.F.R. § 1625.22.

¹⁵⁴³ Congress relied heavily on Title VII language in creating the ADEA, thus, courts will construe the ADEA like Title VII to the extent they are similar.

¹⁵⁴⁴ Employees will be counted if they are employed for the same time period set forth in Title VII; that is, for each working day in each of 20 or more calendar weeks in the current or preceding calendar year. 29 U.S.C. § 630(b).

The EEOC enforces the ADEA.

(iv) Americans with Disabilities Act

The ADA prohibits intentional discrimination in employment against qualified individuals with physical or mental disabilities.¹⁵⁴⁵ Under the ADA, employers must provide “reasonable accommodation” to otherwise qualified disabled employees, unless doing so would impose an undue hardship. The ADA also limits an employer’s ability to make medical inquiries or require examinations.¹⁵⁴⁶

Like Title VII, the ADA applies to employers with 15 or more employees.¹⁵⁴⁷

The ADA’s coverage, enforcement, and remedies are set forth in Title VII.

The EEOC enforces the ADA. Employees must file a formal charge with the EEOC before they can bring a private suit for any alleged disability discrimination.

(v) Equal Pay Act

The EPA prohibits discrimination based on gender in compensation for equal work.¹⁵⁴⁸ The EPA applies to pay disparities between men and women, but does not apply to disparities based on race, age, or disability.¹⁵⁴⁹ For EPA purposes, employees perform “equal work” if the job duties are “substantially similar.”

The EPA applies to all employers, regardless of the number of employees.¹⁵⁵⁰

The EEOC enforces the EPA, however, an employee also may file a private suit without first filing a charge with the EEOC.

(vi) Genetic Information Nondiscrimination Act

Title II of the Genetic Information Nondiscrimination Act (“GINA”), which took effect on November 21, 2009, prohibits discrimination based on an individual’s genetic information.¹⁵⁵¹ GINA prohibits employers from requesting, requiring, or purchasing genetic information with respect to an individual who is an employee or a family member of the employee, except inadvertently or to provide specialized genetic care services.¹⁵⁵² For the purposes of this Act, genetic information includes:

- an individual’s genetic tests;
- the genetic tests of family members of an individual; and
- the manifestation of a disease or disorder in family members of an individual.¹⁵⁵³

GINA’s employment title provides for private rights of action, with jury trials and compensatory and punitive damages patterned after Title VII of the Civil Rights Act.

¹⁵⁴⁵ 42 U.S.C. §§ 12101-13.

¹⁵⁴⁶ See this Chapter, Section 9.3: Protected Classes.

¹⁵⁴⁷ As with Title VII and the ADEA, the number of employees under the ADA includes persons employed for each working day in each of 20 or more calendar weeks in the current or preceding calendar year. 42 U.S.C. § 12111.

¹⁵⁴⁸ 29 U.S.C. § 206(d)(1), amending Section 6 of the Fair Labor Standards Act of 1938.

¹⁵⁴⁹ Pay disparities based on race, age or disability are governed by Title VII, the ADEA, and the ADA, respectively.

¹⁵⁵⁰ 29 U.S.C. § 203(d).

¹⁵⁵¹ Pub. L. No. 110-233, § 201(4)(a).

¹⁵⁵² Pub. L. No. 110-233, § 201(4)(b).

¹⁵⁵³ Pub. L. No. 110-233, § 201(4)(a).

The EEOC's regulations concerning Title II of GINA took effect on January 10, 2011. Among other things, the regulations address the meaning of a "genetic test," permissible circumstances in which an employer may acquire genetic information, and employer compliance with GINA's confidentiality and posting requirements.¹⁵⁵⁴

(b) Washington Law

Washington anti-discrimination laws generally reflect federal anti-discrimination laws, but there are some key differences, outlined below.

(i) Washington Law Against Discrimination

Washington's general prohibitions on employment discrimination are set forth in the WLAD.¹⁵⁵⁵ Similar to federal law, the WLAD prohibits an employer from discriminating¹⁵⁵⁶ against an employee "because of" sex, race, color, national origin, age,¹⁵⁵⁷ religion (creed),¹⁵⁵⁸ the presence of any disability,¹⁵⁵⁹ and honorably discharged veteran or military status.¹⁵⁶⁰ Unlike federal law, Washington also prohibits discrimination based on marital status,¹⁵⁶¹ sexual orientation,¹⁵⁶² and actual or perceived HIV status.¹⁵⁶³

The WLAD covers employers with eight or more employees, except for religious or sectarian organizations not organized for private profit.¹⁵⁶⁴ This allows some employees who are not covered under federal law to bring a discrimination claim under the WLAD.¹⁵⁶⁵ As under Title VII, any person who is paid for work may be counted as an employee.¹⁵⁶⁶ Employers with fewer than eight employees still may be liable for discrimination under Washington's common law tort of wrongful discharge in violation of public policy.¹⁵⁶⁷

Unlike similar federal laws, the WLAD provides some protection for independent contractors¹⁵⁶⁸ from discrimination on the basis of race, religion (creed), color, national origin, sex, sexual orientation, honorably discharged veteran or military status, or disability.¹⁵⁶⁹ They are not protected from

¹⁵⁵⁴ 29 C.F.R. §§ 1635.1-12.

¹⁵⁵⁵ RCW 49.60.

¹⁵⁵⁶ The WLAD uses the phrase "unfair practice," which includes refusal to hire; discharge or barring from employment; or discrimination in compensation or in other terms or conditions of employment. RCW 49.60.180(1)-(3).

¹⁵⁵⁷ RCW 49.44.090 also prohibits age discrimination in employment. Federal law prohibits age discrimination under the ADEA.

¹⁵⁵⁸ Similar to Title VII's "religion."

¹⁵⁵⁹ The WLAD includes the use of a trained guide dog or service animal by a disabled person. Federal law covers disability under the ADA.

¹⁵⁶⁰ 38 U.S.C. §§ 4301-19; 42 U.S.C. § 2000e-11; 38 U.S.C. § 4212.

¹⁵⁶¹ See *Andrews v. Harrison Med. Cent.*, 158 Wn. App. 1043 (2010) (unpublished) (court found there are genuine issues of material fact regarding whether medical center intentionally discriminated against married couples by having anti-nepotism policy that applied to, among others, married couples but not to couples in a committed intimate relationship).

¹⁵⁶² "Sexual orientation" includes heterosexuality, homosexuality and bisexuality, as well as gender expression or identity. See RCW 49.60.040(15). The provision against discrimination on the basis of sexual orientation was added to WLAD on June 7, 2006. The Washington Supreme Court ruled that this amendment has a prospective application only and does not apply to acts which occurred before June 7, 2006. See *Loeffelholz v. Univ. of Wash.*, 175 Wn.2d 264 (2012).

¹⁵⁶³ RCW 49.60.172, .174.

¹⁵⁶⁴ RCW 49.60.040(11). See *Griffin v. Eller*, 130 Wn.2d 58, 61 (1996) (employers of fewer than eight employees are exempt from the WLAD); see also *Erdman v. Chapel Hill Presbyterian Church*, 156 Wn. App. 827 (2010), *aff'd in part, rev'd in part*, 175 Wn.2d 659 (2012) (former church employee's claims under WLAD for harassment and wrongful discharge are barred by plain language of statute excluding religious organization from definition of covered employer).

Similar to Title VII, an employer need not have eight employees on the day of the alleged discriminatory act or on the day the claim is filed. The WLAD also covers employers that had an average of eight or more employees over a "representative period of time" (WAC 162-16-220), ordinarily the 20 weeks prior to and including the date on which the unfair practice is alleged to have occurred. *Anaya v. Graham*, 89 Wn. App. 588 (1998).

¹⁵⁶⁵ Title VII and the ADA apply only to employers with 15 or more employees. 42 U.S.C. §§ 2000e *et seq.*; 42 U.S.C. §§ 12101 *et seq.* The ADEA covers only employers with 20 or more employees. 29 U.S.C. §§ 621 *et seq.*

discrimination based on age or marital status, and the Washington Human Rights Commission (“WHRC”) will not bring suit to enforce their rights,¹⁵⁷⁰ but independent contractors can enforce a discrimination claim with a private lawsuit.¹⁵⁷¹

The WLAD is patterned after Title VII, and decisions interpreting the federal act are persuasive authority when constructing the WLAD.¹⁵⁷²

Any violation of the WLAD generally also violates Washington’s Consumer Protection Act, which prohibits unfair practices in the course of trade or commerce.¹⁵⁷³

The WLAD is administered by the WHRC,¹⁵⁷⁴ rather than the EEOC.

(ii) Washington’s Equal Pay Statute

Washington’s equal pay law prohibits wage discrimination based on gender and is substantially similar to the Federal Equal Pay Act.¹⁵⁷⁵ The law applies to all Washington employers.¹⁵⁷⁶

(iii) Washington’s Age Discrimination Statute

All Washington employers, regardless of the number of employees, are prohibited from discriminating against employees aged 40 or older based on age.¹⁵⁷⁷ The statute does not apply to independent contractors.¹⁵⁷⁸

(iv) Washington Common Law

All Washington employers, regardless of size, may be sued for discriminatory terminations of their employees under the general tort prohibiting terminations in violation of public policy.¹⁵⁷⁹ The tort applies

¹⁵⁶⁶ See this Chapter, Section 9.1(a)(i): Title VII. “Employees” include all persons employed by the same legal entity, whether or not the persons work in Washington, in the same place of business, or in the same line of business. “Employer” means a legal entity with common management in the areas of employment policy and personnel. WAC 162-16-220.

¹⁵⁶⁷ See Chapter X: Contract and Tort Claims; *Roberts v. Dudley*, 140 Wn.2d 58 (2000).

¹⁵⁶⁸ The status of a worker as an independent contractor is discussed in more detail at Chapter I, Section 1.5: Employee vs. Independent Contractor Status. See also Chapter I for a general discussion of independent contractor status.

¹⁵⁶⁹ *Marquis v. City of Spokane*, 130 Wn.2d 97, 112 (1996). Section 1981 applies to independent contractors. See Section 1981.

¹⁵⁷⁰ *Kilian v. Atkinson*, 147 Wn.2d 16 (2002) (age discrimination claim cannot be asserted by an independent contractor under Washington law).

¹⁵⁷¹ WAC 162-16-230(2) (citing RCW 49.60.030(2)).

¹⁵⁷² See *Xieng v. Peoples Nat’l Bank of Wash.*, 120 Wn.2d 512, 518 (1993) (quoting *Oliver v. Pac. Nm. Bell Tel. Co.*, 106 Wn.2d 675, 678 (1986)).

¹⁵⁷³ RCW 19.86 *et seq.*; RCW 49.60.030(3).

¹⁵⁷⁴ The WHRC has promulgated rules and regulations that elaborate upon the WLAD and impose additional, more detailed requirements upon employers. See the Washington Administrative Code (“WAC”).

¹⁵⁷⁵ RCW 49.12.175. See this Chapter, Section 9.1(a)(v): Equal Pay Act.

¹⁵⁷⁶ RCW 49.12.005(3).

¹⁵⁷⁷ RCW 49.44.090.

¹⁵⁷⁸ *Kilian v. Atkinson*, 147 Wn.2d 16 (2002).

¹⁵⁷⁹ See *Roberts*, 140 Wn.2d 58; see also *Smith v. Bates Tech. Coll.*, 139 Wn.2d 793 (2000) (for-cause employees, like at-will employees, may sue their employers for wrongful discharge in violation of public policy). For more information, see Chapter X on Tort Claims.

only to cases involving *termination* or constructive discharge,¹⁵⁸⁰ not to other adverse employment decisions, which *are* covered by the WLAD.¹⁵⁸¹

(c) California Law

(i) Fair Employment and Housing Act (“FEHA”)

California’s prohibition against employment discrimination is contained in the FEHA.¹⁵⁸² Like federal law, the FEHA prohibits employment discrimination and harassment on the basis of race, color, national origin, sex, physical and mental disability, age, and religion. The FEHA also prohibits discrimination on the basis of sexual orientation, marital status, medical condition (*i.e.*, a condition related to cancer), gender expression and identity, and genetic information. California recently expanded protections against sex or gender discrimination to transgendered applicants and employees.

The FEHA covers all employers with five or more employees, making it broader than both federal and Washington law.¹⁵⁸³

Violations of the FEHA implicate Section 16600 of the California Business & Professional Code. Thus, discrimination plaintiffs often allege claims under both statutes based on the same facts.

The Department of Fair Employment and Housing (“DFEH”) enforces the FEHA. Charges are filed with the FEHA before employees can bring a lawsuit.

(ii) California Law on Equal Pay

California has a separate law expressly prohibiting wage discrimination on the basis of gender, requiring equal pay for equal work.¹⁵⁸⁴ The law is similar to the Federal Equal Pay Act in most respects. However, it contains stricter consequences, including criminal prosecution for willful violations.

The law on equal pay is enforced by the California Division of Labor Standards Enforcement (“DLSE”).

(d) Minnesota Law

(i) Minnesota Human Rights Act

Prohibitions on employment discrimination under Minnesota law are set forth in the Minnesota Human Rights Act (“MHRA”).¹⁵⁸⁵ Unlike the federal legislation discussed above, the MHRA is a “single source” ban on employment discrimination. The statute makes it an “unfair employment practice” for an employer, “because of race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, membership or activity in a local commission, disability, sexual orientation, or age, to: (1) refuse to hire or to maintain a system of employment which unreasonably excludes a person seeking employment; or (2) discharge an employee; or (3) discriminate against a person with respect to hiring, tenure, compensation, [or other terms and conditions] of employment.”¹⁵⁸⁶

¹⁵⁸⁰ Constructive discharge occurs when an employee “voluntarily” leaves a position, but can prove that he or she was virtually forced out of the position by work conditions that were “extraordinary and egregious.” *See, e.g., Poland v. Chertoff*, 494 F.3d 1174 (9th Cir. 2007) (employee’s transfer and demotion were insufficient to establish constructive discharge where he worked in position for five months before leaving, all employees in his position may be transferred at any time, and he had been previously transferred several times).

¹⁵⁸¹ *Roberts*, 140 Wn.2d at 76.

¹⁵⁸² Cal. Gov’t Code §§ 12940 *et seq.*

¹⁵⁸³ Cal. Gov’t Code § 12926(d).

¹⁵⁸⁴ Cal. Lab. Code §§ 1197.5 *et seq.*

¹⁵⁸⁵ Minn. Stat. §§ 363A.01-.41.

¹⁵⁸⁶ Minn. Stat. § 363A.08, subd. 2.

The MHRA is broader than the federal antidiscrimination statutes. First, the MHRA protects persons who are not protected under federal law. For example, sexual orientation is a protected class under the MHRA, but not under federal law.¹⁵⁸⁷ Similarly, the MHRA protects every person over 18 years of age from discrimination on the basis of age, not merely persons age 40 and over.¹⁵⁸⁸ Also, the MHRA applies to any employer having one or more employees.¹⁵⁸⁹

Unlike federal law, the MHRA potentially subjects *individuals* to liability for employment discrimination under its “aiding and abetting” provision.¹⁵⁹⁰

(ii) Minnesota Retirement Act

Minnesota law also prohibits age discrimination against persons up to age 70, but permits mandatory retirement for private employees aged 70 or older only if the employer has enacted a mandatory retirement policy.¹⁵⁹¹ Note that mandatory retirement at age 70 would violate the ADEA for employers with twenty or more employees.

(iii) Agency Investigation Procedures

Once a charge of discrimination is filed with an enforcement agency, the employer is notified by mail with a copy of the charge. The charge identifies the agency involved and the parties charged, and summarizes the allegations. The employer should carefully review the charge and any other papers sent with the charge. If the charge is directed to the wrong person in the employer’s organization, the employer should send a letter to the agency identifying the proper person to whom later inquiries should be directed.

The agency will request a statement of the employer’s position and/or request answers to a list of written questions. Under the MHRA, the employer’s response is due within 20 days of receipt of the charge.¹⁵⁹² If the employer believes that additional time is required to prepare a response, the employer should immediately contact the MHRA investigator to request additional time. The employer may also be able to negotiate modifications to the information requests.

After an initial investigation, the agency may convene a fact-finding conference. In the typical case, the investigator will ask each side to state its position and support its allegations. Usually the conference is tape-recorded. The fact-finding conference is an important part of the investigative process and the employer should be adequately prepared. Statements made at a fact-finding conference will generally be recorded in some manner and may be used in a later proceeding. Consequently, witness preparation is important.

(iv) Minnesota Law on Genetic Information

Minnesota law prohibits employers from: (1) directly or indirectly administering or requiring genetic testing as a condition of employment; and (2) affecting a term or condition of employment or termination of employment based on protected genetic information.¹⁵⁹³ A violation may result in treble damages, punitive damages, reasonable costs and attorneys’ fees, and injunctive relief.¹⁵⁹⁴ Genetic testing also may violate federal laws.

¹⁵⁸⁷ Minn. Stat. §§ 363A.08 & 363A.03, subd. 44.

¹⁵⁸⁸ Minn. Stat. § 363A.03, subd. 2.

¹⁵⁸⁹ Minn. Stat. § 363A.03, subd. 16.

¹⁵⁹⁰ Minn. Stat. § 363A.14.

¹⁵⁹¹ Minn. Stat. § 181.81.

¹⁵⁹² Minn. Stat. § 363A.28, subd. 1.

¹⁵⁹³ Minn. Stat. § 181.974, subd. 2.

¹⁵⁹⁴ Minn. Stat. § 181.974, subs. 2-3.

(e) Utah Law

Utah's anti-discrimination laws generally reflect federal anti-discrimination laws, but there are some key differences, outlined below.

(i) Utah Antidiscrimination Act

Utah's general prohibitions on employment discrimination are set forth in the UADA.¹⁵⁹⁵ Similar to federal law, the UADA prohibits employment discrimination on the basis of race, color, national origin, gender, religion, age and disability.¹⁵⁹⁶ In addition, the UADA prohibits employment discrimination on the basis of pregnancy, childbirth or pregnancy-related conditions.¹⁵⁹⁷

Employers must comply with the UADA if they have 15 or more employees within the state for each working day in each 20 calendar weeks or more in the current or preceding calendar year.¹⁵⁹⁸ The UADA does not apply to certain religious organizations or associations.¹⁵⁹⁹ The Utah statute thus allows employees to seek redress for discrimination not actionable under federal law.¹⁶⁰⁰

The UADA was modeled after Title VII.¹⁶⁰¹ In interpreting the UADA, the substantial body of federal case law interpreting Title VII is "useful."¹⁶⁰²

The UADA is administered by the Utah Antidiscrimination & Labor Division ("UALD").¹⁶⁰³ Additionally, based on a work-share and contract agreement with the EEOC, the UALD is empowered to act as an agent of the EEOC and has authority to enforce Title VII, the ADEA and the ADA.

(ii) Utah's Equal Pay Statute

Unlike many states, Utah does not have a separate equal pay law requiring that men and women be paid equally for equal work. However, under the UADA, employers are prohibited from compensation discrimination based on race, color, gender, pregnancy and childbirth, age (40 years and over), religion, national origin, or disability.¹⁶⁰⁴ Under the UADA, it is unlawful for an employer to pay different wages or salaries to employees having substantially equal experience, responsibilities, and skills for the particular job.¹⁶⁰⁵ The law provides an exception for increases in pay based on seniority if the increases are uniformly applied and available to all employees on a substantially proportional basis.¹⁶⁰⁶

(iii) Utah's Age Discrimination Statute

Under the UADA, Utah employers are prohibited from discriminating against employees aged 40 or older based on age.¹⁶⁰⁷

¹⁵⁹⁵ Utah Code Ann. § 34A-5.

¹⁵⁹⁶ See Utah Code Ann. § 34A-5-106(1)(a)(i).

¹⁵⁹⁷ See *id.*

¹⁵⁹⁸ Utah Code Ann. § 34A-5-102(1)(h)(i).

¹⁵⁹⁹ Utah Code Ann. § 34A-5-102(1)(h)(ii).

¹⁶⁰⁰ Title VII and the ADA apply only to employers with 15 or more employees. 42 U.S.C. §§ 200e *et seq.*; 42 U.S.C. §§ 12101 *et seq.* The ADEA covers only employers with 20 or more employees. 29 U.S.C. §§ 621 *et seq.*

¹⁶⁰¹ See *Gottling v. P.R. Inc.*, 61 P.3d 989, 995 (Utah 2002).

¹⁶⁰² See *Viktron/Lika v. Labor Comm'n*, 38 P.3d 993, 996 (Utah 2001).

¹⁶⁰³ See Utah Code Ann. § 34A-5-104.

¹⁶⁰⁴ See Utah Code Ann. § 34A-5-106.

¹⁶⁰⁵ See Utah Code Ann. § 34A-5-106(1)(a)(iii).

¹⁶⁰⁶ *Id.*

¹⁶⁰⁷ See Utah Code Ann. § 34A-5-106.

(iv) Utah Retirement Act

Utah law also prohibits involuntary termination or retirement from employment on the basis of age alone, if the individual is 40 years of age or older, except for certain circumstances where the employee has attained 65 years of age or when age is a *bona fide* occupational qualification.¹⁶⁰⁸ However, Utah law permits compulsory retirement of an employee who has attained at least 65 years of age, and who, for the two-year period immediately before retirement, is employed in a *bona fide* executive or high policymaking position, if that employee is entitled to an immediate non-forfeitable annual retirement benefit from the employee's pension, profit-sharing, savings, or deferred compensation plan, or any combination of those plans, and the benefits equal, in the aggregate, at least \$44,000.¹⁶⁰⁹ Note that compulsory retirement at age 65 would violate the ADEA for employers with 20 or more employees.

(v) Utah Law on Genetic Information

Utah law prohibits employers from using private genetic information for hiring and promotion purposes.¹⁶¹⁰ An individual whose legal rights have been violated under this law may recover damages and be granted equitable relief in a civil action.¹⁶¹¹ In addition, a violation may result in an order restraining the use of a method, act or practice, a civil fine of not more than \$25,000 for each separate intentional violation, and reasonable costs of investigation and litigation, including attorneys' fees.¹⁶¹² Genetic testing also may violate federal laws.

(vi) Utah Common Law

The Supreme Court of Utah has held all employers have a duty not to terminate any employee, whether the employee is at-will or protected by an express or implied employment contract, in violation of clear and substantial public policy.¹⁶¹³ If an employer breaches that duty, an employee has a tort cause of action against the employer for wrongful discharge.¹⁶¹⁴

SECTION 9.2 THEORIES OF DISCRIMINATION

Anti-discrimination laws typically hold employers liable based on three theories – disparate treatment, disparate impact, and failure to accommodate. Understanding these theories is fundamental to preventing and defeating discrimination claims.

(a) Disparate Treatment Claims

Most employment discrimination claims assert disparate treatment, which occurs when an employer *intentionally* discriminates against a person because of that person's membership in a protected class.¹⁶¹⁵ Disparate treatment may involve depriving an individual of a tangible job benefit (*e.g.*, termination, decreasing compensation) or harassing an employee by subjecting him or her to a "hostile work environment." An employee may prove intentional discrimination by presenting direct evidence (*e.g.*, statements or policies that the company will not promote women)¹⁶¹⁶ or indirect (circumstantial) evidence (*e.g.*, a fully qualified person of color is not promoted and a less qualified Caucasian employee is). Most disparate treatment claims are based on indirect evidence of discrimination.

¹⁶⁰⁸ Utah Code Ann. § 34A-5-106(5).

¹⁶⁰⁹ Utah Code Ann. § 34A-5-106(6).

¹⁶¹⁰ Utah Code Ann. § 26-45-103.

¹⁶¹¹ Utah Code Ann. § 26-45-105(1).

¹⁶¹² Utah Code Ann. § 26-45-106.

¹⁶¹³ *Touchard v. La-Z-Boy, Inc.*, 148 P.3d 945, 948 (Utah 2006) (citing *Ryan v. Dan's Food Stores, Inc.*, 972 P.2d 395, 404 (Utah 1998)).

¹⁶¹⁴ *Id.*

¹⁶¹⁵ A protected class is any class granted protection under law, (*e.g.*, race, color, religion, sex, national origin, disability). *See* this Chapter, Section 9.3: Protected Classes.

(i) *McDonnell Douglas* Burden Shifting

To establish a discriminatory motive using indirect evidence, an employee-plaintiff must use what is referred to as the *McDonnell Douglas* framework.¹⁶¹⁷ Under this framework, the evidentiary burden shifts between the plaintiff and the defendant, resulting in a three-step process. First, the plaintiff must offer enough evidence for a court to infer that unlawful discrimination occurred;¹⁶¹⁸ this is called establishing a *prima facie* case. Second, if a plaintiff successfully presents a *prima facie* case, the burden shifts to the defendant to articulate a legitimate, non-discriminatory reason for its action. Failure to do so results in a judgment for the plaintiff. Third, if the defendant articulates a legitimate, non-discriminatory reason for its action, the burden shifts back to the plaintiff to demonstrate that the defendant's proffered reason is merely a pretext for discrimination. If a plaintiff fails to offer evidence of pretext, the defendant will be entitled to judgment.

1) The *Prima Facie* Case

The exact elements of a *prima facie* case vary depending on the type of employment discrimination alleged.

For hiring process discrimination, the plaintiff must show that four factors are present:

- he or she is a member of a protected class;
- he or she applied for a job for which he or she was qualified and for which the employer was seeking applicants;
- he or she was rejected despite adequate qualifications; and
- after the plaintiff's rejection, the position remained open and the employer continued to seek applicants from persons of plaintiff's qualifications.¹⁶¹⁹

For discriminatory failure to promote, the plaintiff must show:

- he or she is a member of a protected class;
- he or she was qualified for the position sought;
- he or she was denied the promotion; and
- individuals outside of the protected class were promoted.¹⁶²⁰

For discriminatory removal from his or her position, the plaintiff must show that:

- he or she belongs to a protected class;
- he or she was qualified for the position held;
- he or she was terminated or demoted from that position; and

¹⁶¹⁶ "Direct evidence is evidence which, if believed, proves the fact . . . without inference or presumption." *Bergene v. Salt River Project Agric. Improvement & Power Dist.*, 272 F.3d 1136, 1141 (9th Cir. 2001) (citing *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1222 (9th Cir. 1998)).

¹⁶¹⁷ In federal court, the *McDonnell Douglas* framework applies to both federal and state discrimination claims, regardless of the source of the federal court's subject matter jurisdiction. See *Dawson v. Entek Int'l*, 630 F.3d 928 (9th Cir. 2011).

¹⁶¹⁸ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973), *aff'd*, 528 F.2d 1102 (1976). See *Fragante*, 888 F.2d at 595 (citing *Yartsoff v. Thomas*, 809 F.2d 1371, 1374 (9th Cir. 1987)).

¹⁶¹⁹ See *McDonnell Douglas*, 411 U.S. at 802. The burden of proof under California, Washington and Utah law is largely the same. See *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 362 (1988); see also *Hobbs v. Labor Comm'n*, 991 P.2d 590, 593 (Ut. App. 1999).

In the Ninth Circuit, a plaintiff may meet the fourth prong of this test if the position is given to another candidate. "The 'open' position requirement merely requires that some vacancy exist at the time the application is made." *Barefield v. Bd. of Trs.*, 500 F. Supp. 2d 1244 (E.D. Cal. 2007) (citing *Hagans v. Andrus*, 651 F.2d 622 (9th Cir. 1981)).

¹⁶²⁰ See *Pejic v. Hughes Helicopters, Inc.*, 840 F.2d 667, 672 (9th Cir. 1988) (citing *Lynn v. Regents of Univ. of Cal.*, 656 F.2d 1337, 1341 (9th Cir. 1981)).

- the job went to someone outside the protected class.¹⁶²¹

For discriminatory discharge, the plaintiff must show:

- he or she was within the protected class;
- the plaintiff was performing the job well enough to rule out the possibility that he or she was fired for inadequate job performance; and
- the employer sought a replacement with qualifications similar to the plaintiff's own, thus demonstrating a continued need for the same services and skills.¹⁶²²

2) Defendant's Legitimate, Non-Discriminatory Reason

Once the plaintiff successfully establishes a *prima facie* case, a presumption of discrimination arises and the burden shifts to the employer to rebut that presumption by articulating a legitimate, non-discriminatory reason for the employer's adverse decision.¹⁶²³ An employer's non-discriminatory reason need not be job-related to suffice (*e.g.*, an employer may lawfully discriminate against an individual based on zodiac sign).¹⁶²⁴ However, whatever the employer's proffered reason, it must be supported by evidence in order to succeed. For example, in *Reeves v. Sanderson*, the employer argued that the employee was fired for failing to maintain accurate attendance records. The employer lost because the evidence did not clearly support a finding that maintaining such records was one of the employee's job duties.¹⁶²⁵ Employers can increase the likelihood that a judge or jury will believe their offered rationale by creating a complete and accurate written record supporting the employment action. As discussed elsewhere,¹⁶²⁶ both the procedures followed in conducting performance reviews and the substance of the documentation may have a significant impact on the outcome of a lawsuit.

3) Pretext

Employees are often able to establish a *prima facie* case and most employers are able to offer a legitimate reason for the employment action. Consequently, most discrimination disputes turn on the third step: whether the employee can establish that the employer's purported reason for the decision was pretext for discrimination.¹⁶²⁷ The plaintiff can establish pretext directly,¹⁶²⁸ by showing that the employer was more likely motivated by discrimination, or indirectly, by showing that the employer's proffered reason is unworthy of belief.¹⁶²⁹ For example, in *Bergene v. Salt River Project*, the employer asserted that it promoted a man instead of the female plaintiff because the man was better qualified for the position.¹⁶³⁰ The employee presented both direct and indirect evidence that the employer's proffered reason was pretext.¹⁶³¹ The evidence was that the employer changed the job requirements of the position to allow the man to qualify

¹⁶²¹ See *Coghlan*, 413 F.3d at 1094.

¹⁶²² See *Pejic*, 840 F.2d at 672 (citing *Sengupta v. Morrison-Knudsen Co.*, 804 F.2d 1072, 1075 (9th Cir. 1986)). Plaintiffs may be able to establish their *prima facie* case by relying on statistical evidence as their primary support. See *Schechner v. KPIX-TV*, 686 F.3d 1018 (9th Cir. 2012) (analyzing *prima facie* case under California law).

¹⁶²³ See *Fragrante*, 888 F.2d at 595 (citing *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981)).

¹⁶²⁴ In California, an executive director's decision to transfer an employee based, in part, on a desire for "fresh eyes" in the office was ruled a legitimate, non-discriminatory reason to transfer the employee. *Rogers v. Cnty. of L.A.*, 198 Cal. App. 4th 480 (2011).

¹⁶²⁵ 530 U.S. at 133, 143-45.

¹⁶²⁶ See Chapter II: Terms and Conditions of Employment.

¹⁶²⁷ See *id.* (citing *Burdine*, 450 U.S. at 252-53).

¹⁶²⁸ "Only a small amount of direct evidence is necessary in order to create a genuine issue of material fact as to pretext." *Bergene v. Salt River Project Agric. Improvement & Power Dist.*, 272 F.3d 1136, 1142 (9th Cir. 2001) (citing *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1222 (9th Cir. 1998)); see also *Adamson v. Multi Cmty. Diversified Servs., Inc.*, 514 F.3d 1136, 1146 (10th Cir. 2008).

¹⁶²⁹ See *Reeves*, 530 U.S. 133, 143-45 (2000) (citing *Texas Dept. of Cmty Affairs v. Burdine*, 450 U.S. 248, 256 (1981)).

¹⁶³⁰ *Bergene v. Salt River Project*, 272 F.3d 1136, 1141 (9th Cir. 2001).

¹⁶³¹ *Id.* at 1141.

and remove the plaintiff's competitive advantage for the position.¹⁶³² "Pretext" arguments often include evidence of discriminatory remarks, the untruth of an employer's proffered non-discriminatory reason,¹⁶³³ and that defendant has presented shifting or inconsistent reasons.

Although the burden of presenting evidence shifts back and forth between the employee and employer, the employee always has the ultimate burden of persuading the jury that the employer discriminated intentionally. In other words, at trial the evidence must show that unlawful discrimination was more likely than not a substantial factor motivating the adverse employment action.¹⁶³⁴ The employee need not prove that unlawful discrimination was the sole motivating factor, or the "but for" cause for the adverse employment action; the employee need only demonstrate that unlawful discrimination was a substantial cause.¹⁶³⁵ Unless an employee can show that it is more likely than not that discrimination was a substantial factor in the decision, the employer necessarily must win.¹⁶³⁶ This is true even where the employee demonstrates that the employer's rationale was untrue.

(ii) "Cat's Paw" Liability

Generally, a plaintiff must show that one of the decision makers involved in the challenged adverse employment action was acting on his own bias. However, courts have recently started to recognize a theory referred to as "cat's paw" or "subordinate bias" liability. In cases recognizing this theory, employers can be found liable even when the decision makers themselves have no bias. If the decision maker relies entirely on the opinion of a biased subordinate (usually a low level supervisor), the court will proceed as though the subordinate were one of the decision makers.¹⁶³⁷

(iii) Same Decision-Maker Defense

An employer may defend against a disparate treatment claim based on the same decision-maker rationale. Under this rationale, when an employee is both hired and fired by the "same decision maker" within a relatively short period of time, there is a strong inference that he or she was not discharged because of any attribute of which the decision maker was aware at the time of hiring.¹⁶³⁸ For an employer to succeed under this theory it must prove that the person who hired the employee was the same person who decided to fire him or her.¹⁶³⁹ This inference also applies to cases where an employee is not actually fired but merely offered a less desirable job assignment, as well as to recent good evaluations.¹⁶⁴⁰

(iv) Mixed Motive Theory

An employer may be liable for discrimination if its adverse employment action was partially motivated by a legitimate reason and partially motivated by unlawful discrimination. This is called a "mixed motive" case.

¹⁶³² *Id.* at 1142.

¹⁶³³ *Reeves v. Sanderson*, 530 U.S. 133 (2000).

¹⁶³⁴ *Capers v. Bon Marche*, 91 Wn. App. 138 (1998); *see also Peterson v. Utah Dept. of Corr.*, 301 F.3d 1182, 1191 (10th Cir. 2002).

¹⁶³⁵ *MacKay v. Acorn Custom Cabinetry*, 127 Wn.2d 302 (1995).

¹⁶³⁶ *Hill v. BCTI Income Fund I*, 144 Wn.2d 172 (2001) (citing *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148 (2000)); *see also Griffith v. Schnitzer Steel Indus., Inc.*, 128 Wn. App. 438 (2005).

¹⁶³⁷ *EEOC v. BCI Coca-Cola Bottling Co.*, 450 F.3d 476, 487 (10th Cir. 2006). On March 1, 2011, the U.S. Supreme Court, in a case brought under the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), upheld the "cat's paw" theory of employer liability. *Staub v. Proctor Hosp.*, 131 S. Ct. 1186 (2011).

¹⁶³⁸ *Id.* This argument is also known as the *same actor* defense, which, according to the Ninth Circuit, makes an employee's burden "especially steep." *Coghlan v. Amer. Seafoods Co.*, 413 F.3d 1090 (9th Cir. 2005); *Bradley v. Harcourt Brace & Co.*, 104 F.3d 267, 270-71 (9th Cir. 1996); *Hill*, 144 Wn.2d 172 (no judge or jury could reasonably conclude that the employee's age was a substantial factor in the decision to terminate her when the same decision makers had authority over both the employee's hiring and her firing less than a year later).

¹⁶³⁹ *Reid v. Google, Inc.*, 155 Cal. App. 4th 1342 (2007) (employer must prove that the executive who hired the employee at age 52 was the same and only person involved in firing the employee two years later), *aff'd*, 50 Cal. 4th 512 (2010).

¹⁶⁴⁰ *Coghlan v. Amer. Seafoods Co.*, 413 F.3d 1090 (9th Cir. 2005).

For example, a “mixed motive” case occurs if an employer fires an employee: (1) because the employee is bad at her job; *and* (2) because the employee is a woman. In *Metoyer v. Chassman*, the employer fired an employee who admitted diverting more the \$30,000 in funds to her husband and friends.¹⁶⁴¹ The Ninth Circuit held that, even if the employer would have fired the employee despite her race (*i.e.*, because she diverted funds), evidence of racist comments allowed the employee to bring her discrimination claim to a jury based on a mixed motive theory.

To prove a mixed motive case, an employee must establish that his or her membership in the protected class was a motivating factor (or substantial factor under Washington law) in the adverse employment decision.¹⁶⁴²

An employee in a mixed motive case may prove employer liability with either direct or indirect evidence.¹⁶⁴³ For example, in a 2003 case, the employer’s proffered legitimate reason for terminating the female employee-plaintiff was her participation in a physical altercation with a male co-worker. The employer was held liable under a mixed motive theory based on evidence that, while discipline for the altercation may have been legitimate, the two employees engaged in the altercation were disciplined differently. The male employee was merely suspended, while the female employee was terminated.¹⁶⁴⁴ This different treatment for the same offense was indirect evidence that discrimination played a motivating role in the termination.

Employers have limited defenses to a mixed motive case. An employer is liable with no defense if an employee proves a mixed motive case.¹⁶⁴⁵ While liability is absolute, an employer’s defense will be considered by the court in determining appropriate remedies. If the employer proves that it would have taken the same action even without the illegal motivation, remedies are limited to declaratory, injunctive relief and attorneys’ fees and costs, damages, reinstatement, hiring, promotion, or payment are not available in such circumstances.¹⁶⁴⁶

Mixed-motive cases effectively place the burden on employers to prove that all employment actions are taken for legitimate reasons. Adverse employment decisions against employees in a protected class should be carefully documented. Records should be kept detailing the rationale behind the discipline, demotion, promotion, and termination decisions. A complete and accurate written record supporting employment decisions will add credibility to an employer’s proffered reasons and help employers prevail even under a mixed motive theory.

The burden-shifting framework in mixed motive Title VII cases does not apply to age discrimination claims under the ADEA. In *Gross v. FBL Fin. Servs., Inc.*, the U.S. Supreme Court held that a plaintiff asserting a disparate treatment claim under the ADEA must prove that age was the “but-for” cause of an adverse employment action, as opposed to a mere “motivating factor.”¹⁶⁴⁷ In reaching its decision, the Court noted that while Congress amended Title VII to explicitly authorize mixed motive claims in which the plaintiff’s protected class was a motivating factor for an adverse employment action, it did not add a similar provision to the ADEA. The Court’s decision creates a distinction between disparate treatment claims brought under Title VII and the ADEA.

¹⁶⁴¹ *Metoyer v. Chassman*, 504 F.3d 919 (9th Cir. 2007) (evidence of racist motivation included comment by supervisor that he was keeping African-Americans in low-paying jobs “because [he wanted] to keep an eye on them because black people like to party and eat and don’t do their work”); *see also Alwine v. Buzas*, 89 F. App’x 196, 2004 WL 363477 (10th Cir. 2004).

¹⁶⁴² A mixed motive may also apply to an employer’s decision if based in part on a retaliatory motive. *Renç v. Spokane Eye Clinic, P.S.*, 114 Wn. App. 611 (2002).

¹⁶⁴³ *Desert Palace v. Costa*, 539 U.S. 90 (2003).

¹⁶⁴⁴ *Id.* at 95-102.

¹⁶⁴⁵ Previously, a defendant could avoid liability by proving that it would have made the same decision without the discriminatory motive. *See MacKay v. Acorn Custom Cabinetry, Inc.*, 127 Wn.2d 302, 316 (1995) (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244-45 (1989)). This rule was superseded by statute. *MacKay* at 317 (citing 42 U.S.C. § 2000e-5(g)(2)(B)); *see also Alwine v. Buzas*, 89 F. App’x 196, 2004 WL 363477 (10th Cir. 2004).

¹⁶⁴⁶ 42 U.S.C. § 2000e-5(g)(2)(B).

¹⁶⁴⁷ 557 U.S. 167 (2009).

(v) *Bona Fide Occupational Qualifications*

After a plaintiff proves her disparate treatment case, an employer may still avoid liability if it proves that a *bona fide* occupational qualification (“BFOQ”) applies.¹⁶⁴⁸ The BFOQ exception is narrowly applied to jobs for which an individual’s membership in a particular protected class is reasonably necessary to the normal operation of that particular business or enterprise.¹⁶⁴⁹ For example, where it is necessary for the purpose of maintaining conventional standards of sexual privacy (*e.g.*, locker-room attendant, intimate apparel-fitter), gender is a BFOQ.¹⁶⁵⁰ In contrast, an employer’s refusal to consider a person with a disability for a receptionist position because that person’s disability would make customers uncomfortable is not a valid BFOQ.¹⁶⁵¹

(b) Disparate Impact Claims

“Disparate impact” discrimination occurs when an employment policy or practice that is meant to be neutral toward all persons, but in practice disproportionately impacts persons in a protected class. Typically, disparate impact claims involve standardized tests and/or written examinations used to evaluate job applicants or employees, which are alleged to disproportionately impact persons in protected classes. Using subjective criteria in decision making may also lead to disparate impact.¹⁶⁵² Unlike disparate treatment discrimination, the disparate impact theory creates liability even if the employer did not intend to discriminate.¹⁶⁵³

A disparate impact discrimination claim may arise not only from the adoption of an employer policy which has a disparate impact upon individuals in a protected class, but also in all future implementations of the practice covered by the policy. In *Lewis v. City of Chicago*, the City of Chicago gave written examinations to individuals seeking firefighter positions.¹⁶⁵⁴ The City divided the individuals into three pools based on their examination scores – those who were “well qualified,” those who were “qualified,” and those who were “not qualified.” The “well qualified” candidates would be drawn randomly to move on to the next stage of the application process. The City told the “qualified” applicants that, while they were eligible for a position and would be kept on the eligibility list, it was unlikely they would be called for further processing. The City selected “well qualified” applicants to advance from the eligibility list and repeated this process many times over the next six years. In the last round it exhausted the “well qualified” pool and filled the remaining slots with “qualified” candidates. Minority individuals who were “qualified” but not hired sued the City, alleging that the policy negatively impacted them as a class. While not reaching the merits of plaintiffs’ claims, the U.S. Supreme Court held that a disparate impact claim may arise from each implementation of the City’s policy to randomly draw from the “well qualified” candidates first, as long as the elements of a disparate impact claim are met.

(i) The *Prima Facie* Case

In disparate impact cases, the *McDonnell Douglas* framework applies, but what each side must establish is slightly different. Where disparate impact is alleged, a plaintiff establishes a *prima facie* case by proving:

¹⁶⁴⁸ WAC 162-16-240, 162-22-045; Utah Code Ann. §§ 34A-5-102 and 106.

¹⁶⁴⁹ 42 U.S.C. § 2000e-2(e); *see* WAC 162-16-240; *see also* Utah Code Ann. § 34A-5-102.

¹⁶⁵⁰ WAC 162-16-240(1).

¹⁶⁵¹ WAC 162-16-240(3).

¹⁶⁵² *See Williams v. Boeing Co.*, No. 98-761, 2006 WL 126440 (W.D. Wash. Jan. 17, 2006) (some subjectivity in decision making is allowed).

¹⁶⁵³ *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988); *E-Z Loader Board Trailers, Inc. v. Travelers Indem. Co.*, 106 Wn.2d 901 (1986) (to prove disparate impact, a plaintiff must show that a facially neutral employment practice resulted in unintentional discrimination.); *Thompson v. Price Broad. Co.*, 817 F. Supp. 1538 (D. Utah 1993) (disparate impact employment discrimination requires no proof of discriminatory intent; plaintiff need only show that employer’s practices are discriminatory in operation).

¹⁶⁵⁴ 130 S. Ct. 2191 (2010).

- a facially neutral employment practice;
- that falls more harshly on a protected class.

In most cases, disparate impact is established through the use of statistical evidence measuring the extent to which members of the protected class are affected by the policy or rule, as compared to similarly situated persons who are not members of the protected class.

The plaintiff's statistical evidence must actually support an inference of discrimination. In *Frank v. County of L.A.*, the plaintiffs established that some seventy percent of officers in the county police department were minority members and thirty percent were Caucasian, while in the better paid sheriff's department the percentages were reversed. The court held that this differentiation, by itself, did not establish racial discrimination. The county's policy was to pay both minority and Caucasian county police less than their sheriff counterparts and there was no evidence of any racially discriminatory barriers deterring minorities from applying to the higher paid sheriff positions.¹⁶⁵⁵ Thus, the plaintiff's statistics did not support an inference that the policy was discriminatory.

An employer cannot engage in intentional discrimination against members of one protected class in order to avoid a disparate impact claim by individuals in another protected group unless the employer can demonstrate a strong basis in evidence that, had it not taken the action, it would have been subject to disparate impact liability. In *Ricci v. DeStefano*, the U.S. Supreme Court held that an employer's refusal to certify test results on a promotional exam simply because a disproportionate number of minority examinees were unsuccessful constituted a *prima facie* case of discrimination against the successful examinees in violation of Title VII.¹⁶⁵⁶ The Court concluded that the employer lacked a strong basis in evidence to believe that it would face disparate-impact liability if it certified the examination results because there was no evidence that the test was not job-related or that a particular less discriminatory alternative was available.

(ii) Business Necessity Defense

Once the plaintiff establishes a *prima facie* case, the burden shifts to the defendant to prove that the challenged employment policy or practice is justified by "business necessity" and is "manifestly related" to the position in question.¹⁶⁵⁷ This is known as the "business necessity" defense. To establish a business necessity defense, an employer must prove by professionally accepted measures that the practice alleged to have a discriminatory impact accurately predicts or significantly correlates with the fundamental requirements of job performance.

If the employer succeeds in demonstrating a business necessity, the burden shifts back to the plaintiff to prove that other less discriminatory alternatives equally serve the employer's legitimate business requirements.¹⁶⁵⁸

(c) Failure to Accommodate

An employer may discriminate by failing to accommodate an employee's disability, pregnancy, or religious practices. This theory involves a different standard of proof and is discussed in more detail below.

¹⁶⁵⁵ *Frank v. Cnty. of L.A.*, 149 Cal. App. 4th 805 (2007).

¹⁶⁵⁶ 129 S. Ct. 2658 (2009).

¹⁶⁵⁷ 42 U.S.C. § 2000e-2(k); see also *Frank v. United Airlines, Inc.*, 216 F.3d 845 (9th Cir. 2000) (airlines' weight policy that treated males and females differently was discriminatory on its face because airlines offered no evidence that women flight attendants needed to be thinner than their male counterparts); *Smith v. City of Jackson*, 544 U.S. 228 (2005) (holding plaintiffs bringing claims under the Age Discrimination in Employment Act ("ADEA") may rely on the disparate impact theory. The *Smith* case affirmed what was already the standard in the Ninth Circuit. Employees may bring disparate impact claims under the ADEA if they can identify the specific employment practice they believe is responsible for the statistical disparity).

¹⁶⁵⁸ See *Shannon v. Pay 'N Save Corp.*, 104 Wn.2d 722 (1985).

SECTION 9.3 PROTECTED CLASSES

Federal, Minnesota, Washington, California, and Utah law all prohibit employment discrimination on the basis of race, gender, national origin, religion (creed), color, age, and disability. For these types of claims, the *McDonnell Douglas* burden-shifting analysis governs the elements of the plaintiff's *prima facie* case, the applicable presumptions, and the burdens of production and proof.¹⁶⁵⁹ The MHRA, WLAD and California's FEHA also prohibit discrimination based on marital status and sexual orientation.

(a) Race

Employment discrimination claims based on race are available under Title VII, Section 1981, the WLAD, MHRA, California's FEHA, and UADA. Common racial classifications include African-American, American Indian, Caucasian, Asian, and Pacific Islander. "Race" includes ancestry, ethnicity (*e.g.*, Hispanic or Latino), and physical and cultural characteristics associated with a certain race (*e.g.*, skin color, hair texture and styles, certain facial features), but does not include national origin.¹⁶⁶⁰

"Color" generally refers to skin pigmentation and is not necessarily related to race or ethnicity; color discrimination can occur even between persons of the same race or ethnicity (*e.g.*, an African-American employer refuses to hire an African-American applicant based on the applicant's darker skin).¹⁶⁶¹

Generally, to succeed with a race discrimination claim, an employee-plaintiff must prove his or her case by showing, under the *McDonnell Douglas* framework, that similarly-situated individuals of another race were treated more favorably.¹⁶⁶² In the context of a layoff, the employee need not show that he was replaced by a member of a different race, only that the circumstances of his layoff give rise to an inference of discrimination.¹⁶⁶³ Such an inference can be established by showing that the employer had a continuing need for the employee's services and by showing that others outside his protected class were treated more favorably.¹⁶⁶⁴ In *Subia v. Riveland*, the plaintiff established a *prima facie* case of disparate treatment race discrimination by showing that he, a Native American-Hispanic corrections officer, with an otherwise exemplary record, had been placed on administrative leave pending an investigation of sexual misconduct. In contrast, at least one Caucasian officer similarly accused was not placed on leave.¹⁶⁶⁵

Title VII and Section 1981 also prohibit "reverse discrimination,"¹⁶⁶⁶ which refers to discrimination against those who are in the majority or have been favored historically in employment (*e.g.*, Caucasians).¹⁶⁶⁷ While an employee-plaintiff in a reverse discrimination case must make his or her *prima facie* case under the *McDonnell Douglas* framework,¹⁶⁶⁸ the first element of the test must be modified because it requires a plaintiff to be in a racial minority. The Ninth and Tenth Circuits appear to find the first element is satisfied

¹⁶⁵⁹ See this Chapter, Section 9.2: Theories of Discrimination. See, *e.g.*, *Xieng v. Peoples Nat'l Bank*, 120 Wn.2d 512 (1993) (national origin); *Kuyper v. State*, 79 Wn. App. 732 (1995) (age); *Nielson v. AgriNorthwest*, 95 Wn. App. 571 (1999) (religion); *Subia v. Riveland*, 104 Wn. App. 105 (2001) (race).

¹⁶⁶⁰ *St. Francis College v. Al-Khazraji*, 481 U.S. 604 (1987) (a United States citizen, born in Iraq and member of the Muslim faith, may bring a race discrimination claim if the discrimination was based on ancestry or ethnic characteristics, rather than on his place or nation of origin or on his religion).

¹⁶⁶¹ See U.S. Equal Employment Opportunity Commission, Questions and Answers About Race and Color Discrimination in Employment, http://www.eeoc.gov/policy/docs/qanda_race_color.html; see also *EEOC Compliance Manual*, Section 15: Race & Color Discrimination, <http://www.eeoc.gov/policy/docs/race-color.html>.

¹⁶⁶² *Aragon v. Republic Silver State Disposal, Inc.*, 292 F.3d 654 (9th Cir. 2002).

¹⁶⁶³ *Id.* at 660.

¹⁶⁶⁴ *Id.*

¹⁶⁶⁵ *Subia v. Riveland*, 104 Wn. App. 106, 112 (2001) (remanded for new trial on evidentiary grounds).

¹⁶⁶⁶ The term "reverse discrimination" is a term of art; the actual claim will be based on race, sex, etc.

¹⁶⁶⁷ *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976) (employer discriminated in violation of Title VII by firing two Caucasian employees and retaining the black employee when all three employees engaged in the same prohibited conduct).

¹⁶⁶⁸ See this Chapter, Section 9.2: Theories of Discrimination.

if the plaintiff is a member of a protected class, regardless of whether he or she is a “racial minority.”¹⁶⁶⁹ Employers may consider race in employment in narrow circumstances which are discussed in Chapter VIII: Affirmative Action.

(b) National Origin

Title VII, the WLAD, MHRA, California’s FEHA, and UADA prohibit employment discrimination based on an employee’s national origin.¹⁶⁷⁰ The EEOC broadly defines national origin discrimination as “because of an individual’s, or his or her ancestor’s place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group.”¹⁶⁷¹ The EEOC will also consider claims by individuals alleging discrimination grounded in national origin considerations, such as: (1) marriage to or association with a national origin group; (2) association with an organization promoting the interests of or identified with a national origin group; (3) attendance at schools or religious sites generally used by a national origin group; and (4) because an individual’s or his or her spouse’s name is associated with a national origin group.¹⁶⁷² Plaintiffs may bring a claim under a disparate treatment or disparate impact theory.¹⁶⁷³ Claims of reverse discrimination are also available.¹⁶⁷⁴

Washington courts cite the federal definition of national origin.¹⁶⁷⁵

(c) Religion

Title VII, the WLAD, MHRA, California’s FEHA, and the UADA protect an employee from religious discrimination in employment. “Religion” includes “all aspects of religious observances and practices as well as belief.”¹⁶⁷⁶ Religious discrimination includes requiring an employee to adhere to the employer’s religious practices or beliefs, punishing an employee for privately practicing his or her religious beliefs, or failing to reasonably accommodate the employee’s religious practices.

(i) Federal Law

Many religious discrimination cases focus on an employer’s alleged failure to accommodate. Courts apply a two-part framework to these claims.

To establish a *prima facie* case, an employee must establish:

¹⁶⁶⁹ See *Moran v. Selig*, 447 F.3d 748 (9th Cir. 2006) (“Title VII applies to all racial groups, whether majority or minority”) (citing *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 278-80 (1976)); see also *Taken v. Oklahoma Corp. Comm’n*, 125 F.3d 1366, 1368 (10th Cir. 1997). Some circuits require a majority plaintiff to make an additional showing over and above what would be required for minority plaintiffs; specifically, evidence of “background circumstances” that “support the suspicion that the defendant is that unusual employer who discriminates against the majority.” *Parker v. Baltimore & Ohio R.R. Co.*, 652 F.2d 1012 (D.C. Cir. 1981). A plaintiff’s allegation that he or she was better qualified than the minority candidate chosen instead of him or her can constitute sufficient background circumstances to establish a *prima facie* case. *Harding v. Gray*, 9 F.3d 150 (D.C. Cir. 1993).

¹⁶⁷⁰ See 42 U.S.C.A. § 2000e-2(a)(1). See RCW 49.60.180; Cal. Gov’t Code §§ 12940 *et seq.*; Utah Code Ann. §§ 34A-5-101 *et seq.*

¹⁶⁷¹ 29 C.F.R. § 1606.1; see also *Pejic v. Hughes Helicopters, Inc.*, 840 F.2d 667, 673 (9th Cir. 1988) (for purposes of Title VII, national origin includes the country of one’s ancestors even if the country no longer exists); *Fragrante v. City & Cnty. of Honolulu*, 888 F.2d 591 (9th Cir. 1989) (national origin discrimination includes discrimination based solely on foreign accent).

¹⁶⁷² See 29 C.F.R. § 1606.1; see also *Hernandez v. S. Gate*, No. BC312104 (Cal. Super. Ct. May 17, 2007) (four employees were awarded \$10.4 million on a FEHA claim for harassment because they supported two Latino political figures).

¹⁶⁷³ See *Fragrante*, 888 F.2d at 594.

¹⁶⁷⁴ *Thomas v. Robner-Gebrig & Co.*, 582 F. Supp. 669, 675 (N.D. Ill. 1984) (American plaintiffs claimed national origin discrimination against their Swiss-owned employer).

¹⁶⁷⁵ See *Xieng v. Peoples Nat’l Bank of Wash.*, 63 Wn. App. 572, 578 (1991) (quoting 29 C.F.R. § 1606.1); *Espinoza v. Farab Mfg. Co., Inc.*, 414 U.S. 86 (1973) (“national origin” means the country from which your forbearers came).

¹⁶⁷⁶ 42 U.S.C. § 2000e(j). See *Brown v. Woodland Joint Unified Sch. Dist.*, 27 F.3d 1373 (9th Cir. 1994) (holding that Wicca is protected as a religion); *Reed v. Great Lakes Cos., Inc.*, 330 F.3d 931 (7th Cir. 2003) (Title VII protects Atheists from discrimination based on their lack of religious belief). Compare *Wilson v. U.S. West Comm’ns*, 368 F. Supp. 1025 (8th Cir. 1995) (views about military draft or reproductive choice are “religious”); *Bellamy v. Mason’s Stores, Inc.*, 58 F.3d 1337 (E.D. Va. 1993) (membership in the Ku Klux Klan or the Communist Party is political).

- she had a *bona fide* religious belief, the practice of which conflicted with an employment duty;
- she informed her employer of the belief and conflict; and
- the employer threatened her or subjected her to discriminatory treatment, including discharge, because of her inability to fulfill the job requirements.¹⁶⁷⁷

One case demonstrating the boundaries of a *bona fide* religious belief is *Tiano v. Dillard Dep't Stores*. In *Tiano*, the plaintiff learned of a pilgrimage to a town in Yugoslavia where several people claimed to have seen visions of the Virgin Mary. She testified that she had a “calling from God” and requested unpaid leave to go on the pilgrimage. The request was denied because of the store’s vacation policy prohibiting employees from taking leave during the store’s busy holiday season. The court held that, while the plaintiff may have a *bona fide* religious belief in the need to go on the pilgrimage, her need did not extend to going at the requested times.¹⁶⁷⁸ The employer could accommodate her by allowing her to go some other time.

If the employee proves a *prima facie* case of discrimination, the burden shifts to the employer to show that it initiated good faith efforts to reasonably accommodate the employee’s religious practices, or that it could not reasonably have done so without undue hardship.¹⁶⁷⁹ An employer may show undue hardship by demonstrating that the employee’s attendance or a specific performance requirement is needed for normal business operations. For example, an employer need not accommodate an employee’s beard (worn for religious reasons) where facial hair would present danger to the employee or others.¹⁶⁸⁰

Under Title VII, a plaintiff may bring a reverse religious discrimination claim even if she is not a member of a protected class, (*i.e.*, does not adhere to particular religious beliefs). In *Noyes v. Kelly Servs., Inc.*, the plaintiff alleged that she was passed over for a promotion because she did not share the religious beliefs of her supervisor. The court held that in reverse religious discrimination cases, a plaintiff need not prove the “protected class” element because “it is the religious beliefs of the employer, and the fact that [the employee] does not share them, that constitute the basis of the [religious discrimination] claim.”¹⁶⁸¹

A religious institution may present a defense under the ministerial exception if the employee’s primary job function is to serve the employer’s spiritual or pastoral mission. The employee need not be ordained to fall under the exception; *e.g.*, a choir director may qualify if she performs ministerial functions.¹⁶⁸²

(ii) Washington Law

Few reported cases in Washington have involved claims of religious discrimination. However, current precedent suggests that the federal analysis under Title VII will apply. For example, in *Nielson v. AgriNorthwest*, the court held that where discrimination does not target a particular religion, but is against an employee who does not share a particular religious belief, the employee must show: (1) that he or she was subject to some adverse employment action; (2) that, at the time of that action, the employee’s job performance was satisfactory; and (3) some additional evidence to support the reference that the employment action was taken because of a discriminatory motive based on the employee’s failure to hold or follow the employer’s religious belief.¹⁶⁸³

Washington courts also follow federal analysis regarding Title VII’s exemption for religious corporations, associations, educational institutions, and societies. In *Spencer v. World Vision Inc.*,¹⁶⁸⁴ the court held that a

¹⁶⁷⁷ *Tiano v. Dillard Dep't Stores*, 139 F.3d 679 (9th Cir. 1998).

¹⁶⁷⁸ *Id.*

¹⁶⁷⁹ See *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977) (citing and discussing the definition of “religion” contained in 42 U.S.C. § 2000e(j)).

¹⁶⁸⁰ See *Bhatia v. Chevron USA, Inc.*, 734 F.2d 1382 (9th Cir. 1984) (employer not required to accommodate the employee’s religious belief in wearing a beard because the beard would interfere with the respirator’s safety function).

¹⁶⁸¹ *Noyes v. Kelly Servs., Inc.*, 488 F.3d 1163, 1038 (9th Cir. 2007).

¹⁶⁸² *Fontana v. Diocese of Yakima*, 138 Wn. App. 421 (2007).

¹⁶⁸³ *Nielson v. AgriNorthwest*, 95 Wn. App. 571, 578 (1999).

non-profit corporation that provides humanitarian aid and services to children and families is exempt from Title VII's ban on religious discrimination because the corporation is itself a "primarily religious" organization. World Vision received twenty-three to twenty-seven percent of its revenue from federal government grants, provided humanitarian services, and was not affiliated with a particular church. Nonetheless, the court agreed that the corporation was religious in character, as evidenced by its Christian mission statement, emphasis on Christian ministries, invocation of Bible verses, and requirement of religious faith in job applicants.

The WLAD does not support a claim for failure to accommodate religious beliefs.¹⁶⁸⁵

(iii) California Law

California has adopted the Ninth Circuit's test for determining what constitutes a religious belief under the FEHA. A "religious" belief is one that: (1) addresses fundamental and ultimate questions having to do with deep and imponderable matters; (2) is part of a religion that is comprehensive in nature and consists of a belief system as opposed to an isolated teaching; and (3) can be recognized by the presence of certain formal and external signs. In *Friedman v. S. Cal. Permanente Med. Group*, the court held that "veganism," a creed that proscribes the ingestion or use of any products derived from animals, did not qualify as a "religious creed" under this test.¹⁶⁸⁶ In 2012, California passed a law clarifying that FEHA protection covers religious dress and grooming practices.¹⁶⁸⁷ It also specifies that segregating an individual from other employees or the public is not a reasonable accommodation of religious practices.

(iv) Utah Law

Current precedent suggests that the federal analysis under Title VII will apply to religious discrimination cases in Utah. For example, in *Seely v. Runyon*, the court held that where discrimination does not target a particular religion, but is against an employee who does not share a particular religious belief, the employee must show: (1) that he or she was subject to some adverse employment action; (2) that, at the time of that action, the employee's job performance was satisfactory; and (3) some additional evidence to support the reference that the employment action was taken because of a discriminatory motive based on the employee's failure to hold or follow the employer's religious belief.¹⁶⁸⁸

(d) Age

The ADEA, the WLAD, RCW 49.44.090, the MHRA, California's FEHA, and UADA prohibit discrimination against individuals age 40 and over on the basis of age. Age discrimination is not based on a distinction between under 40 years old and over 40 years, but rather on the preference of someone younger to someone who is over 40 (*i.e.*, preferring 45-year-old to 70-year-old is still discrimination).¹⁶⁸⁹

An employee may bring a disparate treatment claim based on ageist comments made by the employer. For example, comments that the employee was not a "cultural fit"; was "slow," "fuzzy," "sluggish," and

¹⁶⁸⁴ 570 F. Supp. 2d 1279 (W.D. Wash. 2008) (employer not liable for firing employees "because they no longer believed or were aligned" with the employer's "statement of faith"), *aff'd*, 633 F.3d 723 (9th Cir. 2011) (after taking into account all significant religious and secular characteristics, employer found to be "primarily religious").

¹⁶⁸⁵ *Short v. Battle Ground Sch. Dist.*, 169 Wn. App. 188 (2012). *Hiatt v. Walker Chevrolet Co.*, 120 Wn.2d 57 (1992) (court did not consider whether the WLAD supports a state claim for religious accommodation because only the federal claim was on appeal).

¹⁶⁸⁶ *Friedman v. S. Cal. Permanente Med. Group*, 102 Cal. App. 4th 39 (2002).

¹⁶⁸⁷ Cal. AB 1964.

¹⁶⁸⁸ *Seely v. Runyon*, 966 F. Supp. 1060, 1063 (D. Utah 1997), citing *Shapolia v. Los Alamos Nat'l Lab.*, 992 F.2d 1033, 1038 (10th Cir. 1993).

¹⁶⁸⁹ *O'Connor v. Consol. Coin Caterers*, 517 U.S. 308 (1996); *see also Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581 (2004) (holding that discrimination against the relatively young is outside ADEA's protection, and employer therefore did not violate the ADEA by eliminating health insurance benefits for workers under 50, but retaining program for workers over 50).

“lethargic”; and that his ideas were “obsolete” and “too old to matter” could be construed to be direct evidence of age discrimination.¹⁶⁹⁰

Employees may bring disparate impact claims under the ADEA if they can identify the specific employment practice they believe is responsible for the statistical disparity.¹⁶⁹¹ Recently, the Ninth Circuit Court of Appeals ruled that, in determining the validity of an age discrimination claim, the court may make a comparison with younger employees in the protected class.¹⁶⁹² Liability based on ADEA disparate impact claims is “narrower” in scope than under Title VII. An employer will not be liable if the employer can prove that the differentiation between younger and older workers is based on “reasonable factors other than age.”¹⁶⁹³ The business necessity defense is unavailable to employers defending against ADEA claims.¹⁶⁹⁴

Employers should take special care to ensure that any release of claims under the ADEA made by employees is knowing and voluntary. In other words, it should be written in a manner calculated to be understood by the average employee eligible to participate in the agreement.¹⁶⁹⁵ The Older Workers Benefits Protection Act (“OWBPA”), enacted in 1990, amends the ADEA to require that a release of an ADEA claim must, at a minimum: (1) be a written agreement understandable by the average employee; (2) expressly refer to the employee’s ADEA rights; (3) not include prospective waivers; (4) provide written advice to consult attorney prior to execution; (5) provide an adequate consideration period (21 days for a single termination; 45 days for a group termination); (6) provide adequate consideration; (7) allow a seven-day revocation period; and (8) where applicable, provide group termination disclosures.

(e) Sex

Title VII, the WLAD, MHRA, California’s FEHA, and UADA prohibit employment discrimination on the basis of sex.¹⁶⁹⁶ Sex discrimination includes pregnancy and wage discrimination based on sex,¹⁶⁹⁷ as well as reverse discrimination.¹⁶⁹⁸ Under California’s FEHA, the term “sex” also includes breastfeeding or medical conditions related to breastfeeding.¹⁶⁹⁹ The Washington Human Rights Commission processed more complaints of sexual harassment and pregnancy or maternity discrimination between June 2006 and June 2007 than any other type of claim.

The Pregnancy Discrimination Act of 1978 (“PDA”) amended Title VII to prohibit discrimination on the basis of pregnancy, childbirth, or related medical conditions.¹⁷⁰⁰ An employer cannot refuse to hire a woman because of her pregnancy-related condition as long as she is able to perform the major functions of her job.

¹⁶⁹⁰ Of possible relevance was the fact that these comments were made by a younger (38-year-old) executive. *Reid v. Google, Inc.*, 155 Cal. App. 4th 1342 (2007), *judgment affirmed*, 50 Cal. 4th 512 (2010).

¹⁶⁹¹ *Smith v. City of Jackson*, 544 U.S. 228 (2005); *see, e.g., Reid v. Google, Inc.*, 155 Cal. App. 4th 1342 (evidence showing that older employees statistically were more likely to receive poorer performance reviews and lower bonuses may be evidence of age discrimination).

¹⁶⁹² *Earl v. Nielsen Media Research, Inc.*, 658 F.3d 1108 (9th Cir. 2011).

¹⁶⁹³ *Smith*, 544 U.S. 228; *see Palmer v. United States*, 794 F.2d 534, 536 (9th Cir. 1986).

¹⁶⁹⁴ *Smith*, 544 U.S. at 242.

¹⁶⁹⁵ 29 U.S.C. § 626(f); *see also* EEOC regulations at 29 C.F.R. § 1625.22.

¹⁶⁹⁶ *See* RCW 49.60.180; Minn. Stat. § 363A.08, subd. 2; Utah Code Ann. § 34A-5-106.

¹⁶⁹⁷ *See* this Chapter, Section 9.3: Protected Classes. 42 U.S.C. § 2000e-2(a); Equal Pay Act; 29 U.S.C. § 206(d); *see Maxwell v. City of Tucson*, 803 F.2d 444, 446 (9th Cir. 1986); Washington’s Equal Pay Statute, RCW 49.12.175, California’s equal pay law, Cal. Lab. Code, pt. 4, Ch. 1, §§ 1197.5 *et seq.*, as amended by Ch. 1479, 1985 Cal. Stat.; Utah Code Ann. § 34A-5-106.

¹⁶⁹⁸ *See Schafer v. Bd. of Pub. Educ.*, 903 F.2d 243 (3d Cir. 1990) (male employee had claim for discrimination where he was not allowed to take a year of paternity leave, while female employees were allowed to take a year of maternity leave).

¹⁶⁹⁹ Cal. Gov’t Code § 12926(9).

¹⁷⁰⁰ *But see AT&T Corp. v. Hulteen*, 556 U.S. 701 (2009) (AT&T did not violate the PDA by calculating the accrual of pension benefits in a way that gives less retirement credit to employees who took pregnancy leave before enactment of the PDA than to employees who took other kinds of medical leave).

An employer may be liable for sex discrimination based on a failure to accommodate a woman during her pregnancy.¹⁷⁰¹ If an employee is temporarily unable to perform her job due to pregnancy, the employer must accommodate her to the same extent as any other temporarily disabled employee; (*e.g.*, providing modified tasks, alternative assignments, disability leave, or leave without pay). Employers must hold open a job for a pregnancy related absence the same length of time jobs are held open for employees on sick or disability leave.

An employer must not discriminate in providing benefits to pregnant women. For example, any health insurance provided by an employer must cover expenses for pregnancy-related conditions on the same basis as costs for other medical conditions.¹⁷⁰² Pregnancy-related benefits cannot be limited to married employees. If an employer provides any benefits to workers on leave, the employer must provide the same benefits for those on leave for pregnancy-related conditions. Employees with pregnancy-related disabilities must be treated the same as other temporarily disabled employees for accrual and crediting of seniority, vacation calculation, pay increases and temporary disability benefits.¹⁷⁰³

Pregnancy discrimination is outlawed by Chapter 162-30 of the Washington Administrative Code (“WAC”), which interprets and implements the sex discrimination protection of RCW 49.60.180.¹⁷⁰⁴ Specifically, the WAC makes it an unfair practice for an employer to refuse to hire, promote, terminate, demote, or impose different terms and conditions of employment on women because of pregnancy or childbirth.¹⁷⁰⁵

The Washington Supreme Court ruled in 2007 that an employer who refuses to hire a job applicant because of her pregnancy is liable for sex discrimination under the WLAD, absent a business necessity or a BFOQ. The case, *Hegwine v. Longview Fibre Co.*,¹⁷⁰⁶ involved a woman, Stacy Hegwine, who applied for a clerk/order checker position in Fibre’s customer service department. During Hegwine’s interview, Fibre said the position had a 25-pound lifting requirement. Fibre offered Hegwine the position conditioned upon her successful completion of a physical exam. During the exam, Hegwine disclosed that she was pregnant. Her doctor indicated that she could meet Fibre’s 25-pound lifting requirement. After Fibre learned Hegwine was pregnant, however, it notified her that its lifting requirement was actually 40 pounds. Hegwine then obtained a new release from her physician indicating that she could meet the 40-pound requirement. Fibre subsequently determined that the requirement was actually 60 pounds and notified Hegwine that it was withdrawing its offer of employment because her “availability did not permit her to perform the job.” Hegwine sued Fibre alleging unlawful sex discrimination.

The Washington Supreme Court held that using disability discrimination analysis was erroneous and instead, claims of employment discrimination because of pregnancy are to be analyzed as matters of sex discrimination. Under the Supreme Court’s framework, an employer unlawfully discriminates by refusing to hire a person because of her pregnancy, unless the refusal is based upon a business necessity or the employer proves a BFOQ.

The Supreme Court further held that Fibre could not support either a business necessity or a BFOQ defense to its various lifting requirements. To establish a business necessity defense, an employer must prove that the challenged employment practice utilized significantly correlates with the fundamental requirements of job performance. For example, the court stated, “an employer hiring workers into a

¹⁷⁰¹ See, *e.g.*, *Lopez v. Bimbo Bakeries USA, Inc.*, No. CGC-05-445104 (Cal. Super. Ct. Sept. 27, 2007) (former employee was awarded \$2.34 million jury verdict and nearly \$1.06 million in attorneys’ fees based on claim that the company failed to accommodate her pregnancy and discriminated against her).

¹⁷⁰² Health insurance for expenses arising from abortion is not required, except where the life of the mother is endangered.

¹⁷⁰³ 29 C.F.R. § 1604.11; see, *e.g.*, *Pallas v. Pac. Bell*, 940 F.2d 1324, 1326-27 (9th Cir. 1991) (employer who credits temporary disability leave toward retirement benefits must also credit pregnancy-related leave).

¹⁷⁰⁴ WAC § 162-30-010.

¹⁷⁰⁵ WAC § 162-30-020(3)(a).

¹⁷⁰⁶ 159 Wn.2d 1001 (2007).

training program that cannot accommodate absences for the first two months might be justified in refusing to hire a pregnant woman whose delivery date would occur during those first two months.” The court held that Fibre’s business necessity claim failed because its proffered non-discriminatory reason for not hiring Hegwine, the lifting requirement, was merely pretext for intentional discrimination because of her pregnancy. The court pointed to evidence that the job advertisement listed no lifting requirement; in the interview, only a 25-pound lifting requirement was mentioned; and when Hegwine’s doctor’s permission exceeded the 25-pound lifting requirement, Fibre changed the requirement and told her it was 40, and then 60 pounds.

To establish a BFOQ, an employer must show that excluding pregnant women was essential to the purposes of the position or that all or substantially all pregnant women would be unable to efficiently perform the duties of the position, such that hiring them would undermine the company’s operations. Fibre’s BFOQ defense failed because it did not show that excluding pregnant women was essential to the clerk/order checker position or that substantially all pregnant women are incapable of meeting the position’s lifting requirement.

The court also held that Fibre violated the WLAD when it inquired as to Hegwine’s pregnancy status as part of its mandatory pre-employment medical exam, because “inquiring as to a prospective employee’s pregnancy status constitutes unlawful sex discrimination, unless the inquiry is based upon a valid BFOQ.”

Unresolved by the court was the issue of whether a pregnancy related condition that becomes a permanent disability may be governed by the disability discrimination framework involving reasonable accommodation.

(i) Wage Discrimination

1) Federal Law

Under the federal Equal Pay Act of 1963, a plaintiff must prove that his or her employer pays different wages to different employees of the opposite sex “for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.”¹⁷⁰⁷

A plaintiff also must show that he or she selected the proper comparator: “a plaintiff cannot make a comparison of one classification composed of male and females with another classification of employees also composed of males and females.”¹⁷⁰⁸ For example, in *Hall v. County of L.A.*, the plaintiff alleged that the county violated the federal Equal Pay Act because it paid female lawyers employed under the county’s Auxiliary Legal Services program (“ALS”) less than it paid male lawyers serving as county counsel. The court held that there was no basis for the plaintiff’s use of a male county counsel lawyer as a comparator because, at any given time, ALS and county counsel both employed a substantial number of women and within ALS, women were paid the same as men.¹⁷⁰⁹

If the plaintiff can provide sufficient evidence of substantial equality in jobs and a disparity in wages, the burden of persuasion shifts to the employer to demonstrate that the disparity is permitted by one of the four statutory exceptions to the Equal Pay Act: “(i) a 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.”¹⁷¹⁰ Title VII incorporates the Equal Pay Act defenses, so a defendant who successfully defends under one act cannot be liable under the other.¹⁷¹¹

¹⁷⁰⁷ 29 U.S.C. § 206(d)(1); see also *EEOC v. Maricopa Cnty. Cmty. Coll. Dist.*, 736 F.2d 510, 513 (9th Cir. 1984).

¹⁷⁰⁸ *Hall v. Cnty. of L.A.*, 148 Cal. App. 4th 318 (2007).

¹⁷⁰⁹ *Id.* at 325.

¹⁷¹⁰ *Maricopa Cnty.*, 736 F.2d 510 (citing 29 U.S.C. § 206(d)(1)). See *Hall v. Cnty. of L.A.*, 148 Cal. App. 4th 318 (2007) (two-tiered wage and benefits system was not discriminatory because there was a legitimate and non-discriminatory cost-savings purpose).

2) Washington Law

By statute, Washington employers are prohibited from paying female workers a lower wage than is paid to males presently or previously performing a similar job.¹⁷¹² Employers who violate this law are liable for the difference between the female employee's salary and the higher male employee's salary. In addition, violation of this law is a misdemeanor. The Washington statute is virtually identical to the federal Equal Pay Act of 1963, which requires the plaintiff to prove he or she is paid at a lower rate than opposite-gender employees "for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions."¹⁷¹³

The Washington statute allows only one defense: that the wage differential is based in good faith on a factor or factors other than gender. Accordingly, an employer may defend against a claim of wage discrimination by articulating, and demonstrating, legitimate business reasons for its actions, which are reasonably and consistently applied.¹⁷¹⁴ Washington's defense is essentially the same as exception (iv) under federal law. Accordingly, interpretations of exception (iv) under federal law may provide guidance in interpreting the Washington defense.

An example of an employer's successful use of this defense is presented in *Adams v. Univ. of Wash.* In *Adams*, the plaintiffs were employed pursuant to a collective bargaining agreement, creating two new categories of union employees, both hired at wages less than those paid to the original position. In time, a class of predominately male employees was paid higher wages than a class of predominately female employees paid to perform substantially similar work.¹⁷¹⁵ The court held that the employer did not violate Washington's equal pay statute because it premised its actions in good faith on legitimate business reasons, including: (1) a decision to maintain the higher wage for both men and women in the original position in order to retain the skilled workers; (2) desire to mitigate the impact of potentially demoralizing adjustment in job duties; (3) avoidance of higher charges to customers than would have resulted from paying all positions the same wages; and (4) the determination to no longer hire any individuals in the original position, but to phase out such classification through natural attrition.¹⁷¹⁶

3) California Law

FEHA prohibits discrimination in compensation because of a person's status in a protected class.¹⁷¹⁷ The California Equal Pay Law prohibits discrimination on the basis of sex in the payment of wages.¹⁷¹⁸ Male and female employees in the same classification who perform substantially the same quantity and quality of work are entitled to equal pay, unless pay differentials are based on *bona fide* factors other than sex, such as seniority or merit. Wage discrimination is proven according to the *McDonnell Douglas* burden-shifting analysis.

An employer need not pay male and female employees the same wage merely because they hold the same position. In *Shaffer v. GTE, Inc.*, a female employee's work background, experience, and prior salary were legitimate, non-gender-based reasons for the employer to place the employee in a lower salary range than two male employees hired for the same position.¹⁷¹⁹

¹⁷¹¹ *Maxwell*, 803 F.2d at 446.

¹⁷¹² RCW 49.12.175.

¹⁷¹³ 29 U.S.C. § 206(d)(1).

¹⁷¹⁴ *Adams v. Univ. of Wash.*, 106 Wn.2d 312 (1986).

¹⁷¹⁵ *Id.* at 326.

¹⁷¹⁶ *Id.* at 325-26.

¹⁷¹⁷ Cal. Gov't Code § 12940(a).

¹⁷¹⁸ Cal. Lab. Code § 1197.5.

¹⁷¹⁹ 40 F. App'x 552, 556 (9th Cir. 2002).

Under California's law on equal pay, an employer or other person acting either individually or as an officer, agent, or employee of another person is guilty of a misdemeanor, if he or she: (1) pays or causes to be paid any employee a wage less than the rate paid to an employee of the opposite sex; or (2) reduces the wages of any employee in order to comply with the wage statute; or (3) violates or refuses or neglects to comply with any provision of the wage statute. The misdemeanor is punishable by a fine of up to \$10,000, or imprisonment for up to six months, or both.

4) Minnesota Law

Minnesota law prohibits employers from paying female employees at a lower rate than male employees "for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions."¹⁷²⁰ "Equal work" means "substantially equal," even if the jobs are not identical.¹⁷²¹ "Skill" includes considerations such as experience, training, education, and ability. "Effort" refers to the physical or mental exertion necessary to the performance of the job. "Responsibility" concerns the degree of accountability required in performing a job.¹⁷²² These same standards apply to a Title VII sex discrimination case involving unequal compensation.¹⁷²³

A wage differential is permissible, however, if it is "made pursuant to: (1) a seniority system; (2) a merit system; (3) a system which measures earnings by quantity or quality of production; or (4) a differential based on any other factor other than sex."¹⁷²⁴

Under the Minnesota Equal Pay for Equal Work Law, an employee is entitled to damages equal to the amount of unpaid wages for one year and an equal amount for exemplary damages, as well as reasonable attorney fees.¹⁷²⁵ A violation of this law also constitutes a misdemeanor.¹⁷²⁶

5) Utah Law

By statute, Utah employers are prohibited from paying differing wages or salaries to employees having substantially equal experience, responsibilities, and skill for the particular job.¹⁷²⁷ In addition, a determination of discrimination in rate of pay because of sex cannot be made solely on basis of finding that the employee was doing the same work, and with the same degree of competence.¹⁷²⁸ Courts also must consider classification and seniority.¹⁷²⁹

(f) Marital Status

The WLAD, MHRA, and California's FEHA prohibit discrimination based on marital status. Marital status is "the legal status of being married, single, separated, divorced or widowed."¹⁷³⁰ Marital status under the WLAD does not apply to co-habiting, dating, or other social relationship.¹⁷³¹ An employer may base

¹⁷²⁰ Minn. Stat. § 181.67.

¹⁷²¹ *Lawrence v. CNF Transp.*, 340 F.3d 486, 491 (8th Cir. 2003); *Peltier v. City of Fargo*, 533 F.2d 374, 377 (8th Cir. 1976).

¹⁷²² *Yountz v. Fremont Cnty., Iowa*, 370 F.3d 748, 753 (8th Cir. 2004); *Krenik v. Cnty. of LeSueur*, 47 F.3d 953, 960 (8th Cir. 1995); *EEOC v. Universal Underwriters Ins. Co.*, 653 F.2d 1243, 1245 (8th Cir. 1981).

¹⁷²³ *Simmons v. New Pub. Sch. Dist.*, 251 F.3d 1210, 1215 (8th Cir. 2001); *EEOC v. Delight Wholesale Co.*, 973 F.2d 664, 669 (8th Cir. 1992).

¹⁷²⁴ Minn. Stat. § 181.67, subd. 1.

¹⁷²⁵ Minn. Stat. § 181.68.

¹⁷²⁶ Minn. Stat. § 181.70.

¹⁷²⁷ Utah Code Ann. § 34A-5-106.

¹⁷²⁸ *Kopp v. Salt Lake City*, 506 P.2d 809, 811 (Utah 1973).

¹⁷²⁹ *Id.*

¹⁷³⁰ RCW 49.60.040(7).

¹⁷³¹ See *Waggoner v. Ace Hardware Corp.*, 134 Wn.2d 748 (1998) (employment policy against related co-habiting or dating employees supervising one another does not violate the WLAD).

some employment decisions on a person's marital status if it can show that the employer is enforcing a clearly established conflict of interest policy.¹⁷³²

(g) Sexual Orientation

Discrimination based on sexual orientation is not prohibited under federal law. In fact, an employee's sexual orientation is irrelevant in a Title VII claim; it "neither provides nor precludes" a sexual harassment claim.¹⁷³³

Washington, Minnesota, and California include "sexual orientation" among their protected classes.¹⁷³⁴ "Sexual orientation" includes "heterosexuality, homosexuality and bisexuality," as well as "gender expression or identity." "Gender expression or identity" means "having or being perceived as having a gender identity, self-image, appearance, behavior, or expression, whether or not that gender identity, self-image, appearance, behavior, or expression is different from that traditionally associated with the sex assigned to that person at birth."¹⁷³⁵ Alternatively, under California law, "gender expression" is defined as "a person's gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth."¹⁷³⁶ Several local ordinances also prohibit sexual orientation discrimination.¹⁷³⁷ In California, every group health insurance policy that is marketed, issued, or delivered to a California resident is subject to the requirement to provide equal coverage to domestic partners as is provided to spouses, notwithstanding any other provision of law. A willful violation of this provision by a health care service is a crime.¹⁷³⁸

(h) Veterans and Military Service

An employer may not discriminate against an applicant or employee based on current or prior membership in the military.¹⁷³⁹ "Discriminate" includes failure to hire, re-employ, or promote; termination; or denying any other benefit of employment on the basis of that membership. Retaliation is also prohibited.¹⁷⁴⁰

Veterans are also entitled to certain re-employment rights based on their length of service.¹⁷⁴¹ Generally, an employer must re-employ a veteran in the position in which he or she would have been employed if continuous employment had not been interrupted by military service or in a position of like seniority, status and pay.¹⁷⁴²

¹⁷³² WAC 162-16-250(2).

¹⁷³³ *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061 (9th Cir. 2002); *see also Johnson v. Cmty. Nursing Services*, 932 F. Supp. 269, 273-74 (D. Utah 1996).

¹⁷³⁴ *See, e.g., Jones v. Lodge at Torrey Pines P'ship*, 147 Cal. App. 4th 475, *review granted and opinion partially superseded by*, 160 P.3d 661 (Cal. 2007) (California appeals court reinstated a \$1.5 million sexual orientation discrimination and retaliation verdict). The Court of Appeal's decision was later reversed and remanded by 42 Cal. 4th 1158 (2008). *See also Loeffelholz v. Univ. of Wash.*, 175 Wn.2d 264 (2012) (2006 amendment to WLAD to add sexual orientation as a protective class was not retroactive).

¹⁷³⁵ *See* RCW 49.60.040(15).

¹⁷³⁶ *See* Cal. Gov't Code § 887. This law, enacted in 2011, also amends Government Code § 12949 relating to dress code to include that an employee must be allowed to dress consistently with both the employee's gender identity and gender expression.

¹⁷³⁷ *See* Seattle Fair Employment Practices Ordinance, Seattle Municipal Code, Ch. 14.04; King County Fair Employment Practices Ordinance, King County Code, Ch. 12.18. In addition, the Washington Administrative Code prohibits sexual orientation discrimination by government employers. WAC 356-09-020, -030(1).

¹⁷³⁸ S.B. 757.

¹⁷³⁹ 38 U.S.C. § 4311. A person who applies for membership in the military is also protected. *See generally* 38 U.S.C. §§ 4301-19 and 42 U.S.C. § 2000e-11. Employers with federal contracts or subcontracts of \$25,000 or more are also covered by the Vietnam Era Veterans' Readjustment Assistance Act of 1974. 38 U.S.C. § 4212; Utah Code Ann. § 39-1-36.

¹⁷⁴⁰ *See* this Chapter, Section 9.6: Retaliation.

¹⁷⁴¹ 38 U.S.C. §§ 4312-16.

¹⁷⁴² 38 U.S.C. § 4313; *see also* Utah Code Ann. § 39-1-36.

Washington prohibits an employer from discriminating against an applicant or employee because of honorably discharged veteran or military status.¹⁷⁴³

California prohibits employers from discriminating against a member of the armed forces with respect to employment. Employers are also prohibited from discharging from employment any military person because he or she is required to perform military service, and from hindering or preventing a military person from performing any ordered service. A plaintiff may recover monetary damages and attorneys' fees, and violators may be guilty of a misdemeanor.¹⁷⁴⁴

(i) Political Activity

The Washington Fair Campaign Practices Act prohibits discrimination based on political activity. "No employer or labor organization may discriminate against an officer or employee in the terms or conditions of employment for: (1) the failure to contribute to; (2) the failure in any way to support or oppose; or (3) in any way supporting or opposing a candidate, ballot proposition, political party, or political committee."¹⁷⁴⁵

The Fair Campaign Practices Act prohibits employers from discriminating against employees because of the employees' refusal to abstain from political involvement. In *Nelson v. McClatchy Newspapers, Inc.*, the employer-newspaper had an ethics code that defined "conflict of interest" to include all situations in which readers might be led to believe that the news reporting was biased, including situations in which reporters participate in high-profile political activity.¹⁷⁴⁶ The employee-plaintiff violated the code by attending political fora, demonstrations, and classes for political causes, giving highly visible support for gay and lesbian rights, feminist issues, and abortion rights. As a result, the newspaper transferred the employee to another position in which she maintained her salary, benefits, and seniority, but was required to work nights and weekends and was no longer a beat reporter investigating and writing stories. Her transfer became permanent when she refused to promise future conformity with the ethics code. Finding for the defendant, the court held that the law was meant to prevent employers from wielding their might to influence politics and elections;¹⁷⁴⁷ an "employer may not disproportionately influence politics by forcing their employees to support their position or by attempting to force political abstinence on politically active employees."¹⁷⁴⁸

In Utah, employers must allow up to two hours of paid leave to allow employees to vote if (1) the employee is not already off of work at least three hours during the time the polls are open, and (2) the employee applies for leave before election day.¹⁷⁴⁹ Employers may specify the hours during which employees may take leave except that if an employee requests leave at the beginning or end of the work shift, the employer must grant that request.¹⁷⁵⁰

(j) Genetic Information

Federal law states that employers are prohibited from discrimination against employees on the basis of genetic information.¹⁷⁵¹ Genetic information means, with respect to any individual, information about any

¹⁷⁴³ RCW 49.60.180.

¹⁷⁴⁴ Cal. Mil. & Vet. Code § 394 (2008); *see also* Utah Code Ann. § 39-1-36.

¹⁷⁴⁵ RCW 42.17.680(2). *See also* Cal. Lab. Code § 1102 for similar California legislation protecting employees' political freedom.

¹⁷⁴⁶ *Nelson v. McClatchy Newspapers, Inc.*, 131 Wn.2d 523 (1997).

¹⁷⁴⁷ *Id.* at 534.

¹⁷⁴⁸ Because the defendant employer was a newspaper, the federal and state constitutional right to freedom of the press rendered unconstitutional application of the statute to the facts of the case. However, such constitutional arguments likely do not apply in the private (non-press) employer-employee relationship context. *Id.* at 535-44.

¹⁷⁴⁹ Utah Code Ann. § 20A-3-103.

¹⁷⁵⁰ *Id.*

¹⁷⁵¹ 42 U.S.C. § 2000ff-1; *see also* Cal. Gov't Code § 12920; Utah Code Ann. § 26-45-103.

of the following: the individual's genetic tests, the genetic tests of family members of the individual, or the manifestation of a disease or disorder in family members of the individual.¹⁷⁵² California has determined that genetic information includes any request for, or receipt of, genetic services, or participation in clinical research that includes genetic services, by an individual or any family member of that individual. Genetic information does not include information about the sex or age of any individual.¹⁷⁵³

(k) Gender or Sexual Orientation Discrimination Involving California State Contracts

The state of California is prohibited from entering into contracts of more than \$100,000 with companies that discriminate against their employees on the basis of gender or sexual orientation with regard to benefits.¹⁷⁵⁴

SECTION 9.4 DISABILITY DISCRIMINATION

The ADA, the WLAD, MHRA, the FEHA, and UADA make it unlawful for an employer to discriminate against a disabled person who is otherwise qualified for employment.¹⁷⁵⁵ Discrimination includes failing to take affirmative steps to accommodate a disabled person. The ADA applies to all employers with 15 or more employees.¹⁷⁵⁶ The WLAD applies to all Washington employers with eight or more employees.¹⁷⁵⁷ Washington employers with fewer than eight employees are exempt from the WLAD,¹⁷⁵⁸ but may be sued for allegedly discriminatory terminations under the common law tort of wrongful discharge in violation of public policy.¹⁷⁵⁹ The UADA applies to employers with 15 or more employees within the state for each working day in each of 20 calendar weeks or more in the current or preceding calendar year.¹⁷⁶⁰

(a) “Disability”

In order to qualify for protection under any of the statutes, an individual must have a condition that counts as a disability. The definition of a person with a “disability” varies slightly under federal, Washington, California, Minnesota, and Utah law.

(i) Federal Law

Under the ADA, the definition of disability has three parts. A person with a disability is someone who (1) has a physical or mental impairment, (2) that substantially limits, (3) one or more major life activities.¹⁷⁶¹ “Major life activities” refers to activities that are of central importance to daily life.¹⁷⁶² Additionally, “major life activities” include the operation of major bodily functions, such as the immune system, sense organs and skin, and the digestive system.¹⁷⁶³ Generally, “disability” does not include impairments that merely render the individual incapable of performing a particular job for one employer;¹⁷⁶⁴ an individual must be incapable of performing a class of jobs or “broad range” of jobs.¹⁷⁶⁵ Furthermore, the impact of the impairment must also be permanent or long-term.¹⁷⁶⁶ However, temporary and episodic conditions, and

¹⁷⁵² *Id.*

¹⁷⁵³ Cal. Gov't Code § 12920.

¹⁷⁵⁴ Cal. Pub. Cont. Code § 10295.3.

¹⁷⁵⁵ 42 U.S.C. § 12112(a); RCW 49.60.030(1)(a); Minn. Stat. § 363A.08.

¹⁷⁵⁶ 42 U.S.C. § 12111(5)(A). Shareholders of a corporation may be counted among the 15 or more employees necessary to be covered by the ADA. *Clackamas Gastroenterology Assoc. P.C. v. Wells*, 538 U.S. 440 (2003).

¹⁷⁵⁷ RCW 49.60.040(3).

¹⁷⁵⁸ *Griffin v. Eller*, 130 Wn.2d 58 (1996).

¹⁷⁵⁹ *Roberts v. Dudley*, 140 Wn.2d 58 (2000).

¹⁷⁶⁰ Utah Code Ann. § 34A-5-102(1)(h)(i)(D).

¹⁷⁶¹ 42 U.S.C. § 12102(1).

conditions in remission, also qualify as disabilities if the condition would substantially limit a major life activity when active.¹⁷⁶⁷

Until very recently, the determination of whether an impairment is “substantially limiting” took into account the effect of any corrective mitigating measures (such as eyeglasses, medications, medical procedures, etc.).¹⁷⁶⁸ On January 1, 2009, the ADA Amendments Act (“ADAAA”) went into effect. Congress enacted the ADAAA to reject the Supreme Court decisions in *Sutton* and *Toyota Motor Mfg.* and bring more people under the scope of the ADA. No court or employer is allowed to consider mitigating measures taken by employees when deciding whether that employee is actually disabled (except for eyeglasses). Also, courts are now supposed to be more liberal when deciding whether an impairment substantially limits a major life activity. The Act now states that the emphasis is most ADA litigation should be on whether the employer has discharged its responsibility to find a reasonable accommodation for its employees.

Federal courts have limited the impact of the ADAAA by declining to retroactively apply the Act to plaintiffs’ claims concerning conduct that occurred before the effective date of the ADAAA.¹⁷⁶⁹

The effects of these amendments on the enforcement of the ADA could be costly for employers. Many claims of disability discrimination were dismissed after courts decided, early in litigation, that the employee simply was not disabled. Now, presumably, more of those claims will proceed further. It is advisable, generally, to give employees with medical certification the benefit of the doubt about whether they are disabled, and actively engage in a process to determine how they can be accommodated.

The first wave of disability discrimination cases arising since the ADAAA took effect are now starting to reach the federal courts. One of the first cases to reach the summary judgment stage, *Hoffman v. Carefirst of Fort Wayne, Inc.*,¹⁷⁷⁰ is instructive. In *Hoffman*, the court ruled that the employee’s renal cancer in remission was a disability under the plain language of the ADAAA, which provides that “[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.”¹⁷⁷¹ As neither side disputed that the employee’s renal cancer would substantially limit a major life activity when active, the court found that under the plain language of the ADAAA, the employee need not show that he was substantially limited in a major life activity at the time of the alleged adverse employment action. After finding the employee was disabled under the ADAAA, the court then turned its attention to whether the employer offered a reasonable accommodation. Because of the liberalized definition of what constitutes a

¹⁷⁶² Such as: caring for one’s self, performing manual tasks, eating, sleeping, walking, seeing, hearing, speaking, breathing, learning, lifting, reading, concentrating and working. 42 U.S.C. § 12102(2). Other major life activities include: thinking, communicating, and interacting with others. 29 C.F.R. § 1630.2(i)(1)(i). See, e.g., *Littleton v. Wal-Mart Stores, Inc.*, 552 U.S. 944 (2007) (U.S. Supreme Court declined to resolve a circuit split as to whether “interaction with others” and “social interaction” are major life activities. The Ninth Circuit assumes that social interaction is a major life activity); see also *Head v. Glacier Nm., Inc.*, 413 F.3d 1053 (9th Cir. 2005) (reading is a major life activity); *McAlindin v. Cnty. of San Diego*, 192 F.3d 1226 (9th Cir. 1999) (sexual relations, sleeping, and interacting with others are “major life activities” for the purposes of the ADA); *Fraser v. Goodale*, 342 F.3d 1032 (9th Cir. 2003) (eating is a “major life activity” for ADA purposes); *Coons v. U.S. Dept. of Treasury*, 383 F.3d 879 (9th Cir. 2004) (the ability to travel is not a major life activity under the ADA).

¹⁷⁶³ 29 C.F.R. § 1630.2(i)(1)(ii).

¹⁷⁶⁴ *Walton v. U.S. Marshals Serv.*, 492 F.3d 998 (9th Cir. 2007), cert. denied, 552 U.S. 1097 (2008) (“an allegation that an employer which requires its employees to meet certain vision standards does not establish a claim that the employer regards one who fails to meet the vision requirement as being substantially limited in the major life activities of working or seeing”; the activity must be “of comparative importance, and . . . central to most people’s daily lives”). See also *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516 (1999); *Thornton v. McClatchy Newspapers, Inc.*, 261 F.3d 789 (2001), clarified by, 292 F.3d 1045 (9th Cir. 2002) (“The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.”). See also *EEOC v. United Parcel Serv., Inc.*, 306 F.3d 794 (9th Cir. 2002), opinion amended at 311 F.3d 1132 (9th Cir. 2002) (held that for a monocular person to prove that his impairment substantially limits a major life activity, the impairment must severely restrict use of his eyesight compared with the normal use of eyesight in the daily life of an unimpaired person).

¹⁷⁶⁵ *EEOC v. Exxon Corp.*, 124 F. Supp. 2d 987, 995 (N.D. Tex. 2000).

¹⁷⁶⁶ *Id.* at 994.

¹⁷⁶⁷ 29 C.F.R. §§ 1630.2(j)(1)(vii)-(ix).

disability under the ADAAA, litigation is more likely to focus on the accommodation offered by employers.

An employee may bring a claim of disability discrimination under the ADA without producing “comparative or medical” evidence regarding the impairment of a major life activity;¹⁷⁷² the plaintiff’s sworn testimony may suffice. For example, in *Head v. Glacier Nm., Inc.*, the court held that the plaintiff’s affidavit had established sufficient evidence to demonstrate that his depression and bipolar disorder resulted in a substantial impairment in the major life activities of sleeping, interacting with others, reading and thinking. The court cautioned that “an affidavit supporting the existence of a disability must not be merely self-serving and must contain sufficient detail to convey the existence of an impairment.”¹⁷⁷³

An employee who does not meet the ADA’s definition of “disabled” may bring an ADA suit against an employer who “regards” or perceives the employee as disabled.¹⁷⁷⁴ To support a “regarded as” claim, a plaintiff must establish that the employer subjectively believed that the employee had some impairment and was substantially limited in a major life activity. If the employee cannot prove that the employer subjectively believed the employee was disabled, the employee must prove that a reasonable employer would believe the impairment wrongly attributed to the employee would be substantially limiting, if accurate.¹⁷⁷⁵

This area of the law can be difficult for employers. For example, in *USF-Red Star Express Inc. v. Taylor*, the U.S. Supreme Court declined to disturb a federal appeals court decision holding an employer liable under the ADA on the basis of perceived disability, despite evidence that the employee affirmatively misled the employer that he had epilepsy.¹⁷⁷⁶ The employer argued that it held the employee out of work because it believed a seizure might be “a threat to [the employee] and others” and readmitted him to work when a doctor certified that he would be safe. The appeals court turned this evidence against the employer, using it to support the court’s finding that the employer regarded the employee as disabled.

¹⁷⁶⁸ Now abrogated by statute, the U.S. Supreme Court had explicitly rejected the position that an individual’s impairment should be judged in the unmitigated or uncorrected state. *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999) (two individuals with impaired vision were not “disabled” because they were able to correct their visual impairments with eyeglasses or contact lenses); *Murphy*, 527 U.S. 516 (blood pressure medication could mitigate the condition). *Toyota Motor Mfg.* held that an employee is required to offer evidence that shows that the limitation is substantially limiting personally as opposed to showing that the disability usually limits people in their major life activity. 534 U.S. 184 (2002). State laws differ on this point. See Cal. Gov’t Code §§ 12926(j)(1)(A) (mental disability), (l)(1)(B)(i) (physical disability) (limitation of a major life activity is to be considered without regard to any mitigating measures); *Fuller v. Iowa Dept. of Human Servs.*, 576 N.W.2d 324, 332 (Iowa 1998) (evaluating plaintiffs’ vision in the uncorrected state, without benefit of mitigating or corrective measures); *Grant v. May Dept. Stores Co.*, 786 A.2d 580, 585 (D.C. 2001) (mitigating measures, specifically insulin use, are taken into account when considering whether an individual has a disability under the DC Human Rights Act); *Hook v. Georgia-Gulf Corp.*, 788 So.2d 47, 54 (1st Cir. 2001) (analyzing claim under Louisiana law, evidence does not clearly establish that plaintiff was substantially limited in his ability to learn despite his Ritalin treatment); *Davis v. Computer Maint. Serv., Inc.*, No. 01A01-9809-CV-00459, 1999 WL 767597, *9-11 (Tenn. App. Sept. 29, 1999) (mitigating measures are taken into account when determining disability under Tennessee Handicap Act).

¹⁷⁶⁹ See *Becerril v. Pima Cnty. Assessor’s Office*, 587 F.3d 1162 (9th Cir. 2009) (holding that the ADAAA applies prospectively only); see also *Lyles v. D.C. Water & Sewer Auth.*, 572 F.3d 936 (2009) (holding that the ADAAA does not apply retroactively).

¹⁷⁷⁰ 737 F. Supp. 2d 976 (N.D. Ind. 2010).

¹⁷⁷¹ *Id.* at *7 (quoting 42 U.S.C. § 12102(4)(D)).

¹⁷⁷² *Head v. Glacier Nm., Inc.*, 413 F.3d 1053 (9th Cir. 2005).

¹⁷⁷³ *Id.* at 1059.

¹⁷⁷⁴ See e.g., *Walton v. U.S. Marshals Serv.*, 492 F.3d 998 (9th Cir. 2007) (employee failed to show that her inability to meet her employer’s hearing requirements meant that the employer regarded her as disabled in the major life activities of hearing and working).

¹⁷⁷⁵ *Id.* at 1006.

¹⁷⁷⁶ *Taylor v. USF-Red Star Express Inc.*, 212 F. App’x. 101 (3d Cir. 2006), cert. denied, 550 U.S. 936 (2007) (the employee told his supervisor he had epilepsy, gave the company literature about accommodations for epilepsy; wrote a letter requesting an accommodation for epilepsy; and falsely stated in a signed EEOC Charge that he had been diagnosed with epilepsy. He later testified he never believed he had epilepsy).

(ii) Washington Law

The WLAD covers more employees than the ADA because Washington has given a broader definition of “disability” when interpreting the WLAD than federal courts have given to the ADA. The Washington definition of “disability” has been in flux for several years, with the most recent change coming from the legislature in July of 2007.¹⁷⁷⁷

A “disability” under the WLAD is defined as a currently existing medically cognizable or diagnosable sensory, mental, or physical impairment, which currently exists, which existed once or which is recorded as having existed once, or which is perceived to exist.¹⁷⁷⁸ “Impairment” includes a physiological disorder or condition, cosmetic disfigurement, anatomical loss affecting one or more of several specified body systems, and any mental, developmental, traumatic, and psychological disorder.¹⁷⁷⁹ A “disability” can be temporary or permanent, common or uncommon, mitigated or unmitigated, and must limit the person’s ability to do work or otherwise engage in any other activity encompassed within Washington’s anti-discrimination law.¹⁷⁸⁰

An employer must provide a reasonable accommodation if it knows of an impairment: (1) which has a substantially limiting effect upon the individual’s ability to perform his or her job, to apply or be considered for a job, or to access equal benefits, privileges, or terms of employment; or (2) which would likely be aggravated to the extent that it would create such a substantial limit if an employee was required to engage in job functions without accommodation. If the proposed basis for accommodation is the reasonable likelihood that without the accommodation the impairment would be aggravated, the employee must have notified the employer of the impairment.¹⁷⁸¹ Also, medical documentation must establish this basis. A limitation is not substantial if it has only a trivial effect.¹⁷⁸²

Conduct resulting from the disability (*e.g.*, decrease in performance, absenteeism) is part of the disability and not a separate basis for termination.¹⁷⁸³ For example, in *Gambini v. Total Renal Care, Inc.*,¹⁷⁸⁴ the plaintiff, Stephanie Gambini, suffered bipolar disorder. This caused her to experience depression, anxiety, and at least one emotional breakdown at work. She notified her supervisors of her condition, that she was seeking treatment, and that she was struggling with medication-caused symptoms, including mood swings. Her symptoms worsened and her job performance suffered. When confronted by her supervisors regarding her work performance issues, Gambini erupted into an emotional outburst: she cried, threw the performance improvement plan across the desk, directed a “flourish of several profanities” at her supervisors, and continued kicking and throwing things once she returned to her cubicle. Gambini

¹⁷⁷⁷ Until 2007, the WLAD did not contain a definition of the term “disability.” In 2006, the Washington State Supreme Court found that the meaning of “disability” as used in the WLAD was consistent with the definition of “disability” found in the ADA. *See McClarty v. Totem Elec.*, 157 Wn.2d 214 (2006). The state legislature then amended the WLAD to provide a new, more expansive, statutory definition of “disability.” The legislature explicitly declared the new statutory definition applied retroactively to causes of action occurring the day before the *McClarty* opinion was filed and on or after the effective date of the amendment.

In *Hale v. Wellpinit Sch. Dist. No. 49*, 165 Wn.2d 494 (2009), the Washington State Supreme Court considered whether the legislature’s retroactive amendment of a statute the court had already construed violated the separation of powers doctrine. The court held that the retroactive amendment of the WLAD did not threaten the independence or integrity of the judicial branch.

¹⁷⁷⁸ RCW 49.60.040(7)(a).

¹⁷⁷⁹ RCW 49.60.040(7)(c).

¹⁷⁸⁰ RCW 49.60.040(7)(b).

¹⁷⁸¹ *See Roeber v. Dowty Aerospace Yakima*, 116 Wn. App. 127, 138 (2003) (employee failed to give adequate notice that his migraines and depressive conditions were substantial limitations where his letter to his employer from the employee’s nurse-practitioner and counselor indicated that these conditions were controlled by medication). *See also, Harrell v. State of Wash.*, 170 Wn. App. 386 (2012) (no failure to accommodate or demotion when transferred to on-call position).

¹⁷⁸² RCW 49.60.040(7)(d)-(e).

¹⁷⁸³ *Riebl v. Foodmaker, Inc.*, 152 Wn.2d 138 (2004), citing *Humphrey v. Mem’l Hosps. Ass’n*, 239 F.3d 1128, 1139-40 (9th Cir. 2001), *cert. denied*, 535 U.S. 1011 (2002).

¹⁷⁸⁴ *Gambini v. Total Renal Care, Inc.*, 486 F.3d 1087 (9th Cir. 2007).

reported to a hospital the next day. Following an investigation of the incident, the company terminated Gambini on the basis that her violent outburst violated workplace conduct rules. Gambini filed suit. The Ninth Circuit ruled that based on both the WLAD and ADA a jury could connect conduct resulting from Gambini's disability to her disability itself.

(iii) California Law

California law contains a broader definition of physical disability, mental disability, and medical condition than federal law. California recognizes as a disability any physical or mental condition “which in any way limits” one or more major life activities “mak[ing] the achievement of the major life activity difficult.”¹⁷⁸⁵ This includes many more impairments than does federal law, which requires that a physical or mental condition “substantially limit” one or more major life activities. This distinction is intended to, and does, result in broader coverage under California law. For example, in *EEOC v. United Parcel Serv.*, the Ninth Circuit determined that an employee with monocular vision was disabled under FEHA, because he was limited in the major life activities of seeing and working.¹⁷⁸⁶ The court previously determined that the same condition did not qualify as a disability under the ADA, because it did not *substantially* limit these major life activities.¹⁷⁸⁷

EEOC v. United Parcel Service highlights another difference between state and federal disability law: California state law specifically includes the activity of “working” as a major life activity, regardless of whether the actual or perceived working limitation implicates a particular employment or a class or broad range of employments.¹⁷⁸⁸ Recall that under federal law, a disability based on the major life activity of “working” must render an individual incapable of performing a “substantial class of jobs” or “broad range of jobs.”¹⁷⁸⁹

California law protects employees from discrimination due to an actual or perceived physical or mental impairment that is disabling, potentially disabling, or perceived as disabling or potentially disabling. This, however, does not end the inquiry. As with the ADA, a plaintiff must prove that he or she is able to perform the essential duties of the position with or without reasonable accommodation.¹⁷⁹⁰ When determining whether an employee is able to perform the essential duties of their position when the employee was placed on a “light duty assignment” after their return to work from disability leave, the relevant inquiry is whether the employee is able to perform the essential duties of the light duty assignment given to them on their return to work, *not* whether the employee is able to perform all of the essential duties of their original position in general.¹⁷⁹¹

California law also imposes an obligation on employers, under FEHA, to engage in the interactive process to explore potential accommodations for an employee's disability. In certain instances, reasonable accommodation can include providing the employee accrued paid leave or additional unpaid leave for treatment; however, if doing so would create an undue hardship and this undue hardship is supported by

¹⁷⁸⁵ See *Nimmo v. Montage Hotels & Resorts, LLC*, No. G043306, 2011 WL 2084146 (Cal. Ct. App. May 26, 2011). Cal. Gov't Code § 12926(l)(1)(B). The state code lists, by way of example, specific physical and mental disabilities, including HIV/AIDS, hepatitis, seizure disorder, diabetes, clinical depression, bipolar disorder, multiple sclerosis, and heart disease. Recently, the California Supreme Court reversed the Court of Appeal's decision and ruled in favor of a plaintiff who was discriminated against based on her panic disorder, a body odor caused by her medication, and a nervous disorder that caused her to dig her fingernails into the skin of her arms. See *Roby v. McKesson Corp.*, 47 Cal. 4th 686 (2009) (holding that personnel management actions were proper evidence of disability harassment under FEHA).

¹⁷⁸⁶ *EEOC v. United Parcel Serv., Inc.*, 424 F.3d 1060 (9th Cir. 2005).

¹⁷⁸⁷ *EEOC v. United Parcel Serv., Inc.*, 306 F.3d 794, 797 (9th Cir. 2002), *opinion amended at* 311 F.3d 1132 (9th Cir. 2002).

¹⁷⁸⁸ Cal. Gov't Code § 12926.1(c) (2005); *EEOC v. United Parcel Serv., Inc.*, 424 F.3d at 1072; *Bryan v. United Parcel Serv., Inc.*, 307 F. Supp. 2d 1108 (N.D. Cal. 2004).

¹⁷⁸⁹ *EEOC v. Exxon Corp.*, 124 F. Supp. 2d 987, 995 (N.D. Tex. 2000).

¹⁷⁹⁰ *Green v. California*, 42 Cal. 4th 254 (2007).

¹⁷⁹¹ *Cuiellette v. City of Los Angeles*, 194 Cal. App. 4th 757 (2011).

the facts, a California employer may not be required to provide accrued paid leave or additional unpaid leave for treatment once their CFRA/FMLA leave has been exhausted.¹⁷⁹²

(iv) Minnesota Law

The MHRA's definition of "disability" requiring a "material limitation" is apparently slightly different and somewhat less stringent than the ADA definition of a "disability" requiring a "substantial limitation."¹⁷⁹³ However, the factors and considerations utilized in determining whether one is, in fact, "disabled" as a matter of law nevertheless remain the same.¹⁷⁹⁴ It remains to be seen how Minnesota courts will approach the amended ADA.

(v) Utah Law

The UADA's definition of "disability" is a physical or mental disability as defined and covered by the ADA.¹⁷⁹⁵

(b) "Qualified Individual"

The ADA does not protect all persons with disabilities; rather, it protects only disabled persons who are otherwise "qualified" to perform the job. An individual is "qualified" if he or she can perform the "essential functions" of the job with or without reasonable accommodation.¹⁷⁹⁶ Thus, an ADA plaintiff must prove that he or she is an individual with a disability who "satisfied the requisite skill, experience, education and other job-related requirements of the employment position . . . and who, with or without reasonable accommodation, can perform the essential function of such position."¹⁷⁹⁷ Determining the essential functions of a specific position requires the employer to consider several factors, including the employer's judgment as to which functions are essential, the written job description, if any, covering the position, and the actual experience of persons in the position.¹⁷⁹⁸

Employers may not substitute a policy for the required individualized assessment of whether a qualified individual is able to perform the essential functions of the job with or without reasonable accommodation.¹⁷⁹⁹

Establishing that a person is "qualified" or "able" is the same regardless of whether federal, Washington, or California law applies. Emphasis is given to written job descriptions and to a physician's opinion regarding the person's actual capabilities given the sensory, mental, and physical qualifications needed for proper performance of the job.¹⁸⁰⁰

As discussed in the *Hegvine* decision, pregnancy and any related condition do not qualify as a disability under the WLAD because of their temporary nature.¹⁸⁰¹ Accordingly, a person cannot sue under the WLAD for disability discrimination related to such a condition.

¹⁷⁹² See *Gonzalez v. ATI Systems Int'l*, No. B223779, 2011 WL 1902582 (Cal. Ct. App. May 23, 2011).

¹⁷⁹³ See *Landers v. Nat'l R.R. Passenger Corp.*, No. 00-2233, 2001 WL 1690061 (D. Minn. Dec. 28, 2001); *Hoover v. Norwest Private Mortg. Banking*, 632 N.W.2d 534, 543 n.5 (Minn. 2001).

¹⁷⁹⁴ *Hoover*, 632 N.W.2d at 543 n.5; see also *Kammueler v. Loomis, Fargo & Co.*, 383 F.3d 779, 784 (8th Cir. 2004); *Weber v. Strippit, Inc.*, 186 F.3d 907, 912 n.4 (8th Cir. 1999) ("[T]he difference is merely semantic. . .").

¹⁷⁹⁵ Utah Code Ann. § 34A-5-102(1)(e).

¹⁷⁹⁶ California law applies the same standard. Cal. Gov't Code §§ 12940(a)(1)-(2).

¹⁷⁹⁷ 29 C.F.R. § 1630.2(m).

¹⁷⁹⁸ 29 C.F.R. § 1630.2(n)(3).

¹⁷⁹⁹ *McGregor v. Nat'l R.R. Passenger Corp.*, 187 F.3d 1113, 1116 (9th Cir. 1999).

¹⁸⁰⁰ WAC 162-22-090.

¹⁸⁰¹ See *Hegvine v. Longview Fibre Co., Inc.*, 132 Wn. App. 546, 562-63 (2006), *aff'd*, 162 Wn.2d 340 (2007).

Overtime can be an essential function of a position. In *Davis v. Microsoft Corp.*,¹⁸⁰² the plaintiff was a systems engineer required by his employer to work 60 to 80 hours per week and to travel often. After working for nine years, he was diagnosed with Hepatitis C and his doctor advised that he reduce his workweek to 40 regular hours. The court held the employer was not required to eliminate the overtime requirement because overtime and travel in the systems engineer position were essential functions of the job. The court relied on the fact that all systems engineers in his department consistently worked similar hours for years and that the structure of the position did not lend itself to regular, 40-hour workweeks: systems engineers travel extensively and set up computer demonstrations under deadlines and problems frequently occur during the set-up process, requiring the engineer to work long hours to ensure that the computers are properly functioning in time for the presentations.

In defending a discrimination charge, an employer may present evidence of a federal regulation prohibiting employing an individual with a particular disability.¹⁸⁰³ In *Tinjum v. ARCO*, the plaintiff claimed that his employer discriminated against him because of his medical condition by refusing to hire him as a commercial truck driver and failing to accommodate his disability. The court held that federal highway safety regulations prohibiting employers from allowing insulin-dependent diabetics to drive commercial motor vehicles in interstate commerce formed the basis of a BFOQ and a complete defense to a discrimination charge.

The U.S. Supreme Court has held that an employee who applies for Social Security disability benefits stating that he or she is unable to work due to a disability is not necessarily precluded from pursuing an ADA claim or precluded from arguing that he or she is a “qualified” individual. However, the employee must explain why that contention is consistent with the ADA claim that he or she can perform the essential function of the job, at least with reasonable accommodation.¹⁸⁰⁴ California courts take a similar position, allowing FEHA claims despite inconsistent statements on disability benefit applications where those statements are equivocal.¹⁸⁰⁵ It is unclear how Washington courts would rule on this issue.¹⁸⁰⁶

(c) Status of Alcohol and Drug Users

The ADA protects persons who have completed or are participating in a supervised drug or alcohol rehabilitation program and who are no longer engaging in the illegal use of drugs or use of alcohol while on duty.¹⁸⁰⁷ A “qualified” individual with a disability excludes any employee or applicant who is currently engaging in the illegal use of drugs.¹⁸⁰⁸

Employers may hold alcoholics and illegal drug users to the same standards of performance and behavior as other employees, even if the employee has performance or behavior problems that are related to alcoholism or drug use.¹⁸⁰⁹ Employers may prohibit employees from using illegal drugs or alcohol in the workplace.¹⁸¹⁰

¹⁸⁰² 149 Wn.2d 521 (2003).

¹⁸⁰³ *Albertson's v. Kirkingburg*, 527 U.S. 555, 567 (1999). See also *Tinjum v. Atlantic Richfield Co.*, 109 Wn. App. 203 (2001); but see *Bates v. UPS*, 465 F.3d 1069 (9th Cir. 2006) (holding that UPS hearing test requirements that exceeded the Department of Transportation requirements violated the ADA).

¹⁸⁰⁴ *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795 (1999).

¹⁸⁰⁵ See, e.g., *Bell v. Wells Fargo Bank, N.A.*, 62 Cal. App. 4th 1382 (1998).

¹⁸⁰⁶ See *Stevens v. City of Centralia*, 86 Wn. App. 145, 155-57 (1997) (employee failed to appeal issue and was therefore precluded from challenging trial court's ruling that employee's application for and award of disability insurance benefits with the Social Security Administration collaterally estopped him from suing for failure to accommodate).

¹⁸⁰⁷ 42 U.S.C. § 12111(6).

¹⁸⁰⁸ See 42 U.S.C. § 12114(a); see also *Mauerhan v. Wagner Corp.*, 649 F.3d 1180, 1187 (10th Cir. 2011).

¹⁸⁰⁹ 42 U.S.C. § 12114(c)(4).

¹⁸¹⁰ 42 U.S.C. § 12114(c)(1); see *Raytheon Co. v. Hernandez*, 540 U.S. 44 (2003); *Collings v. Longview Fibre Co.*, 63 F.3d 828, 835 (9th Cir. 1995).

The status of alcohol and drug users has not been fully clarified under the WLAD.¹⁸¹¹ In 2005, the Washington Court of Appeals held, in *Hines v. Todd Pac. Shipyards Corp.*, that termination for failure to complete a substance abuse treatment program did not amount to termination because of alcohol and drug dependency and was a legitimate, non-discriminatory reason for the employee's termination.¹⁸¹²

In Minnesota, a person who currently is engaging in the illegal use of drugs is not protected under the MHRA. The MHRA likewise specifically excludes any person who is unable to perform the essential functions of his or her position due to alcohol abuse.¹⁸¹³ Like the ADA, under the MHRA, employers may also hold alcoholics and illegal drug users to the same standards of performance and behavior as other employees, even if the performance or behavior problems are related to alcoholism or illegal drug use.¹⁸¹⁴ Consequently, in most instances where drug or alcohol use is at issue, an employer's obligations toward that employee under the MHRA and ADA will turn on whether the employee currently is illegally using drugs or abusing alcohol.

In Utah, an employee or prospective employee whose drug or alcohol test is confirmed as positive may not, because of those results alone, be defined as a person with a disability for the purposes of the UADA.¹⁸¹⁵

Employers are cautioned that they cannot act on a perception that an employee is an alcoholic (*e.g.*, cannot terminate or offer treatment) simply because the employer suspects the employee of being under the influence of alcohol at work. Rather, the employer must first attempt to establish whether the person is an alcoholic and demonstrate performance problems related to alcoholism.¹⁸¹⁶

(d) Individuals With AIDS or HIV Infection

A "qualified" individual with a disability may include a person infected with HIV. The U.S. Supreme Court has held that HIV is a physical impairment encompassed by the ADA from the moment of infection.¹⁸¹⁷ Whether an HIV-infected employee is a qualified individual with a disability must be determined by considering objective evidence in each individual's case as to whether that employee would pose a risk to the health and safety of themselves or others.¹⁸¹⁸ Washington law prohibits discrimination against a person on the basis of the results of an HIV test, unless the absence of HIV infection is a BFOQ.¹⁸¹⁹ California law lists HIV/AIDS as an example of a physical disability protected by FEHA.¹⁸²⁰

(e) Prohibited Discriminatory Practices

While "discrimination" is not given any official definition, the following practices are prohibited:

- limiting, segregating, or classifying an applicant or employee in a way which adversely affects his or her employment status or opportunities;

¹⁸¹¹ See *Phillips v. City of Seattle*, 111 Wn.2d 903, 911 (1989) (jury question whether employer had duty to keep employee's job open while he completed in-patient alcohol treatment program).

¹⁸¹² 127 Wn. App. 356 (2005).

¹⁸¹³ 42 U.S.C. § 12114(a) (ADA); Minn. Stat. § 363A.03, subd. 36 (MHRA).

¹⁸¹⁴ 42 U.S.C. § 12114(c); Minn. Stat. § 363A.03, subd. 36.

¹⁸¹⁵ Utah Code Ann. §§ 34-38-14 and 34-41-106.

¹⁸¹⁶ *Miners v. Cargill Comm'n, Inc.*, 113 F.3d 820 (8th Cir.), cert. denied, 522 U.S. 981 (1997).

¹⁸¹⁷ *Bragdon v. Abbott*, 524 U.S. 624 (1998).

¹⁸¹⁸ Technical Assistance Manual on the Employment Provisions (Title I) of the ADA, EEOC-M-1A, §§ 2.1, 4.5 (1992, amended January, 2000). The Amendment was republished in October of 2002 and can be found at <http://www.eeoc.gov/policy/docs/adamanual.add.html>.

¹⁸¹⁹ RCW 49.60.172. For the absence of HIV infection to be a valid BFOQ, performance of the job by an HIV-infected individual must present a significant risk of transmitting HIV infection to others, and there must be no way of eliminating the risk by restructuring the job.

¹⁸²⁰ Cal. Gov't Code § 12926.1(1).

- participating in contractual or other business relationships that have the effect of discriminating against disabled individuals;
- utilizing standards, criteria, or methods of administration that have the effect of discrimination, or which perpetuate discrimination, on the basis of disability;
- excluding or otherwise denying equal jobs and benefits because of the disability of an individual with whom the individual is known to associate (*e.g.*, discriminating against parents of disabled children);
- using qualification standards and tests which screen out an individual with a disability, unless the test is job-related and consistent with business necessity;
- failing to select and administer employment tests so as to accurately measure the skills and aptitude of the disabled individual; and
- failing to make reasonable accommodation for a disability or refusing employment because of a failure to make such an accommodation.¹⁸²¹

An employer also discriminates based on disability if it makes an adverse employment decision because of an act that results from the disability.¹⁸²² For example, courts have found that an employer discriminated against an employee because of her disability where the employee's obsessive-compulsive disorder caused an inability to conform her behavior to her employer's expectations of punctuality and attendance.¹⁸²³ Similarly, courts have found discrimination when an employer terminated an employee because of his disability where the employee's depression and post-traumatic stress disorder caused the personality change that triggered the termination.¹⁸²⁴

Most federal courts have concluded that the ADA encompasses hostile work environment claims for discriminatory practices related to employee disabilities, and have applied the Title VII standards to those claims. Under the UADA, unlawful discrimination in the conditions of employment can be established by showing that the employer has either created or negligently allowed co-workers to create a hostile environment.¹⁸²⁵ Similarly, the WLAD supports a disability-based hostile work environment claim.¹⁸²⁶ Such a claim requires the employee to prove that: (1) she was disabled for purposes of the anti-discrimination statute; (2) the harassment was unwelcome; (3) the harassment was due to her disability; (4) the harassment affected the terms or conditions of her employment; and (5) the harassment may be imputed to the employer.¹⁸²⁷

(f) Disability-Related Inquiries and Medical Examinations

Under the ADA, the WLAD, the MHRA, California's FEHA, and the UADA, an employer may not make disability-related inquiries¹⁸²⁸ or conduct medical examinations until *after* it makes a conditional job offer to an applicant.¹⁸²⁹ Once a conditional job offer is made, but before the applicant begins work, the employer

¹⁸²¹ 42 U.S.C. § 12112(b).

¹⁸²² See *Gambini v. Total Renal Care, Inc.*, 486 F.3d 1087 (9th Cir. 2007); *Dark v. Curry Cnty.*, 451 F.3d 1078 (9th Cir. 2006) (employee's misconduct, continuing to work without regard to the threat to the safety of others created by his epilepsy, resulted from his disability and, therefore, was covered by the ADA); *Riebl v. Foodmaker, Inc.*, 152 Wn.2d 138, 152 (2004) (*en banc*) (conduct resulting from the disability is part of the disability and not a separate basis for termination).

¹⁸²³ See *Humphrey v. Mem'l Hosps. Ass'n*, 239 F.3d 1128 (9th Cir. 2001).

¹⁸²⁴ See *Riebl*, 152 Wn.2d at 938.

¹⁸²⁵ *Darrish v. Labor Com'n Appeals Bd.*, 273 P.3d 953, 959-60 (Ut. App. 2012).

¹⁸²⁶ *Robel v. Roundup Corp.*, 148 Wn.2d 35 (2002).

¹⁸²⁷ *Id.*

¹⁸²⁸ "A 'disability-related inquiry' is a question (or series of questions) that is likely to elicit information about a disability." EEOC Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans With Disabilities Act (ADA), <http://www.eeoc.gov/policy/docs/guidance-inquiries.html>, July 27, 2000.

¹⁸²⁹ See *Leonel v. Am. Airlines, Inc.*, 400 F.3d 702 (9th Cir. 2005).

may make disability-related inquiries and require medical examinations, job-related or not, as long as it does so for all entering employees in that job category.¹⁸³⁰

The EEOC has established guidelines for employers regarding permissible pre-employment disability-related questions and medical examinations.¹⁸³¹ For example, employers may ask:

- about an applicant's ability to perform specific job functions. For instance, an employer may state the physical requirements of a job and ask if the applicant can satisfy those requirements, with or without accommodation;
- about an applicant's non-medical qualifications and skills, such as the applicant's education, work history, and required certifications and licenses; and/or
- an applicant to describe or demonstrate how they would perform job tasks.

Both the ADA and FEHA require that all critical non-medical stages of the hiring process be completed before a medical examination can take place.¹⁸³² In *Leonel v. Am. Airlines, Inc.*, the court held that to issue a "real" offer of employment under the ADA or FEHA, an employee must have either completed all non-medical components of its application process or be able to demonstrate that it could not reasonably have done so before issuing the offer. The employer in the case extended offers of employment to three candidates conditioned upon passing background checks and medical examinations. The candidates' offers were rescinded when the employer discovered the candidates failed to fully disclose their medical information. The court determined that the employer violated the FEHA by conducting the medical examination *before* the non-medical background check.

If a conditional offer is withdrawn because of a disability, the employer must demonstrate that the reason for rejecting the individual is "job-related and consistent with business necessity." For example, an employer may screen out an applicant because he is a "direct threat" to safety, if the employer can demonstrate that the individual poses a significant risk of substantial harm to himself or others, and that the risk cannot be reduced below the direct threat level through reasonable accommodation.¹⁸³³

After employment begins, disability-related inquiries and medical examinations must be "job-related and consistent with business necessity."¹⁸³⁴

Employers must treat any information obtained from a disability-related inquiry or medical examination with care. Such information is considered confidential and may be shared only in limited circumstances.¹⁸³⁵

The ADA's restrictions on disability-related inquiries and medical examinations apply to all employees, not just those with disabilities.¹⁸³⁶

¹⁸³⁰ *But cf. Harris v. Harris & Hart, Inc.*, 206 F.3d 838 (9th Cir. 2000) (employer allowed to require medical release before rehiring employee when employer needs to assess extent of employee's recovery and make accommodations).

¹⁸³¹ ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations (Oct. 10, 1995). A copy of this enforcement guidance may be found at <http://www.eeoc.gov/policy/docs/preemp.html>.

¹⁸³² *Leonel v. Am. Airlines, Inc.*, 400 F.3d 702 (9th Cir. 2005).

¹⁸³³ *Chevron USA, Inc. v. Echazabal*, 536 U.S. 73 (2002) (upholding the EEOC regulation that allows an employer to refuse to hire an applicant because his performance on the job would endanger his own health due to his disability).

¹⁸³⁴ 42 U.S.C. § 12112(d)(4)(A); 29 C.F.R. § 1630.14(c). *See also Indergard v. Georgia-Pacific Corp.*, 582 F.3d 1049 (9th Cir. 2009) (physical capacity evaluation given to employee upon her return from medical leave was "medical examination" under the ADA provision preventing employer from requiring employee to undergo medical examination that was not job-related and consistent with business necessity); *Brownfield v. City of Yakima*, 612 F.3d 1140 (9th Cir. 2010) (business necessity standard may be met even before an employee's work performance declines if there is genuine reason to doubt whether employee can perform job-related functions).

¹⁸³⁵ 42 U.S.C. §§ 12112(d)(3)(B), (4)(C); 29 C.F.R. § 1630.14(b)(1).

¹⁸³⁶ EEOC Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans With Disabilities Act (ADA), <http://www.eeoc.gov/policy/docs/guidance-inquiries.html>, July 27, 2000 (citing *Fredenburg v. Contra Costa Cnty. Dept. of Health Servs.*, 172 F.3d 1176 (9th Cir. 1999)) (plaintiffs need not prove that they are qualified individuals with a disability to bring claims challenging the scope of medical examinations under the ADA).

(g) “Reasonable Accommodation” Requirement

The ADA, the WLAD, MHRA, and the FEHA require that covered employers make “reasonable accommodations” to qualified (or “able,” under Washington law) individuals with disabilities.¹⁸³⁷ In general, an accommodation is any change in the work environment or in the way things are customarily done that enables an individual with a disability to perform the essential functions of the position.¹⁸³⁸ An accommodation is not reasonable if it would impose an “undue hardship” on the employer.¹⁸³⁹

Washington courts have indicated that an employer is only obligated to provide reasonable accommodations that are “medically necessary” to enable the employee to perform the job.¹⁸⁴⁰ In *Hill v. BCTI*, an employee asked to transfer offices because she believed her chronic asthma was aggravated by her commute. The employer denied the employee’s request, even after she was hospitalized for a severe asthma attack.¹⁸⁴¹ The court rejected the employee’s failure to accommodate claim because the uncontested medical expert testimony was that the asthmatic condition did not make a transfer “medically necessary.” In *Riehl v. Foodmaker, Inc.*, an employee who suffered from depression and post-traumatic stress disorder asked for additional feedback from his supervisor as an accommodation. The court held that the employee failed to show that the accommodation was a medical necessity.¹⁸⁴²

The employer’s duty to reasonably accommodate an employee’s disability does not arise until the employer receives actual or constructive notice of the employee’s disability.¹⁸⁴³ The employee is generally responsible for notifying the employer about the need for reasonable accommodation and thereby initiating the accommodation process.¹⁸⁴⁴ Upon receiving notice, the employer has a duty to take affirmative steps to determine the nature and extent of the employee’s limitations and to determine the appropriate accommodation, focusing on the essential functions of the position and the particular employee’s restrictions.¹⁸⁴⁵

An employer may be aware of an employee’s disability even without actual notice – constructive notice may suffice. In *Martini v. Boeing*,¹⁸⁴⁶ the court held that a duty to accommodate arose even though the employee did not tell the employer that his disability limited his ability to do his job. The court held that the employer at least knew that the employee was disabled because he met with counselors at the employer’s Employee Assistance Program and with a company doctor regarding physical and emotional problems.¹⁸⁴⁷

The employee is not required to tell the employer the full nature and extent of the disability, only that a disability requiring accommodation exists.¹⁸⁴⁸ However, an accommodated employee whose disability has

¹⁸³⁷ 42 U.S.C. § 12112(b)(5)(A); WAC 162-22-025(2); Minn. Stat. § 363A.08, subd. 6.

¹⁸³⁸ EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans With Disabilities Act (ADA), <http://www.eeoc.gov/policy/docs/accommodation.html>, citing 29 C.F.R. § 1630.2(o).

¹⁸³⁹ *Id.* An employer need only utilize the “undue hardship” defense if it makes no accommodation. *Griffith v. Boise Cascade, Inc.*, 111 Wn. App. 436, 443 (2002).

¹⁸⁴⁰ *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172 (2001) (finding for defendant where plaintiff’s physician testified that accommodation was not medically necessary, but was merely “good just from a mental health standpoint”); *Fischer-McReynolds v. Quasim*, 101 Wn. App. 801 (2000) (finding for defendant where plaintiff presented no evidence of a “disability,” only that she perceived a stress problem, and did not prove unsafe condition at worksite).

¹⁸⁴¹ *Hill*, 144 Wn.2d 172.

¹⁸⁴² 152 Wn.2d 138 (2004).

¹⁸⁴³ *See Hume v. Am. Disposal Co.*, 124 Wn.2d 656, 671 (1994) (plaintiff’s action was properly rejected on ground that defendants did not know or have reason to know that plaintiff suffered from a medical condition; plaintiff’s contemporaneous medical records contained no evidence of a medical condition).

¹⁸⁴⁴ *See id.*

¹⁸⁴⁵ *Goodman v. Boeing Co.*, 127 Wn.2d 401, 408 (1995); an employer is not generally obligated to provide reasonable accommodation to a disabled employee in order to assist that employee in becoming “otherwise qualified.” *See Johnson v. Bd. of Trustees*, 666 F.3d 561 (9th Cir. 2011).

¹⁸⁴⁶ 88 Wn. App. 442, 457 (1997).

subsidized must formally notify the employer of the change if he or she would like to seek a position that was previously precluded by the disability.¹⁸⁴⁹ Likewise, the employer's duty of inquiry extends only to gathering enough information to accommodate the disability.¹⁸⁵⁰

The accommodation process involves a dialogue between the employer and the employee, in which each seeks and shares information to achieve the best match between the employee's capabilities and any available position.¹⁸⁵¹ Once the employer is aware of the need for accommodation, the employer has a mandatory obligation to engage in an interactive process with the employee to identify and implement appropriate reasonable accommodation.¹⁸⁵² The interactive process requires communication and good-faith exploration of possible accommodations between employers and individual employees – neither side can delay nor obstruct the process.¹⁸⁵³ The employer can select the accommodation of its choice so long as it enables the employee to do his or her job.¹⁸⁵⁴ An employer's duty to engage in an interactive process is satisfied so long as the employer considers all medical evidence provided by the employee.¹⁸⁵⁵

No specific law entirely identifies what actions satisfy the “reasonable accommodation” duty. The EEOC's 2002 Enforcement Guidance, however, more fully addresses this issue.¹⁸⁵⁶ The examples generally fall into two categories, the first of which entails modification of the physical structure of the workplace or the purchase of certain equipment. The second category of examples involves changes such as the following:

- job restructuring;
- leave;
- part-time or modified work schedules; and
- reassignment to a vacant position.¹⁸⁵⁷

An employer's duty to accommodate is a continuing responsibility that is “not exhausted by one effort.”¹⁸⁵⁸ Each request for reasonable accommodation must be considered. If one accommodation is ineffective (*i.e.*,

¹⁸⁴⁷ *Id.*; see also *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105 (9th Cir. 2000), *vacated and remanded on other grounds*, 535 U.S. 391 (2002) (in circumstances where an employee is unable to request accommodation, and the employer knows of the existence of the employee's disability, the employer must initiate the interactive process). In a 2010 unpublished decision, a California Court of Appeal found that an employer did not have a duty to accommodate an employee's disability when, during the more than 18 months she was not at work due to her injury, the employee never requested an accommodation or communicated to the employer that she wanted to continue working. The Court held that the employee must initiate the interactive process. *Milan v. City of Holtville*, 112 Cal. Rptr. 3d 408 (2010) (unpublished).

¹⁸⁴⁸ *Goodman*, 127 Wn.2d at 408.

¹⁸⁴⁹ *Wurzbach v. City of Tacoma*, 104 Wn. App. 894, 900 (2001).

¹⁸⁵⁰ *Goodman*, 127 Wn.2d at 408.

¹⁸⁵¹ *Id.*; *Barnett*, 228 F.3d 1105 (the interactive process between employer and employee to determine reasonable accommodation is mandatory under the ADA, and is triggered by notice of the employee's disability and the desire for accommodation).

¹⁸⁵² *Humbrey v. Mem'l Hosps. Ass'n.*, 239 F.3d 1128, 1137 (9th Cir. 2001).

¹⁸⁵³ *Id.* See, e.g., *Sliman v. Boise Cascade, LLC*, No. 06-320, 2008 WL 202438 (E.D. Wash. Nov. 1, 2007) (former employee could maintain claim to trial on whether former employee was reasonably accommodated under the WLAD, despite contention that he was instructed to comply with his medical restriction of eight-hour workday, where his essential job functions were not analyzed to determine if they could be performed within eight-hour restriction, he was assigned additional duties created by vacancy in another position, and he was not provided with additional support that he had requested).

The FEHA requires California employers to engage in a “timely good faith, interactive process” to determine whether an effective reasonable accommodation may be made. Cal. Gov't Code § 12940(n). However, to prevail on a claim under FEHA for failure to engage in the interactive process, employee must identify a reasonable accommodation that would have been available at the time the interactive process should have occurred. See *Scotch v. Art Inst. of Cal. Orange Cnty., Inc.*, 173 Cal. App. 4th 986 (2009). See also, under WLAD, *Sommer v. Dept. of Social & Health Servs.*, 104 Wn. App. 160, 174-75 (2001) (court noted that the employer uniformly responded to the employee's requests for accommodation with “irrelevant queries about his physical abilities or with requests for information already provided by [his] doctors,” while the employee responded to these requests appropriately, often with invitations to speak directly with his doctors).

¹⁸⁵⁴ See *Cuiellette v. City of Los Angeles*, 194 Cal. App. 4th 757 (2011), stating that the employee must be able to perform the “light duty assignment” if applicable, not the employee's pre-disability role.

¹⁸⁵⁵ *Allen v. Pac. Bell*, 212 F. Supp. 2d 1180 (C.D. Cal. 2002).

the employee remains unable to perform an essential job function), the employer must consider reasonable alternatives that would not result in undue hardship.¹⁸⁵⁹

Washington courts have established a higher burden of accommodation than have California or federal courts.¹⁸⁶⁰ Under Washington law (but not yet in California), the employer's duty to accommodate a disability extends beyond the employment relationship. If an employee is terminated because the employer is unable to accommodate the disability, the employer is still obligated to take affirmative steps to assist the former employee in finding a suitable position. Thus, to establish a *prima facie* case of disability discrimination, the former employee must show that he or she is disabled, that he or she had the qualifications for a vacant position, and that the employer failed to take affirmative steps to make the job opportunity known to the employee and determine if the employee was qualified for the position.¹⁸⁶¹

In determining reasonableness, the employee bears the burden of establishing that a specific accommodation was reasonable and available to the employer at the time the employee's physical limitation became known.¹⁸⁶²

An employer need not grant an employee's specific request for accommodation if the employee is reasonably accommodated by other means. Similarly, an employer may not require an employee to accept a specific accommodation. However, an employee who fails to accept any reasonable accommodation offered by an employer may not be "qualified" as necessary under the ADA. Sufficient participation in the interactive process is key to resolving the accommodation issue in a way that works for both the employer and the employee.

(i) Job Restructuring

An employer may reasonably accommodate a disabled employee by restructuring the employee's job functions to eliminate the non-essential (*i.e.*, marginal) functions that the employee cannot perform. The employer may require the employee to take on other marginal functions that he or she can perform. The employer is not required to restructure the job by removing essential functions or assigning them to another employee.¹⁸⁶³ However, an employer must alter when and/or how a non-essential or marginal function is performed, if reasonable.

¹⁸⁵⁶ EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (ADA) (Oct. 17, 2002). A copy of this enforcement guidance is available at <http://www.eeoc.gov/policy/docs/accommodation.html>.

¹⁸⁵⁷ EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans With Disabilities Act (ADA), <http://www.eeoc.gov/policy/docs/accommodation.html> (citing 42 U.S.C. § 12111(9); 29 C.F.R. §§ 1630.2(o)(2)(i)-(ii)).

¹⁸⁵⁸ *McAlindin v. Cnty. of San Diego*, 192 F.3d 1226 (9th Cir. 1999); *Humphrey v. Mem'l Hosps. Ass'n*, 239 F.3d 1128, 1138 (9th Cir. 2001) ("the employer's obligation to engage in the interactive process extends beyond the first attempt at accommodation and continues . . . where the employer is aware that the initial accommodation is failing and further accommodation is needed.").

¹⁸⁵⁹ *Humphrey v. Mem'l Hosps. Ass'n*, 239 F.3d 1128, 1138 (9th Cir. 2001) (citing EEOC Enforcement Guidance on Reasonable Accommodation, at 7625; *EEOC v. UPS Supply Chain Solutions*, 620 F.3d 1103 (9th Cir. 2010)).

¹⁸⁶⁰ In Washington, an employer doing only what the employee's doctor mandates is not the end of the accommodation process. The Washington Court of Appeals ruled that limiting required accommodations to "medical necessity" was no longer the law. Thus, even if a doctor releases an employee to work without any mandatory restrictions, the employee may still have a viable claim if he or she can show that working a job without accommodation is likely to aggravate the impairment such that it becomes substantially limiting. See *Johnson v. Chevron USA, Inc.*, 159 Wn. App. 18 (2010).

¹⁸⁶¹ *Wurzbach v. City of Tacoma*, 104 Wn. App. 894, 898 (2001).

¹⁸⁶² *Pulcino v. Fed. Express*, 141 Wn.2d 629, 643 (2000).

¹⁸⁶³ *McLean v. Runyon*, 222 F.3d 1150 (9th Cir. 2000) (employer failed to reasonably accommodate plaintiff who was qualified for position and could have been placed at same rate of pay); *Pulcino*, 141 Wn.2d at 644-45; *Ricks v. Xerox Corp.*, 877 F. Supp. 1468, 1477 (D. Kan. 1995).

(ii) Leave

Providing leave is another form of reasonable accommodation. If leave is only one of several reasonable accommodation options, the employer may require an employee to remain on the job instead.

An employer must hold open an employee's job during leave, unless doing so would cause an undue burden. Even if an employer need not hold the position open for the entire leave, it may be required to place the employee in an equivalent position upon his or her return from leave.¹⁸⁶⁴

Because the issue of sick leave or medical leave required under the ADA may coincide with medical leaves required under the Family Medical Leave Act of 1993 ("FMLA"), the Washington Family Leave Act, or the Industrial Insurance Act, it is important to be familiar with the areas in which these statutes intersect.¹⁸⁶⁵ Specifically, a reasonable accommodation may include time off beyond any FMLA leave.¹⁸⁶⁶ For example, the EEOC interpretive guidance illustrates one such scenario:

An employee with an ADA disability needs 13 weeks of leave for treatment related to the disability. The employee is eligible under the FMLA for 12 weeks of leave (the maximum available), so this period of leave constitutes both FMLA leave and a reasonable accommodation. Under the FMLA, the employer could deny the employee the thirteenth week of leave. But, because the employee is also covered under the ADA, the employer cannot deny the request for the thirteenth week of leave unless it can show undue hardship.¹⁸⁶⁷

An employee must be allowed to use any accrued paid leave before unpaid leave. If paid leave is insufficient, an employer should grant unpaid leave.¹⁸⁶⁸

Any employment policy concerning employee leave should include language stating that the employer will comply with its legal obligation to accommodate qualified disabled employees. Leave as a reasonable accommodation raises the issue of whether regular attendance may be considered an essential function of the job, which must be determined on a case-by-case basis.¹⁸⁶⁹

(iii) Part-Time or Modified Work Schedules

Implementing part-time or modified schedules may be required when the employee needs medical treatment or therapy at times that interfere with a standard work schedule. Also, an employer may be required to allow an employee to work at home as a reasonable accommodation if it would not impose an undue hardship.¹⁸⁷⁰

¹⁸⁶⁴ Despite these requirements, the Minnesota Court of Appeals confirmed the trial court's decision that an employer did not violate the law by firing an employee the day after she returned from maternity leave. The Court found that it was "hesitant to find pretext or discrimination on temporal proximity [of the firing] alone. . . ." See *Hansen v. Robert Half Int'l, Inc.*, 796 N.W.2d 359, 367 (Minn. Ct. App. 2011).

¹⁸⁶⁵ Leaves of absence are addressed in detail in Chapter VI.

¹⁸⁶⁶ See, e.g., *Kimbrow v. Atl. Richfield Co.*, 889 F.2d 869, 878 (9th Cir. 1989) (employer required to grant employee leave of absence to recover from present cluster migraine episode and to seek long-term effective treatment); *Ralph v. Lucent Techs., Inc.*, 135 F.3d 166 (1st Cir. 1998) (52 weeks of leave insufficient to completely satisfy employer's obligation to accommodate).

¹⁸⁶⁷ EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans With Disabilities Act (ADA), <http://www.eeoc.gov/policy/docs/accommodation.html>.

¹⁸⁶⁸ See, e.g., *Nunes v. Wal-Mart Stores*, 164 F.3d 1243 (9th Cir. 1999) (unpaid medical leave may be a reasonable accommodation under the ADA if it does not pose an undue hardship on the employer).

¹⁸⁶⁹ *Cebros v. Ne. Ohio Alzheimer's Research Ctr.*, 155 F.3d 775 (6th Cir. 1998) (perfect attendance is not an essential job function); *Tyndall v. Nat'l Educ. Ctrs., Inc.*, 31 F.3d 209, 213 (4th Cir. 1994).

¹⁸⁷⁰ *Humphrey v. Mem'l Hosps. Ass'n.*, 239 F.3d 1128 (9th Cir. 2001) ("Working at home is a reasonable accommodation when the essential functions of the position can be performed at home and a work-at-home arrangement would not cause undue hardship for the employer."); see also *Vande Zande v. State of Wisconsin Dept. of Admin.*, 44 F.3d 538 (7th Cir. 1995).

(iv) Reassignment

The ADA defines “reasonable accommodation” to include reassignment to a vacant position.¹⁸⁷¹ Employers of disabled employees are thus required to consider whether there is a vacant position within the company that the employee could reasonably perform.¹⁸⁷² In cases where there is such a position, authorities are split on whether the employer is required to assign the disabled employee to the position, or merely to allow the employee to apply and compete for it with other applicants. The Fifth, Seventh, and Eighth Circuits have held that an employer does not have to reassign a disabled employee to a vacant position where the employee is qualified, but not the most qualified.¹⁸⁷³ However, the Tenth Circuit and the Circuit for the District of Columbia have held that the reasonable accommodation provision requires an employer to reassign the disabled employee to a vacant position if the employee is qualified to perform it, regardless of any other qualified applicants.¹⁸⁷⁴ The EEOC (the organization charged with enforcing Title I of the ADA) has also opined that qualified, disabled employees need not compete with other applicants.¹⁸⁷⁵ The Ninth Circuit has not yet weighed in on the issue.

A disabled employee’s request to transfer to a new supervisor, as opposed to a different position, is not a reasonable accommodation under the ADA unless the employee can demonstrate how his or her poor work performance would improve with a different supervisor.¹⁸⁷⁶ Additionally, neither the ADA, WLAD, FEHA, nor UADA require an employer to create a job for a disabled employee.¹⁸⁷⁷ Nor need an employer reassign an employee to a position that is already occupied.¹⁸⁷⁸ Similarly, an employer is not required to promote an employee to a new position.

An employer must take reasonable affirmative steps to assist an employee in an internal job search, including giving the employee access to all job openings within the company and assistance from the employer’s personnel office, even when such assistance is not normally provided to internal or external candidates without disabilities.¹⁸⁷⁹ The reasonableness of the employer’s efforts will depend on a number of factors, including the size of the employer and its database of open jobs, the nature of the job descriptions themselves, the level of involvement of the company’s job counselor, and the advisability of disclosing the disability to the new supervisor prior to or after an initial interview with the disabled employee.¹⁸⁸⁰

Reassignment of a disabled employee to a vacant position may conflict with obligations under a collective bargaining agreement establishing seniority qualifications for the vacant position. The ADA specifically

¹⁸⁷¹ 42 U.S.C. § 12111(9)(B) (1990) (emphasis added). The ADA defines “reasonable accommodation” as the following: “job restructuring, part-time or modified work schedules, *reassignment to a vacant position*, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.” *Id.*

¹⁸⁷² 29 C.F.R. pt. 1630, App. § 1630 (background).

¹⁸⁷³ See *Huber v. Wal-Mart Stores, Inc.*, 486 F.3d 480 (8th Cir. 2007); *EEOC v. Humiston-Keeling, Inc.*, 227 F.3d 1024 (7th Cir. 2000); but see *E.E.O.C. v. United Airlines, Inc.*, 693 F.3d 760 (7th Cir. 2012) (ADA mandates that employer appoint employees with disabilities to vacant positions for which they are qualified); *Daugherty v. City of El Paso*, 56 F.3d 695 (5th Cir. 1995).

¹⁸⁷⁴ See *Smith v. Midland Brake, Inc.*, 180 F.3d 1154 (10th Cir. 1999) (*en banc*); *Aka v. Wash. Hosp. Ctr.*, 156 F.3d 1284 (D.C. Cir. 1998).

¹⁸⁷⁵ EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (ADA), available at <http://www.eeoc.gov/policy/docs/accommodation.html>.

¹⁸⁷⁶ *Braunling v. Countrywide Home Loans, Inc.*, 220 F.3d 1154 (9th Cir. 2000); see also *Frazier v. Delco Elecs. Corp.*, 263 F.3d 663 (7th Cir. 2001) (employee who alleged she was disabled and sought only to have co-worker who harassed her transferred was not disabled – she could do everything a healthy person could – except work in proximity to co-worker).

¹⁸⁷⁷ See, e.g., *Dedman v. Washington Pers. Appeals Bd.*, 98 Wn. App. 471 (1999); *Spitzer v. The Good Guys, Inc.*, 80 Cal. App. 4th 1376 (2000).

¹⁸⁷⁸ *Pulcino v. Fed. Express*, 141 Wn.2d 629, 644-45 (2000); compare *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002) (employer need not accommodate disabled employee in position to which another employee is entitled under an established seniority system).

¹⁸⁷⁹ *Davis v. Microsoft*, 149 Wn.2d 521, 536-37 (2003).

¹⁸⁸⁰ *Id.* at 538.

lists reassignment as an example of reasonable accommodation.¹⁸⁸¹ The legislative history of the ADA states that a collective bargaining agreement is but one factor to consider when making a reasonable accommodation determination.¹⁸⁸² The WLAD includes a similar provision.¹⁸⁸³

Ordinarily, an accommodation is not “reasonable” if it requires “an employer to assign a disabled employee to a particular position [when] another employee is entitled to that position under the employer’s ‘established seniority system.’” The employee bears the burden of showing special circumstances that make an exception to the seniority system reasonable in his particular case.¹⁸⁸⁴ This rule applies even if the result would be to bump the employee out of a position in which he was placed as an accommodation. In *U.S. Airways, Inc. v. Barnett*,¹⁸⁸⁵ the employee-plaintiff was accommodated in a position for two years before learning that he may be bumped from the job by employees with greater seniority pursuant to the company’s well-established seniority rules. The court held that the employer need not accommodate the employee in conflict with its seniority system unless the employee could show his circumstances warranted an exception to the rule.

All employers, particularly those with collective bargaining agreements, must ensure that their existing policies and agreements permit them to take all actions necessary to comply with the reasonable accommodation provisions of the WLAD, ADA, and FEHA.

Changing the shifts of other employees to accommodate disabled employees also may be problematic. Employees usually prefer regular day shifts, which are often assigned on the basis of seniority. Reassigning a disabled employee to a preferred shift may create resentment by more senior non-disabled employees, who may feel that they have “earned” a right to work the preferred shift. Presumably, good employee morale is a relevant factor in determining whether an accommodation would pose an undue hardship for the employer. The EEOC, however, has taken the position that the negative impact an accommodation would have on the morale of other employees is not a proper basis for refusing to accommodate a disabled employee.¹⁸⁸⁶

(h) Defenses to ADA Claims

The ADA provides employers with specific defenses depending on the theory under which the claim is filed. To defend against a claim of disparate treatment discrimination an employer must demonstrate that its action was justified by a legitimate, non-discriminatory motive.¹⁸⁸⁷ An employer accused of applying selection criteria in a discriminatory manner must show that the criteria are job-related and consistent with business necessity, and that reasonable accommodation is not a viable alternative.¹⁸⁸⁸ The same showing may serve as a defense to a claim of disparate impact discrimination.¹⁸⁸⁹ An employer can defend against a failure to accommodate claim by asserting that the accommodation would impose an undue hardship.¹⁸⁹⁰

¹⁸⁸¹ Unlike its predecessor, the Rehabilitation Act of 1973, which did not.

¹⁸⁸² *Emrick v. Libbey-Owen-Ford Co.*, 875 F. Supp. 393, 396 (E.D. Tex. 1995).

¹⁸⁸³ See WAC 162-22-075(3) (accommodation will be considered an undue hardship if the cost or difficulty is unreasonable in view of the requirements of other laws and contracts).

¹⁸⁸⁴ *Id. U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002) (special circumstances warranting departure from an established seniority system may include where a seniority system contains exceptions such that one more is unlikely to matter, or where an employer retains the right to alter unilaterally the seniority system and has done so fairly frequently).

¹⁸⁸⁵ *Id.*

¹⁸⁸⁶ *Technical Assistance Manual on the Employment Provisions (Title I) of the ADA*, EEOC-M-1A, § 3.9.5 (1992, amended January, 2000). The amendment was republished October, 2002. A copy of this amendment can be found at http://www.eeoc.gov/policy/docs/adamanual_add.html. See also EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (ADA), at question 28 (Oct. 17, 2002). A copy of this enforcement guidance can be found at <http://www.eeoc.gov/policy/docs/accommodation.html>.

¹⁸⁸⁷ 29 C.F.R. § 1630.15(a).

¹⁸⁸⁸ 29 C.F.R. § 1630.15(b)(1).

¹⁸⁸⁹ 29 C.F.R. § 1630.15(c).

The employer is also permitted to employ qualification standards to ensure that an employee will not pose a “direct threat” to the health or safety of himself or others in the workplace.¹⁸⁹¹ The EEOC defines a “direct threat” as “a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.”¹⁸⁹² Specific factors to be considered in determining if an employee poses a direct threat include: the duration of the risk, the nature and severity of the potential harm, the likelihood that the potential harm will occur, and the imminence of the potential harm.¹⁸⁹³ Even a small risk may be sufficient if the threatened harm is grievous.¹⁸⁹⁴

A “direct threat” defense will fail where a reasonable accommodation, such as temporary reassignment or a leave of absence, could eliminate the threat.¹⁸⁹⁵ An employer should consider granting a proposed medical leave of absence, even if the employee does not show it is likely to be successful.¹⁸⁹⁶

Washington law does not contain a “direct threat” provision and it is unresolved whether courts would incorporate such a defense.¹⁸⁹⁷

(i) Undue Hardship Defense

An employer’s only defense against a failure to reasonably accommodate is the “undue hardship” defense. Under the ADA, the WLAD, MHRA, and California’s FEHA, an employer is not required to undertake an accommodation that causes “undue hardship.” The ADA defines “undue hardship” as “an action requiring significant difficulty or expense” when viewed in light of the following factors:

- the nature and cost of the accommodation;
- the overall financial resources of the facility or facilities involved;
- the number of people employed at that facility;
- the effect on expenses and resources or any other impact that the accommodation would have on the operation of the facility;
- the overall financial resources of the employer;
- the overall size of the business of the employer in terms of number of employees and number, type, and function of the work force; and
- the type of operation or operations of the employer, including the make-up of its workforce, the geographic separateness, administrative, and fiscal relationship between the facility involved and the overall employer.¹⁸⁹⁸

¹⁸⁹⁰ 29 C.F.R. § 1630.15(d).

¹⁸⁹¹ 29 C.F.R. § 1630.2(r); *Chevron v. U.S.A. Inc. v. Echazabal*, 536 U.S. 73 (2002). In *Echazabal*, the U.S. Supreme Court overturned a Ninth Circuit decision that had held that the “direct threat” defense did not apply to employees who posed a threat to their own health or safety. The Supreme Court upheld the EEOC regulation that allows an employer to refuse to hire an applicant when, due to his disability, his performance on the job would endanger the health or safety of himself or others in the workplace.

¹⁸⁹² 29 C.F.R. § 1630.2(r); 42 U.S.C. § 12111(3).

¹⁸⁹³ 29 C.F.R. § 1630.2(r).

¹⁸⁹⁴ *Hutton v. Elf Atochem N. Am., Inc.*, 273 F.3d 884 (D. Or. 2001) (employee was not a qualified person under the ADA because the employee’s diabetes posed a significant risk of substantial harm to the health and safety of others; employee was a chlorine finishing operator whose diabetes created a small risk of rendering him unconscious and creating a “catastrophic” harm to co-workers and persons near the facility). See also *Montalvo v. Radcliffe*, 167 F.3d 873 (4th Cir. 1999) (where an HIV-positive boy was legitimately denied entry to a martial arts class) but c.f. *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1248 (9th Cir. 1999) (where Wal-Mart could not avail itself of the direct-threat defense because the employee’s disability did not pose a very serious threat).

¹⁸⁹⁵ *Dark v. Curry Cnty.*, 451 F.3d 1078 (9th Cir. 2006) (employee, an operator of heavy equipment, controlled his epilepsy with medication but still endured occasional seizures and once fell unconscious while driving a truck. Employer’s “direct threat” defense failed because medical leave or reassignment to a vacant position might have been reasonable accommodations).

¹⁸⁹⁶ *Id.*

¹⁸⁹⁷ *Gambini v. Total Renal Care, Inc.*, 486 F.3d 1087 (9th Cir. 2007).

The WLAD, MHRA, and FEHA specify similar factors for determining whether an accommodation would impose an undue hardship on the employer.¹⁸⁹⁹

The “undue hardship” defense requires the employer to review an individual’s request for a reasonable accommodation in light of the situation presented by *that individual’s* requested accommodation. The EEOC Enforcement Guidance¹⁹⁰⁰ sets forth several examples of accommodations that would impose an undue hardship under the particular circumstances presented.

Example A: A convenience store clerk with multiple sclerosis requests that he be allowed to go from working full-time to part-time as a reasonable accommodation because of his disability. The store assigns two clerks per shift, and if the first clerk’s hours are reduced, the second clerk’s workload will increase significantly beyond his ability to handle his responsibilities. The store determines that such an arrangement will result in inadequate coverage to serve customers in a timely manner, keep the shelves stocked, and maintain store security. Thus, the employer can show undue hardship based on the significant disruption to its operations and, therefore, can refuse to reduce the employee’s hours. The employer, however, should explore whether any other reasonable accommodation will assist the store clerk without causing undue hardship.

Example B: A crane operator, due to a disability, requests an adjustment to his work schedule so that he starts work at 8:00 a.m. rather than 7:00 a.m., and finishes one hour later in the evening. The crane operator works with three other employees who cannot perform their jobs without the crane operator. As a result, if the employer grants this requested accommodation, it would have to require the other three workers to adjust their hours, find other work for them to do from 7:00 to 8:00, or have the workers do nothing. The ADA does not require the employer to take any of these actions because they all significantly disrupt the operations of the business. Thus, the employer can deny the requested accommodation, but should discuss with the employee if there are other possible accommodations that would not result in undue hardship.

Example C: An experienced chef at a top restaurant requests leave for treatment of her disability but cannot provide a fixed date of return. The restaurant can show that this request constitutes undue hardship because of the difficulty of replacing, even temporarily, a chef of this caliber. Moreover, it leaves the employer unable to determine how long it must hold the position or to plan for the chef’s absence. Therefore, the restaurant can deny the request for leave as a reasonable accommodation.

Example D: X Corp., a travel agency, leases space in a building owned by Z Co. One of X Corp.’s employees becomes disabled and needs to use a wheelchair. The employee requests as a reasonable accommodation that several room dividers be moved to make his workspace easily accessible. X Corp.’s lease requires it to seek Z Co.’s permission before making any physical changes that would involve reconfiguring office space. X Corp. requests that Z Co. allow it to make the changes, but Z Co. denies the request. X Corp. can claim that making the physical changes would constitute an undue hardship. However, it must provide any other type of reasonable accommodation that would not involve making physical changes to the facility, such as finding a different location in the office that would be accessible to the employee.

In determining an individual’s particular need for accommodation, the employer may need to ask about sensitive medical information or require applicants or employees to undergo a medical examination to determine the nature of the disability and the functional limitations, if not obvious. An employer must keep strictly confidential any medical information obtained in connection with this process. Decision-makers involved in the hiring process may have access to this information, but only on a need-to-know

¹⁸⁹⁸ 42 U.S.C. § 12111(10)(B).

¹⁸⁹⁹ WAC 162-22-075; Cal. Gov’t Code § 12926(t); Minn. Stat. § 363A.08, subd. 6. *See also Gonzalez v. ATI Systems Int’l*, No. B223779, 2011 WL 1902582 (Cal. Ct. App. May 23, 2011) stating that in California an employer must support claims of undue hardship if the employer wishes to raise this defense.

¹⁹⁰⁰ EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act at Undue Hardship Issues, questions 43, 44 and 46 (Oct. 17, 2002). A copy of this enforcement guidance can be found at <http://www.eeoc.gov/policy/docs/accommodation.html>.

basis. Supervisors and managers may also be told about necessary restrictions on the work or duties of the employee and about necessary accommodations. No one else in the workplace is entitled to know or have access to this information. Medical information must be collected and maintained on separate forms and in separate medical files. Confidentiality applies even to individuals who are no longer applicants or employees.

(i) Recommendations for Employers

In addition to the recommendations discussed above, the following suggestions are offered to assist employers in meeting their obligations to disabled employees and job applicants under the ADA, the WLAD, MHRA, FEHA, and UADA.

(i) Policy Statement

Issue a policy statement that the employer is an equal opportunity employer, that there will be no discrimination against disabled applicants and employees, and that disabled applicants and employees will be afforded reasonable accommodation. Include a statement that employees who can no longer perform essential job functions are encouraged to advise management as to the nature of their disabilities and which functions they cannot perform and to suggest accommodations that they believe would enable them to perform these functions. Creating this policy will make it difficult for a disabled employee who remains silent about his or her disability, or fails to suggest an accommodation, to argue later that the employer should have known about the disability and should have provided the employee with an accommodation.

(ii) Review Neutral Policies Regarding Leaves, Part-Time Work, and Shift Assignments

Neutral policies that prescribe inflexible work hours or automatic termination for absenteeism may discriminate against disabled workers. Any leave or part-time work policy should state that absences for medical reasons are subject to medical documentation and that the company reserves the right to require an employee to submit relevant medical records or to undergo a medical exam. If these matters are governed by a union agreement, the employer should seek to negotiate provisions into the next contract giving the employer the right to take any appropriate action necessary to comply with the ADA, WLAD, MHRA, and/or California's FEHA.

(iii) Review Selection Procedures

Ensure that applicant selection procedures do not tend to screen out disabled individuals disproportionately, unless the procedures are clearly job-related and consistent with business necessity.¹⁹⁰¹

(iv) Review and Revise Job Descriptions

The essential functions of a position likely will be a significant issue in any dispute or litigation involving a claim of disability discrimination. The ADA provides that the employer's description, prepared before advertising the position or interviewing applicants, will be evidence regarding the essential functions of that position. Therefore, employers should craft a description for every position, ensuring that each specifically and completely lists all essential job functions, and then ensure that job descriptions remain current.

(v) Train Supervisors

Employers should train supervisors so that they are knowledgeable of: (1) the basic requirements of the ADA, WLAD, MHRA, FEHA, and UADA; (2) any corporate policies implemented to comply with the

¹⁹⁰¹ For a discussion of permissible selection procedures, see ADA, Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations (Oct. 10, 1995). A copy of this enforcement guidance is available at <http://www.eeoc.gov/policy/docs/preemp.html>.

statutes; and (3) the accommodations the company has agreed to make for employees under their supervision. This training should include an instruction that when supervisors become aware that one of their employees has a disability affecting his or her performance, the supervisor should immediately consult with the appropriate personnel regarding what, if any, action should be taken.

(vi) Document-Appropriate Accommodation

With regard to accommodations requested by the employee or considered by the employer during the interactive process, the employer should document the analysis and reasons for providing or not providing an accommodation. When providing an accommodation, the employer may be setting a precedent and may be expected to explain why it did not similarly accommodate a disabled employee in another instance.

SECTION 9.5 UNLAWFUL HARASSMENT

Unlawful harassment that impacts a person's ability to work is a form of unlawful discrimination. Harassment based on national origin, race, sex, or disability, or membership in any other protected class may form the basis of a harassment claim under state and federal law.¹⁹⁰²

Sexual harassment is a form of sex discrimination prohibited by federal, Washington, Minnesota, California, and Utah law.¹⁹⁰³ There are two basic types of sexual harassment: *quid pro quo* harassment and *hostile work environment* harassment.¹⁹⁰⁴ *Quid pro quo* harassment only applies to sexual harassment, whereas hostile work environment applies to all types of unlawful harassment.

Quid pro quo harassment exists where a supervisor or employer extorts or attempts to extort sexual favors or other sexual consideration in exchange – *quid pro quo* – for a job benefit or the absence of a job detriment.¹⁹⁰⁵ This is sexual harassment in the classic, stereotypical sense. To establish *quid pro quo* harassment, an employee must prove:

- the actor sought sexual consideration in exchange for a job benefit or the absence of a job detriment;
- the actor's conduct was unwelcome;
- the conduct was based on gender; and
- the conduct is attributable to the employer.¹⁹⁰⁶

In California, testimony from other employees that the person accused of sexual harassment also harassed them is admissible to establish a hostile work environment harassment claim.¹⁹⁰⁷

An employer or supervisor may commit *quid pro quo* harassment by seeking sexual consideration to gratify their own personal desires,¹⁹⁰⁸ or to gratify third persons, such as the employer's customers.¹⁹⁰⁹

¹⁹⁰² See, e.g., *El-Hakem v. BJV, Inc.*, 415 F.3d 1068 (9th Cir. 2005) (held an employer's practice of calling an employee of Arabic descent by a westernized nickname created a racially discriminatory hostile work environment); see also *State v. Boeing Co.*, 105 Wn. App. 1 (2000) (hostile work environment based on race); *Robel v. Roundup Corp.*, 148 Wn.2d 35 (2002) (the WLAD supports a disability-based hostile work environment claim); Utah Code Ann. § 34A-5-106.

¹⁹⁰³ *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66 (1986) (Title VII); *Thompson v. Berta Enters., Inc.*, 72 Wn. App. 531 (1994) (WLAD); RCW 49.60.180 (WLAD); Minn. Stat. § 363A.03, subd. 13; *Retherford v. AT&T Communications of Mountain States, Inc.*, 844 P.2d 949, 961 (Utah 1992).

¹⁹⁰⁴ *DeWater v. State*, 130 Wn.2d 128 (1996); see also *Kramer v. Wasatch Cnty.*, 857 F. Supp. 2d 1190, 1205 (D. Utah 2012).

¹⁹⁰⁵ *Id.*

¹⁹⁰⁶ *Schonauer v. DCR Entm't, Inc.*, 79 Wn. App. 808 (1995).

¹⁹⁰⁷ See *Pantoja v. Anton*, 198 Cal. App. 4th 87 (2011).

¹⁹⁰⁸ *Id.*

¹⁹⁰⁹ *Id.* (supervisor's requirement that plaintiff participate in nude waitress contest was *quid pro quo* harassment even though participation was for gratification of customers not supervisor).

Because an element of *quid pro quo* harassment is that the employee's job status or work conditions are directly tied to sexual conduct, this type of harassment requires that the harasser occupy a position of some authority or control vis-à-vis the victim.

Hostile work environment harassment exists where unwelcome conduct has the purpose or effect of unreasonably interfering with an individual's work performance or otherwise creating an intimidating, hostile, or offensive working environment.¹⁹¹⁰ An employee may bring a hostile work environment claim even absent tangible job consequences or direct financial injury.¹⁹¹¹ Sexual and racial hostile work environment claims are evaluated through the eyes of a "reasonable woman" or a "reasonable member of the targeted class."¹⁹¹² To establish hostile work environment harassment against an employer, an employee must prove:

- the actor committed the offensive conduct;
- the conduct was unwelcome, offensive, and unsolicited by the employee-plaintiff;
- the conduct was based on the employee's protected group status;
- the conduct was sufficiently severe or pervasive so as to alter the terms or conditions of employment; and
- the conduct is attributable to the employer.¹⁹¹³

For the conduct to be "based on gender," the plaintiff must prove that his or her gender was the motivating factor for the discrimination.¹⁹¹⁴ A plaintiff may prove discrimination based on gender by providing evidence of hostile acts that are overtly sex- or gender-specific; illegal harassment need not be of a sexual nature or motivated by sexual animus. Offensive conduct that is not facially sex-specific nonetheless may violate Title VII if there is sufficient circumstantial evidence of qualitative and quantitative differences in the harassment suffered by female employees.¹⁹¹⁵ Courts have often stated that Title VII is not a "general civility code,"¹⁹¹⁶ meaning rude, humiliating, or embarrassing behavior is not actionable if that behavior was not based on the employee's gender.

The "based on gender" factor will also be satisfied where the plaintiff proves that the harassment was based on a perceived failure to meet stereotypical gender expectations.¹⁹¹⁷ In *Price Waterhouse v. Hopkins*, the court held that a woman who was denied partnership in an accounting firm because she did not match a gender stereotype had an actionable claim under federal law.¹⁹¹⁸

¹⁹¹⁰ See, e.g., *Campbell v. State*, 129 Wn. App. 10 (2005) (evidence that a female employee's supervisors made derogatory comments about females, sent offensive e-mails specifically singling out the employee and repeatedly yelled at and mocked the employee in front of others over the course of several months, may satisfy a claim of hostile work environment sexual harassment).

¹⁹¹¹ *Meritor Savs. Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

¹⁹¹² *McGinest v. GTE Sern. Corp.*, 360 F.3d 1103 (9th Cir. 2004).

¹⁹¹³ *MacDonald v. Korum Ford*, 80 Wn. App. 877 (1996); accord *Meritor Savs. Bank v. Vinson*, 477 U.S. 57 (1986).

¹⁹¹⁴ Compare *Herried v. Pierce Cnty. Pub. Transp. Ben. Auth. Corp.*, 90 Wn. App. 468 (1998) (plaintiff failed to establish her sex as the motivating factor for harassment because the harasser's conduct was the same with both men and women); with *Kahn v. Salerno*, 90 Wn. App. 110 (1998) (question of fact whether use of word "bitch" was "because of sex"), and *Doe v. State Dept. of Transp.*, 85 Wn. App. 143, 149-50 (1997) (male employee failed to establish the harassment was based on his sex; supervisor singled out those who appeared to be particularly offended by his conduct regardless of the victim's sex). But see *Steiner v. Showboat Operating Co.*, 25 F.3d 1463 (9th Cir. 1994) (holding that even though the abuser consistently abused men and women alike, harassment was because of sex as it relied on sexual epithets, offensive, and explicit references to women's bodies and sexual conduct that were offensive and hostile to a reasonable woman).

¹⁹¹⁵ See *EEOC v. Nat'l Educ. Ass'n, Alaska*, 422 F.3d 840, 845-46 (9th Cir. 2005).

¹⁹¹⁶ *Adams v. Able Bldg. Supply, Inc.*, 114 Wn. App. 291 (2002).

¹⁹¹⁷ *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864 (9th Cir. 2001).

¹⁹¹⁸ *Id.* at 874 (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)).

Same-sex sexual harassment is actionable under Title VII,¹⁹¹⁹ irrespective of an employee's sexual orientation.¹⁹²⁰ For example, a male employee-plaintiff alleged that throughout his tenure at a restaurant he was subjected to a relentless campaign of insults, name-calling, and vulgarities by male co-workers. The co-workers and a supervisor repeatedly referred to him as "she" and "her," mocked him for walking and carrying his serving tray "like a woman," and taunted him in vulgar terms.¹⁹²¹ The plaintiff contended that he was harassed because he failed to conform to a male stereotype. The Ninth Circuit agreed, holding that because the systematic abuse directed at the plaintiff was closely linked to gender, the conduct of the co-workers and the supervisor constituted actionable harassment under both Title VII and the WLAD.¹⁹²²

Whether the harassment is sufficiently severe or pervasive is determined by looking at the totality of the circumstances, including the nature, frequency, intensity, location, and duration of the language or conduct.¹⁹²³ Pervasiveness is measured by both a subjective standard – whether the plaintiff found it pervasive – and an objective "reasonable person" standard.¹⁹²⁴ Conduct found to be sufficiently pervasive includes repeated unwelcome sexual advances, sexual touching, and offensive language or derogatory remarks of a sexual nature. In *Nichols v. Azteca*, the employee-plaintiff testified that he "endured an unrelenting barrage of verbal abuse while employed at Azteca."¹⁹²⁵ He alleged that other employees habitually called him sexually derogatory names, referred to him with the female gender, and taunted him for behaving like a woman.¹⁹²⁶ The court held that a reasonable man in the plaintiff's position would have found the sustained campaign of taunts directed at him, and designed to humiliate and anger him, sufficiently severe and pervasive to alter the terms and conditions of his employment.¹⁹²⁷

Casual, isolated, or trivial manifestations of a discriminatory environment, such as simple teasing or offhand comments, are not sufficiently pervasive to create a hostile environment, unless they are extremely serious.¹⁹²⁸

In *Clark County*, the employee-plaintiff brought a sexual harassment claim based on a single incident in which the plaintiff met with her male supervisor and another male employee to review reports of four job applicants. One of the reports disclosed that the applicant once commented to a co-worker, "I hear making love to you is like making love to the Grand Canyon."¹⁹²⁹ After reading the comment aloud, plaintiff's supervisor said "I do not know what that means." The other employee said, "I'll tell you later," and both men chuckled. The U.S. Supreme Court concluded that the employee failed to make out a case of hostile work environment sexual harassment because "[n]o reasonable person could have believed that the single incident . . . violated Title VII's standards." Plaintiff's job required her to review the report in the

¹⁹¹⁹ See *Oncale v. Sundowner Offshore Servs. Inc.*, 523 U.S. 75 (1998); see also *Cummings v. Koebner*, 568 N.W.2d 418 (Minn. 1997).

¹⁹²⁰ *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061 (9th Cir. 2002) (sexual orientation is irrelevant to Title VII claims; it "neither provides nor precludes" a sexual harassment claim); see also *Johnson v. Cmty. Nursing Services*, 932 F. Supp. 269, 273-74 (D. Utah 1996).

¹⁹²¹ *Nichols*, 256 F.3d 864.

¹⁹²² *Id.* at 874-75.

¹⁹²³ *MacDonald*, 80 Wn. App. at 877. *Accord Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993); see, e.g., *Wahl v. Dash Point Family Dental Clinic*, 144 Wn. App. 34 (2008) (awarding former employee \$20,000 based on constructive discharge and sexual harassment after dentist made inappropriate and sexually explicit comments to the dental assistant, including comments about his attraction to the assistant's mother, who was a patient at the clinic. Assistant had only worked at clinic for a few months).

¹⁹²⁴ *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998).

¹⁹²⁵ *Nichols*, 256 F.3d at 872.

¹⁹²⁶ *Id.*

¹⁹²⁷ *Id.*

¹⁹²⁸ See *Glasgow v. Georgia-Pacific Corp.*, 103 Wn.2d 401 (1985); *MacDonald*, 80 Wn. App. 877 (manager's single unwelcome kiss on New Year's Eve is sufficient to create hostile work environment); *Clark Cnty. Sch. Dist. v. Breedon*, 532 U.S. 268 (2001) (citing *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998)); *Jones v. R.J. Donovan Corr. Facility*, 152 Cal. App. 4th 1367 (2007) (an isolated incident, such as delay in the delivery of a single paycheck, a failure to receive an overtime check or an early job change, does not constitute an adverse employment action).

¹⁹²⁹ *Clark*, 532 U.S. at 269.

course of screening job applicants and others in her position were subject to the same requirement. Furthermore, the plaintiff conceded that “it did not bother or upset her to read the statement in the file.”¹⁹³⁰

For conduct to actually alter the terms and conditions of employment, the employee must subjectively perceive the environment to be abusive.¹⁹³¹ In a Washington case, the plaintiff’s harassment claim failed because, while she found the behavior “offensive” and “irritating,” she did not perceive the actions to be sexual harassment at the time they occurred and never complained about the behavior.¹⁹³² In regard to one incident, when a manager grabbed and kissed her as she left work one New Year’s Eve, she testified that she was “very surprised” by the kiss because it was “out of character” from him but could not recall that manager ever treating her in an inappropriate manner.¹⁹³³

The court also rejected her claim based on an objective reasonable person standard. Although inappropriate, the behaviors alleged – the kissing incident and actions of another manager who had a habit of placing his hands on her back and positioning himself in the hallway so she would brush up against him when she passed¹⁹³⁴ – were mild in comparison to acts previously found to create a hostile work environment.¹⁹³⁵ The court noted that the plaintiff did not allege the actions were physically threatening or humiliating or that they unreasonably interfered with her work performance.¹⁹³⁶

Similarly, a California court found no hostile work environment where a former employee for the popular television show “*Friends*” sued under the FEHA asserting that the writers’ use of sexually coarse and vulgar language and conduct, including recounting their own sexual experiences, constituted harassment based on sex.¹⁹³⁷ The court stated that “the use of sexually coarse and vulgar language in the workplace is not actionable per se.” To determine whether the language was severe or pervasive enough to create a hostile work environment, the court looked at the totality of the circumstances and found that “the *Friends* production was a creative workplace focused on generating scripts for an adult-oriented comedy show featuring sexual themes,” and the plaintiff was warned about the language before she began employment. Accordingly, the court held that the language was not severe or pervasive enough to create a hostile work environment. Importantly, the court applied a different standard to the plaintiff’s claims because most of the coarse and vulgar language at issue did not involve and was not aimed at her. The standard stated by the court was that, when sexually harassing conduct is not directed at a plaintiff, but instead is aimed at other women in the workplace, the plaintiff generally must show that the harassment directed at others was in her immediate work environment, and that she personally witnessed it. The court held that the plaintiff could not meet this burden.¹⁹³⁸

An employer may be liable for a hostile work environment via its reaction to the conduct of a non-employee “where the employer either ratifies or acquiesces in the harassment by not taking immediate

¹⁹³⁰ *Id.* at 271.

¹⁹³¹ *Sauers v. Salt Lake Cnty.*, 1 F.3d 1122, 1125-26 (10th Cir. 1993) (plaintiff claiming violation of Title VII based on sex discrimination creating hostile or abusive work environment must demonstrate that offending conduct was unwelcome).

¹⁹³² *MacDonald v. Korum Ford*, 80 Wn. App. 877 (1996).

¹⁹³³ *Id.* at 886.

¹⁹³⁴ *Id.*

¹⁹³⁵ *Id.* at 887 (some comparison examples noted by the court: co-worker “touched and fondled” female employees; female employees asked to retrieve coins from president’s front pocket and asked to retrieve objects purposefully tossed on the floor; manager demanded sex from, fondled, exposed himself to, and raped female employee; employee wrote “bizarre” love letters to a co-worker which frightened and upset the co-worker; employees used derogatory and insulting terms to describe and address female employees; employees posted pornography in common areas and personal work spaces of female employees; female supervisor called female employees “dogs” and “whores”).

¹⁹³⁶ *Id.*; see also *State v. Boeing Co.*, 105 Wn. App. 1 (2000) (plaintiff failed to establish pervasive element of hostile work environment claim; while use of terms like “dear” and “sweet pea” to address plaintiff were offensive to her they were isolated incidents that did not unreasonably interfere with her work performance).

¹⁹³⁷ See *Lyle v. Warner Bros. Television Prods.*, 38 Cal. 4th 264 (2006).

¹⁹³⁸ *Id.* at 284-85.

and/or corrective actions when it knew or should have known of the conduct.”¹⁹³⁹ In *Little v. Windermere Relocation, Inc.*, the plaintiff-employee was raped by a client during an out-of-office business meeting. After the employee notified the company’s harassment policy manager of the rape, she was not effectively removed from the client’s account. When she reported the rape to the company president he immediately decreased her compensation. The court held that the company’s “failure to take immediate and effective corrective action allowed the effects of the rape to permeate [the employee’s] work environment and alter it irrevocably.”¹⁹⁴⁰

(a) Employer’s Vicarious Liability for Sexual Harassment

Under state and federal law, employers are subject to vicarious liability for sexual harassment by their managers, supervisors, and other employees. Although generally Washington courts interpret the WLAD consistent with federal law, the WLAD has been interpreted differently than federal law in certain areas. The scope of vicarious liability is one area where federal and state law arguably differ.

(i) Federal Law

1) Harassment by Managers

An employer is automatically, or “strictly,” liable for the manager’s conduct where the harassment culminates in a “tangible employment action.” A tangible employment action is a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits. In most cases, a tangible employment action inflicts direct economic harm.¹⁹⁴¹

An employer may also be strictly liable for hostile environment harassment. However, in such cases an employer may raise an affirmative defense, commonly referred to as the *Ellerth/Faragher* defense, by demonstrating:

- that the employer exercised reasonable care to prevent and promptly correct any sexually harassing behavior; *and*
- that the plaintiff-employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.¹⁹⁴²

To satisfy the first element it is key for the employer to create, distribute, and enforce a suitable policy prohibiting harassment and provide effective procedures for reporting. In addition to implementing and distributing a suitable harassment policy, an employer also must have taken steps to correct any sexually harassing behavior.¹⁹⁴³

An employer’s *Ellerth/Faragher* defense can succeed based solely on the employee’s failure to take advantage of opportunities provided by the employer. For example, in *Hardage v. CBS Broad. Inc.*,¹⁹⁴⁴ a sales executive complained to the company that he had been subject to unwanted sexual advances from a co-worker, but was vague about the extent and nature of such advances, and left out the “gory details.” The Ninth Circuit held that no duty to investigate arose because the employee failed to properly put his

¹⁹³⁹ *Little v. Windermere Relocation Inc.*, 301 F.3d 958 (9th Cir. 2002) (quoting *Folkerson v. Circus Circus Enters., Inc.*, 107 F.3d 754, 756 (9th Cir. 1997)).

¹⁹⁴⁰ *Id.*

¹⁹⁴¹ *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). The Ninth Circuit has also determined that a tangible employment action occurs when a supervisor successfully coerces a subordinate to have sex. See *Holly D. v. Cal. Inst. of Tech.*, 339 F.3d 1158 (9th Cir. 2003).

¹⁹⁴² *Id.*

¹⁹⁴³ *Kobler v. Inter-Tel Techs.*, 244 F.3d 1167, 1181 (9th Cir. 2001).

¹⁹⁴⁴ *Hardage v. CBS Broad., Inc.*, 427 F.3d 1177 (9th Cir. 2005), *opinion amended and superseded on other grounds*, 433 F.3d 672 and 436 F.3d 1050 (9th Cir. 2006).

employer on notice of the alleged sexual harassment and failed to take advantage of his employer's remedial and preventative procedures by waiting half a year to make a complaint, and then stating that he would "handle it [him]self."¹⁹⁴⁵

It is unclear whether this defense applies under Washington law, which is discussed below in Section (ii).

2) Harassment by Co-Workers

An employer is vicariously liable for harassment¹⁹⁴⁶ by a co-worker or a non-employee that occurs in the workplace if the employer knew, or should have known, of the harassment. The employer may avoid liability by demonstrating that, after discovering the harassment, it took immediate and effective corrective action "reasonably calculated to end the harassment."¹⁹⁴⁷ Reasonableness is based on the remedy's ability to: (1) stop the current harasser from engaging in harassment, and (2) discourage potential harassers from engaging in unlawful conduct.¹⁹⁴⁸ Corrective action should reflect the severity of the conduct and may range from reprimand to discharge.¹⁹⁴⁹

In *Nichols v. Azteca Rest. Enters., Inc.*, the employer's remedy was insufficient because it failed to include an investigation of the harassment allegations, or a discussion of the allegations with the harassers, and a demand that the offensive conduct cease. The court also stated that the employer's remedial actions must target the harasser, not the victim¹⁹⁵⁰ and held that the employer's response was insufficient due to its refusal to transfer the harasser.

Employers should establish protocols to ensure prompt, careful and complete investigations of sexual harassment complaints. The EEOC recommends that an employer also should make the harassment victim whole by restoring lost employment benefits or opportunities.

(ii) Washington Law

1) Harassment by Managers

Under Washington law, an employer is strictly liable where an owner, manager, partner, or corporate officer personally participates in the harassment, whether it is *quid pro quo* harassment or hostile environment harassment.¹⁹⁵¹ A division of the Washington Court of Appeals has adopted the federal test to analyze employer liability for sexual harassment by a mid-level manager. As with federal law, if there has been a tangible employment action, the employer is precluded from raising an affirmative defense to liability.¹⁹⁵²

In rare circumstances, an employee need not suffer direct economic harm for his or her harassment claim to succeed. In *Henningsen v. WorldCom, Inc.*, the court imputed liability to the employer for the conduct of the plaintiff's direct supervisor.¹⁹⁵³ The supervisor had authority to grant plaintiff a promotion she desired.

¹⁹⁴⁵ *Pa. State Police v. Suders*, 542 U.S. 129, 141 (2004).

¹⁹⁴⁶ The harassment must be based on a protected classification. *See, e.g., Cooper-Schut v. Visteon Auto. Sys.*, 361 F.3d 421 (7th Cir. 2004) (plaintiff's notification of harassment to employer was insufficient because neither notification put the employer on notice that the harassment was based on a protected classification – neither incident involved racial or sex-based comments).

¹⁹⁴⁷ *See, e.g., Burrell v. Star Nursery, Inc.*, 170 F.3d 951 (9th Cir. 1999) (co-worker); *Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062 (10th Cir. 1998) (customers). *But see Brooks v. San Mateo*, 229 F.3d 917 (9th Cir. 2000) (one severe incident of sexual harassment and conduct of co-workers in shunning plaintiff did not constitute adverse employment action when employer initiated termination proceedings against perpetrator).

¹⁹⁴⁸ *Nichols*, 256 F.3d at 875; *see also Perry v. Costco Wholesale, Inc.*, 123 Wn. App. 783 (2004).

¹⁹⁴⁹ *Id.* (employer's transfer of the harasser to the day shift and conditioning continued employment on completion of three hours of counseling were not remedial measures assessed proportionately to the seriousness of the offense).

¹⁹⁵⁰ *Nichols*, 256 F.3d at 876.

¹⁹⁵¹ *Glasgow v. Georgia-Pacific Corp.*, 103 Wn.2d 401 (1985); *Henningsen v. Worldcom, Inc.*, 102 Wn. App. 828 (2000) (liability imputed to employer based on actions of direct supervisor under agency principles).

¹⁹⁵² *Henningsen*, 102 Wn. App. 828.

Plaintiff submitted to sexual relations with the supervisor upon his request.¹⁹⁵⁴ Following this sexual encounter, plaintiff informed the supervisor that she did not want a sexual relationship with him and said she would quit if not given the promotion. The supervisor gave plaintiff the promotion she sought, but continued to make sexual advances and told plaintiff she got the sales position “thanks to him” and that she “owed” him.¹⁹⁵⁵ The court concluded that because plaintiff’s supervisor had taken a tangible employment action, no affirmative defense to employer liability was available. Although the tangible employment action was a promotion rather than a demotion or other action having adverse economic consequences, the promotion was coupled with repeated sexual demands and implicit threats of adverse employment consequences unless plaintiff continued to “pay” what the supervisor felt she owed him for the promotion.¹⁹⁵⁶ The supervisor was aided in creating the hostile work environment by the agency relation with the employer, thus, the employer was liable for the supervisor’s conduct.

2) Harassment by Co-Workers or Supervisors

An employee cannot maintain an action against an employer for individual co-worker harassment if the co-worker is not the employee’s supervisor or manager.¹⁹⁵⁷ Washington law distinguishes between “managers,” who are so closely connected to the corporate management that their actions can be automatically attributed to the employer, and “supervisors,” who have a lower level of authority.¹⁹⁵⁸ To establish vicarious liability, the plaintiff must prove that the person committing the harassment is an employee in a supervisory capacity and that the employer:

- authorized, knew, or should have known of the harassment; *and*
- failed to take reasonably prompt and adequate corrective action.

These may be shown by proving:

- that complaints were made to the employer through higher managerial or supervisory personnel; *or*
- that the harassment in the workplace was so pervasive as to create an inference of the employer’s knowledge or constructive knowledge of it; *and*
- that the employer’s remedial action was not of such a nature as to have been reasonably calculated to end the harassment.¹⁹⁵⁹

An employer may ordinarily avoid liability by taking prompt and adequate corrective action when it learns that an employee has been harassed.¹⁹⁶⁰

This defense to vicarious liability for harassment claims under Washington law is very different than that provided under the *Ellerth/Faragher* defense, in the following ways. Under Washington law:

- there is no affirmative defense available where the hostile environment was created by an owner, manager, partner, or corporate officer;
- there is no requirement that the employer have a suitable harassment policy in place. The focus is on after-the-fact remedial action, rather than on prevention;

¹⁹⁵³ *Id.*

¹⁹⁵⁴ *Id.* at 833.

¹⁹⁵⁵ *Id.*

¹⁹⁵⁶ *Id.* at 843-44.

¹⁹⁵⁷ *Jenkins v. Palmer*, 116 Wn. App. 671, 674-75 (2003) (RCW 49.60.220 does not cover acts of harassment committed by a co-worker acting alone).

¹⁹⁵⁸ *Francom v. Costco Wholesale Corp.*, 98 Wn. App. 845 (2000); *see also Glasgow v. Georgia-Pacific Corp.*, 103 Wn.2d 401 (1985).

¹⁹⁵⁹ *Id.*

¹⁹⁶⁰ *Id.*

- there is no requirement that the plaintiff complain to the employer. Rather, the employer may be vicariously liable if the hostile environment is sufficiently pervasive that the employer should have known about it. Under federal law, if there is a harassment complaint policy in place, generally the plaintiff must use it in order to recover; and
- the burden of proof is on the plaintiff to prove that the employer is vicariously liable.¹⁹⁶¹ Under federal law, the burden is on the employer to prove that it is *not* vicariously liable.¹⁹⁶²

Washington courts have stated that repeat conduct may show the unreasonableness of a prior response, while “[t]he fact that harassment never happens again is proof that the employer’s response was reasonable and adequate as a matter of law.”¹⁹⁶³

Under Washington law, simply transferring the sexual harasser to another shift or another location, without doing anything to prevent continued harassment is insufficient. It is not enough simply to stop the sexual harassment as to the plaintiff, when the harasser is left free to harass others.¹⁹⁶⁴

It is unclear whether Washington’s defense to vicarious liability will be replaced with the federal defense promulgated in *Ellerth* and *Faragher*.¹⁹⁶⁵ The Washington Supreme Court has not ruled on this issue.

3) Harassment by Independent Contractors

Employers are not liable for harassment by their independent contractors unless the employer retains the right to control the manner and means of performing the work.¹⁹⁶⁶ Generally, a worker is classified as an independent contractor pursuant to the factors in WAC 162-16-230, including: (1) control of the work; (2) tools and place of work; (3) skill level involved; (4) type of work involved; (5) duration of the work; (6) method of payment; (7) ending the work relationship; (8) whether leave is provided; (9) integration into the operations; (10) accrual of benefits; (11) taxation; (12) salary or income; (13) employer records; and (14) the intention of the parties. In addition, the Washington Supreme Court has noted that a worker will be presumed to be an employee, not an independent contractor, when any two of the following three factors are present:

- the employer controls the manner and means of performance of the work;
- the worker is paid on the basis of time worked (*e.g.*, hourly, monthly); or
- the worker is treated as an employee for tax purposes.¹⁹⁶⁷

4) Attorney’s Fees in Sexual Harassment Cases

In 2011, the Washington Court of Appeals ruled that state courts were not allowed to limit an employee’s award of attorney’s fees in a sexual harassment claim under the WLAD, reasoning that the goal of allowing attorney’s fees for sexual harassment claims is to enable the “vigorous enforcement of laws against discrimination and to make it financially feasible for individuals to enforce such claims.” The court ruled that in discrimination cases public policy must play a stronger role, and that awarding attorney’s fees to the employee that would not cover the cost of litigation discourages others from bringing similar claim.¹⁹⁶⁸

¹⁹⁶¹ *Francom*, 98 Wn. App. 845.

¹⁹⁶² *Sangster v. Albertson’s, Inc.*, 99 Wn. App. 156 (2000).

¹⁹⁶³ *Perry v. Costco Wholesale, Inc.*, 123 Wn. App. 783 (2004).

¹⁹⁶⁴ *Id.*

¹⁹⁶⁵ Compare *Sangster*, 99 Wn. App. 156 with *Francom*, 98 Wn. App. 845; but see *Hardage v. CBS Broad. Inc.*, 427 F.3d 1177 (9th Cir. 2005), *opinion amended and superseded on other grounds*, 433 F.3d 672 and 436 F.3d 1050 (9th Cir. 2006) (citing authority that Washington’s Law Against Discrimination tracks federal discrimination law and applying the *Faragher/Ellerth* defense to plaintiff’s sexual harassment claims).

¹⁹⁶⁶ *DeWater v. State*, 130 Wn.2d 128 (1996). See also *Little v. Windermere Relocation, Inc.*, 301 F.3d 958 (9th Cir. 2002) (employer liable if it ratified or acquiesced to alleged rape by customer).

¹⁹⁶⁷ *Id.* at 138-39. See Chapter I for more information.

(iii) Borrowed Servant Doctrine

Washington law includes the borrowed servant doctrine which states that a worker employed by one person may be loaned or hired to another. In such a circumstance, the general employer may escape liability for the worker's negligence if the employee is under the exclusive control of the special employer at the time of the act. For example, in *Campbell v. State*, the employee was employed by a university and was placed as a secretary in the Military Science Department. Her supervisor was employed by the Army. The employee sued the university claiming sexual harassment based on the acts of her supervisor. The university argued that it was not liable for the acts of the supervisor because he was employed by the Army. The court held otherwise based on evidence that: (1) the university retained some control over the employee's employment; (2) the university investigated her complaint of sexual harassment; and (3) the Dean of the university directed her supervisor regarding the employee's job description and evaluation.¹⁹⁶⁹

(iv) California Law

1) Harassment by Managers

The *Ellerth/Faragher* defense does not apply under California's FEHA; an employer is strictly liable for all acts of sexual harassment by supervisors or agents.¹⁹⁷⁰ Thus, determining who is a "supervisor" is essential. Under the FEHA, a supervisor is:

any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend that action, if, in connection with the foregoing, the exercise of that authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Job title and primary responsibilities are not determinative. In *Almanza v. Wal-Mart Stores, Inc.*, the court found that an employee paid by the hour whose primary responsibility was unloading trucks may be a supervisor for FEHA purposes. Evidence indicated that the employee "was afforded significant discretion in managing and controlling the unloading department" and filled out performance appraisals that may have been used to promote, discharge, or reward fellow employees.¹⁹⁷¹

Although an employer cannot avoid liability for harassment perpetrated by managers, it may limit its damages under the doctrine of avoidable consequences, which is similar to the *Ellerth/Faragher* defense. To prevail, an employer must prove:

- the employer took reasonable steps to prevent and correct workplace sexual harassment;
- the employee unreasonably failed to use the preventative and corrective measures that the employer provided; and
- the reasonable use of the employer's procedures would have prevented at least some of the harm that the employee suffered.

If all three elements are met, an employer will remain liable but may exclude those damages that the employee more likely than not could have prevented with "reasonable effort and without undue risk, expense, or humiliation, by taking advantage of the employer's internal complaint procedures appropriately

¹⁹⁶⁸ See *Little v. Baker*, 164 Wn. App. 1028 (2011).

¹⁹⁶⁹ *Campbell v. State*, 129 Wn. App. 10 (2005).

¹⁹⁷⁰ *State Dep't of Health Serv. v. Super. Ct.*, 31 Cal. 4th 1026 (2003); see, e.g., *Myers v. Trendvest Resorts, Inc.*, 148 Cal. App. 4th 1403 (2007) (physical groping of plaintiff by her supervisor during employer-sponsored fundraising event in and of itself constitutes actionable conduct).

¹⁹⁷¹ *Almanza v. Wal-Mart Stores, Inc.*, No. 06-0553, 2007 WL 2274927 (E.D. Cal. Aug. 7, 2007) (employee routinely gave out assignments to other unloaders, told them whether or not to work past a rest or meal break, and approved leave requests).

designed to prevent and eliminate sexual harassment.”¹⁹⁷² Essential to this defense is that an employer has adopted appropriate anti-harassment policies and has communicated essential information about the policies to its employees. An employer may avoid strict liability if the supervisor’s acts of harassment result from a completely private relationship unconnected with the employment and not occurring at the workplace or during normal working hours.¹⁹⁷³

In addition to employer liability, managers and supervisors may be held personally liable for acts of harassments that they perpetrate.¹⁹⁷⁴

2) Harassment by Co-Workers

An employer is liable for harassment by non-supervisory co-workers only if the employer was negligent in allowing the harassment to continue, *i.e.*, if the employer, its agents, or supervisors knew of such conduct and failed to take immediate and appropriate corrective action.¹⁹⁷⁵

Rank and file employees may be held personally liable for acts of harassment in which they engage.¹⁹⁷⁶

3) Harassment by Non-Employees

California differs from Washington in that employers may be liable for acts of sexual harassment committed by non-employees.¹⁹⁷⁷ Liability is determined according to the same negligence standard applied to harassment by non-supervisory co-workers – an employer is liable for sexual harassment where the employer, its agents or supervisors knew or should have known of the conduct and failed to take immediate and appropriate corrective action.¹⁹⁷⁸

(v) Minnesota Law

Previously under the MHRA (and under Title VII until 1998), an employer could avoid liability, even if the alleged conduct was by a supervisor, if the employer had no knowledge of the harassment in question or if it took prompt remedial action in response to a complaint of harassment.¹⁹⁷⁹

This language was deleted from the MHRA, however, to make Minnesota law consistent with the federal standard under the *Ellerth-Faragher* progeny.¹⁹⁸⁰ This legislative change proved significant in the recent case of *Frieler v. Carlson Mktg. Group, Inc.*¹⁹⁸¹ In *Frieler*, the Minnesota Supreme Court found (4-3) that employers should only be responsible for a supervisor’s sexual harassment if the employer knew or should have known of that wrongful conduct and failed to take timely and appropriate action. Note that Minnesota recognizes that the coercive power of a supervisor to cause a victim to submit to sexual misconduct by virtue of the supervisor’s position of authority does not diminish simply because the misconduct occurs after work hours or off work premises.¹⁹⁸²

¹⁹⁷² *State Dep’t of Health Serv.*, 31 Cal. 4th at 1044.

¹⁹⁷³ *Myers v. Trendwest Resorts, Inc.*, 148 Cal. App. 4th 1403 (2007).

¹⁹⁷⁴ *See Page v. Super. Ct.*, 31 Cal. App. 4th 1206 (1995).

¹⁹⁷⁵ Cal. Gov’t Code § 12940(j)(1).

¹⁹⁷⁶ Cal. Gov’t Code § 12940(j)(3).

¹⁹⁷⁷ Amendments to the FEHA in 2003 imposed employer liability in these circumstances, rejecting previous case law from the California Court of Appeal. *See, e.g., Carter v. Cal. Dep’t of Veterans Affairs*, 38 Cal. 4th 914 (2006) (2003 amendment clarified existing law by providing explicit standards to govern employer liability for sexual harassment of employees by non-employees); *Salazar v. Diversified Paratransit, Inc.*, 117 Cal. App. 4th 318, 328 (2004) (an employer may be liable for sexual harassment by clients or customers).

¹⁹⁷⁸ Cal. Gov’t Code § 12940(j)(1).

¹⁹⁷⁹ *Todd v. Ortho Biotech, Inc.*, 175 F.3d 595 (8th Cir. 1999); *Fore v. Health Dimensions, Inc.*, 509 N.W.2d 557, 559 (Minn. Ct. App. 1993).

¹⁹⁸⁰ *See* Minn. Stat. § 363A.03, subd. 43.

¹⁹⁸¹ *Frieler v. Carlson Mktg. Group, Inc.*, 751 N.W.2d 558 (Minn. 2008).

Under the MHRA, an employer must also take prompt action after learning that an employee has been subjected to sexual harassment by a *non*-employee – a customer, contractor, or other individual with whom the employer has a business relationship.¹⁹⁸³

(vi) Utah Law

To prevail on claim of “negligent employment,” employee, who claimed that employer was negligent in hiring co-workers who sexually harassed her, and then retaliated when she complained, was required to show that employer knew or should have known that co-workers posed foreseeable risk of retaliatory harassment to third parties, including fellow employees, that co-workers did inflict such harm, and that employer’s negligence in hiring, supervising, or retaining employees proximately caused injury.¹⁹⁸⁴ In Utah, an employer may be held vicariously liable for actionable sexual harassment perpetrated by a supervisor with immediate authority over the victimized employee in two situations: (1) when the supervisor’s sexual harassment culminates in an adverse tangible employment action, and (2) where no tangible adverse employment action occurred, the employer is liable for a severe and pervasive hostile work environment unless it can prove by a preponderance of the evidence that (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.¹⁹⁸⁵

(b) Preventative Actions

(i) Unlawful Harassment Policy

Every employer should develop and maintain a written, well-publicized policy against unlawful harassment. This policy should address harassment on all prohibited bases, such as racial or religious harassment, not just sexual harassment. It should include a procedure that every employee can follow to report or complain about an incident of harassment. Because an employee may not feel comfortable reporting harassment to an immediate supervisor, or because the supervisor may be the harasser, the complaint procedure should establish a reporting procedure that permits an employee to report an incident to someone other than the employee’s immediate supervisor.

(ii) Training

Every employer should routinely conduct training sessions on unlawful harassment for three purposes: (1) to educate employees of the employer’s unlawful harassment policy and complaint procedure; (2) to educate supervisors to ensure that they understand their responsibility to report instances of harassment, whether or not the supervisor actually witnessed an incident or received a complaint by a victim or witness of alleged harassment; and (3) to ensure that co-workers and supervisors do not engage in inappropriate conduct. It is critical that supervisors realize that their own unlawful harassing conduct can result in direct liability for the employer (and possibly themselves).

The case of *Miller v. Woodbarbor Molding & Millworks* is an unfortunate example of how an employer’s inadequate anti-harassment policy coupled with a failure to train managers and supervisors may lead to liability for hostile work environment discrimination. The employer maintained an employee handbook that it distributed to all employees.¹⁹⁸⁶ Included in the handbook was a section entitled “Sexual Harassment Policy.” The section contained examples of when harassment may arise, and stated that the employer did not tolerate sexual harassment in the workplace. Employees were encouraged to report complaints of

¹⁹⁸² *State of Minn. v. Fero*, 747 N.W.2d 596, 599 (Minn. Ct. App. 2008).

¹⁹⁸³ *Costilla v. State of Minn.*, 571 N.W.2d 587 (Minn. Ct. App. 1997); cf. *Royer v. City of Oak Grove*, 374 F.3d 685, 688 n.5 (8th Cir. 2004); 29 C.F.R. § 1604.11(e).

¹⁹⁸⁴ *Retherford v. AT&T Communications of Mountain States, Inc.*, 844 P.2d 949, 967 (Utah 1992).

¹⁹⁸⁵ *Kramer v. Wasatch Cnty.*, 857 F. Supp. 2d 1190, 1208 (D. Utah 2012) (following the *Ellerth/Faragher* affirmative defense).

¹⁹⁸⁶ *Miller v. Woodbarbor Molding & Millworks*, 80 F. Supp. 2d 1026 (N.D. Iowa 2000).

sexual harassment. The section stated that all such complaints would be handled with confidentiality and be promptly investigated by the human resources staff. Those found to be engaging in such conduct were warned that they would be subject to disciplinary action, including possible discharge.¹⁹⁸⁷

The employee-plaintiff testified to being aware of the anti-harassment policy. However, her supervisors were not. Plaintiff's direct supervisor testified that he never received training or instruction on how to identify sexual harassment, the procedure he was expected to follow if he observed sexually harassing behavior, or the procedure he was expected to follow if one of his employees reported such behavior to him. Thus, the employer failed to ensure that its supervisors possessed its sexual harassment policy or that they were familiar with it. Moreover, the employer failed to provide training for its supervisors about sexual harassment and failed to inform them about the company's procedure for reporting sexual harassment.¹⁹⁸⁸ The court also relied on the fact that the anti-harassment policy contained no express anti-retaliation language of any kind and had no formal complaint procedure.¹⁹⁸⁹ The court held that the employer did not exercise reasonable care to prevent the sexually harassing conduct.

The FEHA now requires employers with 50 or more employees or contractors (either inside or outside of California) to provide two hours of interactive sexual harassment prevention training to all supervisors and managers every two years.¹⁹⁹⁰ A "supervisor" can include anyone who can "effectively recommend" disciplinary action.¹⁹⁹¹ He or she must be trained if he or she supervises at least two California employees. New or newly promoted supervisors must be trained within six months of their assumption of the position. The training must be "interactive," at least two hours long, address legal prohibitions against unlawful sexual harassment, harassment, discrimination, and retaliation under federal and state law, discuss factors which include but are not limited to correction of situations involving sexual harassment, remedies available to the victims, effects of harassment, relevant statutory provisions of case law, practical examples, confidentiality issues, reporting procedures, supervisors' responsibilities, the company's policies, and how to respond to and prevent harassment and retaliation in the workplace. The training must be provided by a "qualified trainer" who is an expert in California employment discrimination law. This includes California licensed attorneys specializing in this area of law.

Online training may suffice if it is made interactive by including questions and scenarios the trainee has to assess and respond to, and making a qualified trainer be available to answer within two days any questions trainees may have.

(iii) Prompt Investigations

Every employer should promptly and thoroughly investigate complaints of unlawful harassment. One person should be placed in charge of collecting relevant information and interviewing the necessary individuals or determining whether an outside investigator is necessary. Care should be taken to document the investigation and to preserve impartiality and confidentiality. Document the facts of the incident rather than conclusions. For example, the investigation summary should not end in a statement that "employee X has been sexually harassed," but should simply recite the facts of the situation.

(iv) Documentation of Results

Any action taken in response to an investigation should be clearly and completely documented. In particular, if it is determined that harassment occurred, the responsible employee or employees must be disciplined according to the severity of the offense. A written warning or other discipline may be

¹⁹⁸⁷ *Id.* at 1030.

¹⁹⁸⁸ *Id.*

¹⁹⁸⁹ *Id.* at 1030-31.

¹⁹⁹⁰ *See* Cal. Gov't Code § 12950.1. "Every two years" can be measured by the calendar year; Utah has a similar requirement for employees at state agencies. *See* Utah Admin. Code r. 477-10-4.

¹⁹⁹¹ Supervisors who are not located in California (*i.e.*, remote supervisors) do not fall under the law's requirements for training. Cal. Gov't Code §§ 12950.0(a)(8), 12926(s).

appropriate in some cases, whereas termination may be necessary in others. The employer must follow up with the complainant after any incident of harassment to assure that no further harassment has occurred and to assure that the complainant is not subject to retaliation following a complaint.

SECTION 9.6 RETALIATION

Employers are prohibited from discharging an employee because the employee exercises a legal right or privilege.

Federal laws that have anti-retaliation provisions include the National Labor Relations Act (“NLRA”),¹⁹⁹² Employee Retirement Income Security Act (“ERISA”),¹⁹⁹³ Occupational Health and Safety Act (“OSH Act”),¹⁹⁹⁴ Fair Labor Standards Act (“FLSA”),¹⁹⁹⁵ Safe Water Drinking Act,¹⁹⁹⁶ Federal Mine Health and Safety Act,¹⁹⁹⁷ and the Energy Reorganization Act.¹⁹⁹⁸ In Utah, the Utah Occupational Safety and Health Act (“UOSH”) prohibits employers from discharging or discriminating against employees who file complaints or institute proceedings under UOSH, testify in proceedings, or exercise any rights under UOSH.¹⁹⁹⁹

Washington laws that protect employees from retaliation for various acts, including filing a complaint under the Washington Industrial Safety and Health Act (“WISHA”),²⁰⁰⁰ filing a community right-to-know complaint,²⁰⁰¹ reporting nursing homes abuse,²⁰⁰² filing a farm-labor claim,²⁰⁰³ filing a minimum wage claim,²⁰⁰⁴ filing a family-leave claim,²⁰⁰⁵ or engaging in collective bargaining activities.²⁰⁰⁶ Washington also protects from retaliation employees who refuse to follow a superior’s clearly unlawful order.²⁰⁰⁷

Retaliation is also prohibited based on the activities outlined in detail below.

(a) Discrimination Claims

Federal and state anti-discrimination laws provide broad anti-retaliation protection for employees who file charges of discrimination, participate in investigations of alleged discrimination, or oppose discrimination in any way.^{2008 2009}

Employers often respond to discrimination allegations with feelings of anger and betrayal. However, acting on such emotions, by firing, demoting, or otherwise adversely affecting the accuser’s employment, may

¹⁹⁹² 29 U.S.C. § 158(a)(4).

¹⁹⁹³ 29 U.S.C. § 1140.

¹⁹⁹⁴ 29 U.S.C. § 660(c).

¹⁹⁹⁵ 29 U.S.C. § 215(a)(3).

¹⁹⁹⁶ 42 U.S.C. § 300j-9(i).

¹⁹⁹⁷ 30 U.S.C. § 815(c).

¹⁹⁹⁸ 42 U.S.C. § 5851.

¹⁹⁹⁹ Utah Code Ann. § 34A-6-203.

²⁰⁰⁰ RCW 49.17.

²⁰⁰¹ RCW 49.70.

²⁰⁰² RCW 70.124.

²⁰⁰³ RCW 19.30.

²⁰⁰⁴ RCW 49.46.

²⁰⁰⁵ RCW 49.78.

²⁰⁰⁶ RCW 49.32.020.

²⁰⁰⁷ *Lins v. Children’s Discovery Ctrs. of Am., Inc.*, 95 Wn. App. 486 (1999).

²⁰⁰⁸ “Partners” may also be protected. See *Fitzsimmons v. California Emerg. Phys. Med. Grp.*, 205 Cal. App. 4th 1423 (2012).

²⁰⁰⁹ The UADA prohibits all persons from obstructing or preventing any person from exercising rights under the UADA. Utah Code Ann. § 34A-5-106(1)(e).

convert a weak underlying discrimination claim into a strong retaliation claim. The resulting cost to employers can be high. In 2006, a former supermarket clerk won an \$18 million award on a retaliation claim that his employer fired him because he accused a supervisor of sexual harassment.²⁰¹⁰ In 2007, a California court awarded a former engineer \$5.5 million on her retaliation and wrongful termination claims. The employee stated that she was denied promotions and was fired after complaining about her supervisor's harassment and discrimination. The employer said that she was fired because she decided not to move to Houston when her department was transferred there as part of a corporate structuring.²⁰¹¹ In 2008, an ex-employee filed a Section 1981 claim against his employer for allegedly dismissing him because of racial bias and because he had complained about the dismissal of another black employee.²⁰¹² The trial court initially dismissed his claim via summary judgment, holding that Section 1981 did not permit a claim of unlawful retaliation in a race discrimination case. The U.S. Supreme Court disagreed, holding that: (1) Section 1982 encompassed a retaliation action; (2) the Court had long interpreted Sections 1981 and 1982 alike; (3) in 1991, Congress enacted legislation explicitly defining the scope of Section 1981 to include post-contract-formation conduct; and (4) since 1991, the lower courts had uniformly interpreted Section 1981 as encompassing retaliation actions.²⁰¹³

These cases illustrate why an employer should be wary of taking an adverse action against an employee who has engaged in protected activity, even if legitimate reasons exist for taking the action, such as unsatisfactory job performance. In fact, in California an employer may be found to have engaged in an adverse employment action by permitting fellow employees to punish the employee for invoking his or her rights. The courts will consider: (1) if the employer knew or should have known of co-worker retaliatory conduct, and (2) if the employer either participated and encouraged the conduct, or failed to take reasonable actions to end the retaliatory conduct.²⁰¹⁴ The proximity in time between the protected activity and the adverse employment action may provoke a suspicious employee to file a claim and allow a judge or jury to infer a retaliatory motive.²⁰¹⁵

To prove retaliation, plaintiffs must show that: (1) they engaged in protected conduct; (2) the employer subjected them to adverse employment action at the time of, or after, the protected conduct; and (3) the protected conduct caused the adverse employment action.²⁰¹⁶

Title VII, the ADEA, and the ADA define protected conduct to include the following:

- making a charge, testifying, assisting, or participating in any manner in an investigation, proceeding, hearing, or lawsuit involving unlawful discrimination under Title VII, ADEA or ADA; or
- opposing any practice made unlawful by Title VII, ADEA, or ADA.²⁰¹⁷

The first provision is known as the "participation clause," the second as the "opposition clause." The anti-retaliation provisions under WLAD, MHRA, and FEHA are generally interpreted similarly to federal law.

The participation clause prohibits retaliation for essentially everything that relates to the communication of an allegation or evidence of illegal employment discrimination. An employee may succeed on a

²⁰¹⁰ See *Stevens v. Vons Co.'s, Inc.*, No. SC041162, 2006 WL 3799088 (Cal. Super. Ct. Oct. 25, 2006).

²⁰¹¹ *Pande v. Chevron Corp.*, No. C-04-5107, 2007 WL 26887 (N.D. Cal. Oct. 29, 2007).

²⁰¹² *CBOCS West, Inc. v. Humphries*, 553 U.S. 442 (2008) (interpreting 42 U.S.C. § 1981).

²⁰¹³ The Court rejected the employer's arguments that Congress did not intend its 1991 re-enactment of Section 1981 to cover retaliation and that Section 1981, if applied to employment-related retaliation actions, would overlap with Title VII retaliation claims.

²⁰¹⁴ *Kelley v. Conco Cos.*, 196 Cal. App. 4th 191 (2011).

²⁰¹⁵ *Kahn*, 90 Wn. App. at 130.

²⁰¹⁶ *Vasquez v. State*, 94 Wn. App. 976 (1999); see also *Carter v. Labor Com'n Appeals Bd.*, 153 P.3d 763, 766 (Utah 2006) (citing *Viktron/Lika Utah v. Labor Comm'n*, 38 P.3d 993, 995 (Ut. App. 2001)).

²⁰¹⁷ See 42 U.S.C. § 2000e-3 (Title VII); 29 U.S.C. § 623(d) (ADEA); 42 U.S.C. § 12203(a) (ADA).

retaliation claim even if he or she does not file a charge of discrimination or if his or her underlying discrimination claim is rejected.²⁰¹⁸ An employer can unlawfully retaliate even in its hiring process, for example, by refusing to hire a job applicant on the basis of his or her history of filing discrimination charges or because the applicant has a charge pending against a previous employer, even when such a decision may otherwise be considered reasonable.

The opposition clause bars retaliation against employees who oppose unlawful employment practices, even if the employee is not the subject of the practice.²⁰¹⁹ Any employee who takes part in an internal investigation is protected from retaliation, not just the employee whose allegations initiate the investigation. In *Crawford v. Metro. Gov't of Nashville*, the U.S. Supreme Court held that an employee who was allegedly fired for participating in an HR officer's investigation could proceed with an opposition-clause retaliation claim against her employer.²⁰²⁰ The lower courts found that a retaliation claim must be linked either to the employee's own complaint or to a pending EEOC charge.²⁰²¹ The Supreme Court unanimously rejected that argument.²⁰²² It reasoned that participating in an investigation falls within plain meaning of the word "oppose," that adopting the lower court's rule would have an impermissible chilling effect on employee participation in investigations, and that the existence of the *Ellerth/Faragher* defense provides employers with a strong incentive to investigate even though all participating employees are protected from retaliation.²⁰²³

Prohibited retaliation is not limited to termination or serious discipline of an employee, but also can include less severe action, such as an unjustifiably poor job evaluation, a less desirable work assignment,²⁰²⁴ or a negative job reference.²⁰²⁵ In *Hashimoto v. Dalton*, the plaintiff initiated an administrative complaint alleging that two of her supervisors discriminated against her because of her race and gender and because she had met with an Equal Employment Opportunity counselor. The plaintiff later filed a second complaint alleging that when she applied for a job with the Army she received a negative job reference from one of the supervisors in retaliation for filing the first complaint. The Ninth Circuit held that it was "beside the point" that plaintiff's negative job reference was not the reason she did not get the job with the Army. The supervisor's dissemination of the negative job reference itself was an actionable employment decision.²⁰²⁶

A reassignment of duties can constitute retaliatory discrimination even if the employee remains in the same job description if the reassignment results in the employee engaging in duties that are less desirable than before. The test is whether the challenged action "well might have dissuaded" an employee from engaging in the protected act.²⁰²⁷ Furthermore, the *Burlington N.* court held that the anti-retaliation

²⁰¹⁸ *Womack v. Munson*, 619 F.2d 1292, 1298 (8th Cir. 1980) ("The merits of a charge made against an employer is irrelevant to its protected status"); *contra Wentz v. Md. Cas. Co.*, 869 F.2d 1153, 1155 (8th Cir. 1989); *Kahn v. Salerno*, 90 Wn. App. 110 (1998); *Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268 (2001) (employee's internal complaints of harassment did not constitute protected conduct because no reasonable person could have believed that single incident of alleged sexual harassment violated Title VII).

²⁰¹⁹ *Hernandez v. Spacelabs Med., Inc.*, 343 F.3d 1107, 1113 (9th Cir. 2003) (male employee protected when he complained of sexual harassment against a female co-worker).

²⁰²⁰ *Crawford v. Metro. Gov't of Nashville*, 555 U.S. 271, 279 (2009); *see also Hernandez v. Spacelabs Med., Inc.*, 343 F.3d 1107 (9th Cir. 2003) (court allowed an employee's retaliation claim to proceed after the employee was terminated after making complaints about his supervisor on behalf of co-worker who the supervisor was harassing).

²⁰²¹ *Crawford*, 555 U.S. at 275.

²⁰²² *Id.*

²⁰²³ *Id.*

²⁰²⁴ *See Burlington N. v. White*, 548 U.S. 53 (2006) (a less desirable work assignment, even where both the former and present duties fall within the same job description still constitutes retaliation).

²⁰²⁵ *Fielder v. UAL Corp.*, 218 F.3d 973 (9th Cir. 2000) (Title VII's protection against retaliatory discrimination extends to employer liability for co-worker retaliation that rises to the level of an adverse employment action); *see Hashimoto v. Dalton*, 118 F.3d 671 (9th Cir. 1997). Former employees also may bring post-employment retaliation claims, including a claim that the former employer gave a negative job reference in retaliation.

²⁰²⁶ *Hashimoto v. Dalton*, 118 F.3d 671 (9th Cir. 1997).

provision does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace.²⁰²⁸ Examples of adverse employment actions include transfers, changes in work locations or schedules, and unfavorable job references.²⁰²⁹ In *Thompson v. N. Am. Stainless, LP*, the Supreme Court expanded Title VII's anti-retaliation provisions by finding that an employee may have a claim for unlawful retaliation if they were fired in retaliation for the employee's fiancé (who also works for the same company) filing an EEOC charge against the company.²⁰³⁰ Stating that Title VII's anti-retaliation provision must be construed to cover a broad range of employer conduct, the Supreme Court found it obvious that a reasonable worker might be dissuaded from engaging in protected activity if they knew that their fiancé would be fired, thus meeting the test set forth in *Burlington N.* The Supreme Court declined to create a bright-line test to identify a fixed class of relationships for which such third-party reprisals were unlawful, but stated that the firing of a close family member will almost always meet the *Burlington N.* standard, while inflicting a milder reprisal on a mere acquaintance will almost never do so.

However, the employer's action must have been materially adverse to a reasonable employee or applicant;²⁰³¹ that a plaintiff found the action "inconvenient" or less preferred will not suffice.²⁰³² Like the federal law, California courts interpret the FEHA using the *materiality* test, a standard that requires an employer's adverse action to materially affect the terms and conditions of employment.²⁰³³ Washington courts apply the *deterrence* test in analyzing WLAD retaliation claims, which defines an adverse employment action as "any adverse treatment that would deter a charging party or others from engaging in protected activity."

The Minnesota Human Rights Act's anti-discrimination statute contains similarly-phrased participation and opposition clauses in its anti-retaliation provision.²⁰³⁴ In opposing a discriminatory practice, although under a good faith, reasonable belief standard an employee does not have to allege an actual MHRA violation, the employee does have to allege he or she had a good faith, reasonable belief that the opposed practices were prohibited by the MHRA. If a practice is not unlawful under the plain terms of the MHRA, an employee's belief that the practice is unlawful cannot be reasonable.²⁰³⁵ The Minnesota statute is broader than its federal equivalents, expressly forbidding, among other things, even the informing of another employer that a particular employee has engaged in protected participation or opposition conduct.²⁰³⁶ Also, the Supreme Court's "materially adverse" employment action standard, discussed above, has been used to define adverse employment actions under the MHRA.²⁰³⁷

In addition, Minnesota law prohibits employers from retaliating against an employee for declining to contribute to charities or community organizations.²⁰³⁸

²⁰²⁷ *Burlington N.*, 548 U.S. at 68.

²⁰²⁸ *Id.* at 57.

²⁰²⁹ *Ray v. Henderson*, 217 F.3d 1234 (9th Cir. 2000); *see also Kortan v. Cal. Youth Auth.*, 217 F.3d 1104 (9th Cir. 2000) (hostile treatment of plaintiff, including ridicule, laughing at her, increased criticism, name calling, and reduced performance ratings, did not constitute an adverse employment action); *State v. Boeing Co.*, 105 Wn. App. 1 (2000) (co-worker perception of employee as one who may make EEOC claims against them not an adverse action because any such perception not shown to adversely affect employment).

²⁰³⁰ 131 S. Ct. 863 (2011).

²⁰³¹ *See Burlington N.*, 548 U.S. 53.

²⁰³² *Donabue v. Cent. Wash. Univ.*, 140 Wn. App. 17 (2007) (employee's reassignment was not retaliation because he did not lose tenure, was not demoted, and did not receive a reduction in pay; plaintiff's belief that the reassignment resulting in an inconvenient alteration of his job responsibilities is an insufficient basis for actionable retaliation); *Malais v. L.A. City Fire Dept.*, 150 Cal. App. 4th 350 (2007) (assignment to a less-preferred position alone does not constitute an adverse employment action).

²⁰³³ *Yanowitz v. L'Oreal USA*, 36 Cal. 4th 1028, 1036 (2005).

²⁰³⁴ Minn. Stat. § 363A.15. *See Tong v. Am. Pub. Media Group*, No. A05-432, 2005 WL 3527273, at *5 (Minn. Ct. App. Dec. 27, 2005).

²⁰³⁵ *Babr v. Capella Univ.*, 788 N.W.2d 76, 84 (Minn. 2010).

²⁰³⁶ Minn. Stat. § 363A.15. *See Hoover v. Norwest Private Mortg. Banking*, 632 N.W.2d 534, 548 (Minn. 2001).

In *Jones v. Lodge at Torrey Pines*, the California court held that a court must consider the totality of circumstances in determining whether an adverse action has been taken against a plaintiff in California retaliation cases. The court stated that the trial court should have considered evidence that after the employee asked his supervisor to refrain from making derogatory remarks about women and homosexuals, the employee received warning notices and was excluded from meetings, and the supervisor continued to use offensive language despite being asked to stop.²⁰³⁹

Not surprisingly, the dispute in these cases often involves only a question of causation; *i.e.*, whether the employee's involvement in the discrimination allegations or proceedings caused the adverse employment decision. To show causation, an employee is likely to point to evidence that he or she was treated differently after engaging in the protected conduct than other employees who did not participate, or that the adverse employment action occurred shortly after the employer learned of the protected activity. For example, in *Pullom v. U.S. Bakery*, the court inferred a causal connection where the adverse employment action occurred within four months of the employee's engagement in protected activity.²⁰⁴⁰ The employer can support its case by showing that its decision was instead based on acceptable criteria. For example, in *Barker v. Advanced Silicon Materials, LLC*, the employer alleged that it fired the employee based on an investigation that found she was guilty of telephone hacking. The employee alleged that this was merely pretext for retaliatory motives because the investigation was incompetent and incomplete. The employer prevailed based on the court's finding that, though the investigation may have been incompetent and incomplete, the company accepted the results of the investigation and sincerely believed the employee was guilty of telephone hacking.²⁰⁴¹

Generally, retaliation claims are limited to management level conduct resulting in an adverse employment action;²⁰⁴² however, employee conduct can be imputed on the employer in certain circumstances.²⁰⁴³ An employer can be liable for retaliation if it fails to take action against co-workers who shun or treat an employee differently after the employee reports unlawful conduct.²⁰⁴⁴ Where an allegedly independent adverse employment action was in fact influenced by, affected by, or involved a biased subordinate with retaliatory motive, that motive will be imputed on the employer.²⁰⁴⁵ An employee may claim retaliation by a

²⁰³⁷ *Devin v. Schwan's Home Serv.*, 491 F.3d 778, 785-86 (8th Cir. 2007) (applying *White's* "materially adverse" standard to retaliation claims under both Title VII and the MHRA); *Black v. Indep. Sch. Dist. No. 316*, 476 F. Supp. 2d 1115, 1121 (D. Minn. 2007) (applying *White's* "materially adverse" standard to both Title VII and Minnesota Human Rights Act retaliation claims); *Goodman v. City of Brooklyn Ctr.*, No. 06-202, 2007 WL 46289, at *3 (Minn. Ct. App. Jan. 9, 2007) (using *White* to construe MHRA, though not specifically applying "materially adverse" standard).

²⁰³⁸ Minn. Stat. § 181.937.

²⁰³⁹ *Jones v. Lodge at Torrey Pines P'ship*, 147 Cal. App. 4th 475, *review granted and opinion partially superseded by*, 61 Cal. Rptr. 3d 1 (2007).

²⁰⁴⁰ *Pullom v. U.S. Bakery*, 477 F. Supp. 2d 1093 (D. Or. 2007) (citing *Miller v. Fairchild Indus.*, 797 F.2d 727, 731 (9th Cir. 1986)) (court found a proximity of two months between the protected activity and adverse employment action sufficient to infer a causal connection). *But see Anica v. Wal-Mart Stores, Inc.*, 120 Wn. App. 481, 489 (2004) (employee failed to establish case of retaliation, despite being terminated shortly after her return from leave, because employer did not fire her after first injury, received notice of her problems with the Social Security Administration two months prior to her second injury, did not fire her when she was injured the second time, and only fired her after she failed to resolve her Social Security problems).

²⁰⁴¹ *Barker v. Advanced Silicon Materials, LLC*, 131 Wn. App. 616 (2006). *See also King v. United Parcel Serv., Inc.*, 152 Cal. App. 4th 426 (2007) (it does not matter whether the plaintiff actually falsified a driver's timecard as long as the company honestly believed he did).

²⁰⁴² *See, e.g., Renz v. Spokane Eye Clinic*, 114 Wn. App. 611 (2002) (employee has *prima facie* case of retaliatory discharge where employee complained about manager's repeated sexual comments and shortly thereafter employee is fired).

²⁰⁴³ An exception to individual liability exists in California where the discrimination or retaliation stems from action against an employee who was called to active duty. In these instances, there is no individual liability for discrimination or retaliation. *See Haligowsky v. Superior Court of Los Angeles*, 200 Cal. App. 4th 983 (2011).

²⁰⁴⁴ *Fielder*, 218 F.3d 973.

²⁰⁴⁵ *Poland v. Chertoff*, 494 F.3d 1174 (9th Cir. 2007) (investigation was not sufficiently independent to avoid imputed bias where the investigation panel had access to biased subordinate's lengthy memorandum outlining numerous incidents of malfeasance by the plaintiff); *but see King v. United Parcel Serv., Inc.*, 152 Cal. App. 4th (2007) (the bitterness of or mistreatment of the plaintiff by co-workers will not be imputed on the employer absent evidence that the co-workers were involved in the decision-making process).

former employer even if no longer employed by that employer.²⁰⁴⁶ An individual supervisor can be held personally liable for retaliation under the FEHA.²⁰⁴⁷

Both federal and Washington law follow the *McDonnell Douglas* framework outlined above in Section 9.2(a). In other words, once a plaintiff makes a *prima facie* case of retaliation, the defendant must articulate a legitimate non-discriminatory reason for the adverse employment action. If the defendant successfully makes such a showing, the burden shifts back to the plaintiff to demonstrate that the defendant's proffered reason is a mere pretext for discriminatory motive. To make this showing of pretext, the plaintiff may rely on the evidence offered in support of his or her *prima facie* case. Furthermore, a court may infer retaliation without proof of a discriminatory reason if it rejects a proffered non-discriminatory reason as unbelievable.²⁰⁴⁸

In Utah, under the multi-step process to establish and defend employment discrimination claim, the employee must first establish a *prima facie* case of discrimination, and then the burden shifts to the employer to put forth a legitimate, non-discriminatory reason for the action taken.²⁰⁴⁹ Finally, the burden shifts back to the employee to prove, by a preponderance of evidence, that the legitimate reasons offered were a pretext for discrimination.²⁰⁵⁰ In Utah, an employer can only be liable for a co-workers' retaliatory harassment where its supervisory or management personnel either: (1) orchestrate the harassment, or (2) know about the harassment and acquiesce to it in such a manner as to condone and encourage the co-workers' actions.²⁰⁵¹

(b) Workers' Compensation Claims

Washington law specifically prohibits discrimination against an employee in retaliation for the employee filing, or communicating intent to file, a workers' compensation claim.²⁰⁵² However, the employer is not prevented from taking any action against a worker for other reasons, including the failure to observe the employer's safety procedures "or the frequency or nature of the worker's job-related accidents."²⁰⁵³ To succeed on this type of retaliation action, an employee who filed a claim must show that the employer subsequently discriminated against the employee in some way, and that the claim and the discrimination were causally connected.²⁰⁵⁴ Such discrimination includes harassment that creates a hostile work environment.²⁰⁵⁵ An employee who did not file a claim can prove unlawful retaliation by showing that his failure to file was caused by the employer's policy or practice of retaliating against employees who file for workers' compensation benefits, or the employer's direct threat of retaliation.²⁰⁵⁶ The common law tort of wrongful termination in violation of public policy also prohibits an employer from discharging an employee for pursuing workers' compensation benefits.²⁰⁵⁷

²⁰⁴⁶ See *Smith v. SEIU United Healthcare Worker's W.*, No. 05-2877 VRW, 2006 WL 2038209 (N.D. Cal. Jul. 19, 2006) (employee had standing to assert retaliatory claims under FMLA and ADA against former employer who ostracized him publicly in front of prospective employees, since both FMLA and ADA anti-retaliation provisions protect not only "employees").

²⁰⁴⁷ This rule was recently reaffirmed by the California Supreme Court in *Jones v. Lodge at Torrey Pines P'shp*, 42 Cal. 4th 1158 (2008).

²⁰⁴⁸ *Hernandez v. Spacelabs Med. Inc.*, 343 F.3d 1107 (9th Cir. 2003).

²⁰⁴⁹ *Hobbs v. Labor Com'n*, 991 P.2d 590, 593 (Ut. App. 1999).

²⁰⁵⁰ *Id.*

²⁰⁵¹ See, e.g., *Gunnell v. Utah Valley State*, 152 F.3d 1253, 1265 (10th Cir. 1998).

²⁰⁵² RCW 51.48.025. See also Cal. Lab. Code § 132(a). California law places a cap of \$10,000 and \$250 in costs, plus back wages. *Id.*

²⁰⁵³ *Id.*

²⁰⁵⁴ *Robel v. Roundup*, 148 Wn.2d 35 (2002).

²⁰⁵⁵ *Id.*

²⁰⁵⁶ *Johnson v. Safeway Stores, Inc.*, 67 Wn. App. 10, 13 (1992).

²⁰⁵⁷ *Lins v. Children's Discovery Ctrs. of Am., Inc.*, 95 Wn. App. 486, 493 (1999). See Chapter X: Contract and Tort Claims for a more thorough discussion of this tort.

The Minnesota Workers' Compensation Act prohibits an employer from discharging or threatening to discharge an employee for seeking workers' compensation benefits, or from intentionally obstructing an employee from seeking those benefits in any manner.²⁰⁵⁸ An employer who violates this provision may be liable for damages incurred by the employee including any diminution in workers' compensation benefits, reasonable attorney fees, and punitive damages.²⁰⁵⁹

Utah's Workers' Compensation Act ("UWCA") does not contain a provision that forbids an employer to discharge an employee in retaliation for claiming worker's compensation. However, the lack of anti-retaliation provision in Workers' Compensation Act does not diminish the Act's function as source of clear and substantial public policy, and thus, does not bar an employee who was fired for filing for workers' compensation benefits from bringing wrongful discharge action under public policy exception to the at-will employment doctrine.²⁰⁶⁰

In addition, the law requires employers of 15 or more employees to offer continued employment to an injured employee when employment is available within the employee's physical limitations.²⁰⁶¹ Refusal to offer continued employment, without reasonable cause, will subject the offending employer to liability in a civil action for one year's wages, up to a maximum of \$15,000.²⁰⁶²

(c) Whistleblowers/Sarbanes-Oxley/Dodd-Frank

Under the Corporate and Criminal Fraud and Accountability Act of 2002, known as the Sarbanes-Oxley Act ("SOX"), an employee is protected from retaliation for providing information that the employee "reasonably believes constitutes a violation" of any Securities and Exchange Commission rule or regulation or any provision of federal law relating to fraud against shareholders.²⁰⁶³ The Act applies to an "officer, employee, contractor, subcontractor, or agent" of any company that is publicly-traded, is registered under the Securities Exchange Act section 12, must file reports under section 15(d), or is a subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company.²⁰⁶⁴ The Act protects employees and former employees, employment applicants, and "individual[s] whose employment could be affected" that "reasonably believe" a violation has occurred.²⁰⁶⁵

To prevail on a SOX claim, a plaintiff must show that: (1) he or she engaged in protected activity; (2) the employer knew of the protected activity; (3) the plaintiff suffered an adverse employment action; and (4) circumstances exist to suggest that the protected activity was a contributing factor to the adverse action.²⁰⁶⁶

In 2009, the Ninth Circuit issued a decision construing the whistleblower provision of the SOX. In *Van Asdale v. Int'l Game Tech.*, former in-house attorneys for a Nevada corporation brought action against the corporation, alleging claims for retaliatory discharge under the SOX. Reversing a grant of summary judgment for the employer, the Ninth Circuit held that the success or failure of a SOX retaliation action does not depend on the plaintiff's ability to show any actual fraud. Rather, plaintiffs only need show that they reasonably believed that there might have been fraud. In addition, the Ninth Circuit held that concerns about the potential disclosure of attorney-client privileged information did not bar plaintiffs

²⁰⁵⁸ Minn. Stat. § 176.82, subd. 1; *Wolhart v. Genuine Parts Co.*, Civ. No. 05-254, 2006 WL 839506 (D. Minn. Mar. 30, 2006); *Randall v. N. Milk Prods., Inc.*, 519 N.W.2d 456 (Minn. Ct. App. 1994).

²⁰⁵⁹ Minn. Stat. § 176.82, subd. 1.

²⁰⁶⁰ See, e.g., *Touchard v. La-Z-Boy, Inc.*, 148 P.3d 945, 950 (Utah 2006).

²⁰⁶¹ Minn. Stat. § 176.82, subd. 2.

²⁰⁶² *Id.*

²⁰⁶³ 18 U.S.C. § 1514A(a).

²⁰⁶⁴ *Id.*; Pub. L. No. 111-203, § 929A (2010), amending 18 U.S.C. § 1514A(a).

²⁰⁶⁵ 29 C.F.R. § 1980.101; 18 U.S.C. § 1514A. See the Department of Labor website, <http://www.dol.gov> for regulations and guidance.

²⁰⁶⁶ See this Chapter, Section 9.2(a): Disparate Treatment Claims.

from asserting SOX whistleblower claims. The court pointed out that the language of the Sarbanes-Oxley Act authorizes any “person” alleging discrimination based upon protected conduct to bring a SOX claim and that the section did not expressly exclude in-house counsel from coverage.²⁰⁶⁷

Officers or employees who violate the Sarbanes-Oxley whistleblower provisions can be held *individually* and *criminally* liable. A violation can lead to fines and/or imprisonment for up to 10 years.²⁰⁶⁸

The Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”)²⁰⁶⁹ was signed into law on July 21, 2010. The Dodd-Frank Act grants new whistleblower protections while expanding the existing whistleblower protections under SOX. Among other things, the Dodd-Frank Act doubles the statute of limitations under SOX from 90 days to 180 days, and now allows plaintiffs a jury trial.

Significantly, the Dodd-Frank Act provides an opportunity for employees at both publicly and privately held companies to receive a large bounty for whistleblowing. If an employee supplies “original information” to the Securities and Exchange Commission (“SEC”) that results in an action brought by the SEC under the securities laws that results in monetary sanctions exceeding \$1,000,000, the whistleblower shall receive an award of between 10% and 30% of the sanctions collected by the SEC. “Original information” is “information derived from the independent knowledge or analysis of a whistleblower,” that is “not known to the [SEC] from any other source, unless the whistleblower is the original source of the information,” and is “not exclusively derived from an allegation made in a judicial or administrative hearing, in a governmental report, hearing, audit, or investigation, or from the news media, unless the whistleblower is the source of the information.” An employee is protected from retaliation for providing covered information to the SEC, and may bring an action in federal court for any employer retaliation.²⁰⁷⁰

(i) Washington and California Whistleblower Law

Washington and California prohibit retaliation based on filing a whistleblower complaint.²⁰⁷¹

(ii) Minnesota Whistleblower Law

In 1986, the Minnesota Court of Appeals recognized an exception to the at-will employment doctrine when an employer discharges an employee for reasons that contravene a clear mandate of public policy.²⁰⁷² In 1987, Minnesota enacted its whistleblower statute.²⁰⁷³

The whistleblower statute, as amended, prohibits discharge or discrimination against an employee, or someone acting on behalf of the employee, who:

- “in good faith, reports the violation or suspected violation of any state or federal law or rule adopted pursuant to law” to his or her employer or to a government agency;
 - “participate[s] in an investigation, hearing, [or] inquiry” before a public body;
 - “refuses an employer’s order to perform an action that the employee has an objective basis in fact to believe violates any state or federal law” when the employee so informs the employer;
- or

²⁰⁶⁷ 577 F.3d 989 (9th Cir. 2009).

²⁰⁶⁸ 18 U.S.C. § 1513(e).

²⁰⁶⁹ Pub. L. No. 111-203, § 922 (2010).

²⁰⁷⁰ *Id.*

²⁰⁷¹ RCW 49.20; Cal. Lab. Code § 1102.5.

²⁰⁷² *Phipps v. Clark Oil & Refining Corp.*, 396 N.W.2d 588, 592 (Minn. Ct. App. 1986), *aff’d*, 408 N.W.2d 569 (Minn. 1987) (recognizing that the common law protects those fired for their refusal to violate the law); *Lidow v. Superior Court*, 206 Cal. App. 4th 351 (2012) (CEO terminated after complaints about accounting “irregularities” at foreign parent company).

²⁰⁷³ Minn. Stat. § 181.932.

- reports a quality of health care services situation that potentially places the public at risk of harm.²⁰⁷⁴

Under this law, employers cannot penalize employees under these circumstances by adversely changing the employee's compensation, terms, conditions, location, or privileges of employment.²⁰⁷⁵ It is unclear to what extent Minnesota courts will adopt the Supreme Court's "materially adverse" standard with regard to the whistleblower statute.²⁰⁷⁶

The Minnesota Court of Appeals has held that the statute protects only *current* employees.²⁰⁷⁷ Moreover, the statute embodies a "good faith" requirement that "serves to limit the nature of actionable claims."²⁰⁷⁸ In determining whether a report of a violation or suspected violation of law was made in good faith, the central question is whether the report was made "for the purpose of blowing the whistle, i.e., to expose an illegality."²⁰⁷⁹ An employee cannot be said to have "blown the whistle" when the employee's report is made because it is the employee's job to investigate and report wrongdoing, unless, for example, the report was made outside the employee's chain of command, or if the report was made outside the scope of the employee's normal job duties.²⁰⁸⁰ Finally, to qualify as a "report" under the whistleblower statute, the employee need not file a formal report with a government body. Rather, the Minnesota Court of Appeals has held that where a plaintiff had engaged in arguments with a co-worker about allegedly dishonest practices in the presence of her employer and had complained directly to her employer on two occasions, this constituted regular accounts of the alleged fraudulent practices, and met the definition of "report."²⁰⁸¹

Since 1987, Minnesota courts have struggled with the proper application of the statute and its relationship to the common law claim. Under common law, an employer is liable for wrongful discharge if an employee is discharged for reasons that "contravene a clear mandate of public policy" that is either legislatively or judicially recognized.²⁰⁸² There had been some question regarding whether this "clearly mandated policy" requirement is also a requirement of the statutory cause of action.²⁰⁸³ However, the Minnesota Supreme Court held in 2002 that the state Whistleblower statute does *not* contain a public policy requirement.²⁰⁸⁴ As such, a plaintiff stating a claim under the state whistleblower statute need not establish that the reported violation of law implicates public policy.²⁰⁸⁵ More recently, the Minnesota Supreme Court clarified that

²⁰⁷⁴ Minn. Stat. § 181.932, subd. 1.

²⁰⁷⁵ *Id.*; accord *Thompson v. Campbell*, 845 F. Supp. 665 (D. Minn. 1994); *Petroskey v. Lommen, Nelson, Cole & Stageberg, P.A.*, 847 F. Supp. 1437 (D. Minn.), *aff'd*, 40 F.3d 278 (8th Cir. 1994).

²⁰⁷⁶ See *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006) (establishing "materially adverse" standard for Title VII retaliation actions); *Leiendecker v. Asian Women United of Minn.*, 731 N.W.2d 836, 841-42 (Minn. Ct. App. 2007) (discussing *White* in construing Minnesota Whistleblower Act and acknowledging Eighth Circuit's former test is left in doubt by *White*, but not specifically applying *White*'s "materially adverse" test).

²⁰⁷⁷ *Guercio v. Prod. Automation Corp.*, 664 N.W.2d 379 (Minn. Ct. App. 2003).

²⁰⁷⁸ *Anderson-Johanningmeier v. Mid-Minn. Women's Ctr., Inc.*, 637 N.W.2d 270, 277 (Minn. 2002); *Obst v. Microtron Inc.*, 614 N.W.2d 196, 202 (Minn. 2000).

²⁰⁷⁹ *Obst*, 614 N.W.2d at 202; see also *Fjelsta v. Zogg Dermatology PLC*, 488 F.3d 804, 808-09 (8th Cir. 2007) (employee who merely expressed dissatisfaction with employer's policy in attempt to deflect criticism did not make report under Whistleblower Act because employee's purpose was not to expose illegality).

²⁰⁸⁰ *Kidwell v. Sybartic, Inc.*, 784 N.W.2d 220, 228 (Minn. 2010).

²⁰⁸¹ *Hayes v. Dapper*, No. 07-1878, 2008 WL 4301018, at *4 (Minn. Ct. App. Sep. 23, 2008) (citing *Janklow v. Minn. Bd. Of Exams for Nursing Home Adm'rs*, 536 N.W.2d 20, 23 (Minn. App. 1995)).

²⁰⁸² *Phipps v. Clark Oil & Refining Corp.*, 396 N.W.2d 588, 590 (Minn. Ct. App. 1986), *aff'd*, 408 N.W.2d 569 (Minn. 1987).

²⁰⁸³ See, e.g., *Donahue v. Schwegman, Lundberg, Woessner & Kluth, P.A.*, 586 N.W.2d 811 (Minn. Ct. App. 1998) (holding that the report of a violation or suspected violation of federal or state law must implicate an actual federal or state law, not one that does not exist); *Hedglin v. City of Willmar*, 582 N.W.2d 897, 901-02 (Minn. 1998) (stating that the Minnesota Whistleblower Act protects reports made in good faith of "a violation or suspected violation of any federal or state law. . ."); *Vonch v. Carlson Cos., Inc.*, 439 N.W.2d 406 (Minn. Ct. App. 1989) (concluding that a public policy exception to at-will employment protects the public; citing the Minnesota Whistleblower Act even though the case was not brought under the Act).

²⁰⁸⁴ *Anderson-Johanningmeier v. Mid-Minnesota Women's Ctr., Inc.*, 637 N.W.2d 270 (Minn. 2002), *abrogating* *Donahue*, 586 N.W.2d 811, and *Vonch*, 439 N.W.2d 406.

passage of the whistleblower statute did not abrogate common law wrongful discharge actions as they existed prior to passage of the statute.²⁰⁸⁶

An employee who is injured by a violation of the whistleblower statute may bring a civil action to recover damages, including reasonable attorneys' fees, and may obtain injunctive and equitable relief.²⁰⁸⁷ A civil penalty also may be imposed.

The Minnesota Human Rights Act will bar a claim under the whistleblower statute if the employee relies on the same facts and seeks redress for the same allegedly discriminatory practice to support both a MHRA reprisal claim and a separate whistleblower retaliation claim.²⁰⁸⁸

The Federal Aviation Act ("FAA") and ERISA will also pre-empt a Minnesota whistleblower claim based on an alleged violation of the FAA or ERISA.²⁰⁸⁹

(iii) Utah Whistleblower Law

The Utah Supreme Court has recognized four categories of public policies eligible for consideration under the exceptions to the at-will employment doctrine. These are: (1) refusing to commit an illegal or wrongful act, such as refusing to violate the anti-trust laws; (2) performing a public obligation, such as accepting jury duty; (3) exercising a legal right or privilege, such as filing a workers' compensation claim; or (4) reporting to a public authority criminal activity of the employer.²⁰⁹⁰ The analysis of whether the public policy exception applies to a particular legal right or privilege will frequently require a balancing of competing legitimate interests: the interests of the employer to regulate the workplace environment to promote productivity, security, and similar lawful business objectives, and the interests of the employees to maximize access to their statutory and constitutional rights within the work-place.²⁰⁹¹

SECTION 9.7 INDIVIDUAL LIABILITY

(a) Washington Law

Unlike most federal anti-discrimination laws,²⁰⁹² in Washington supervisors can be individually liable for discriminatory acts against employees. The WLAD subjects to liability "any person acting in the interest of an employer, directly or indirectly," and defines "person" as a "manager, agent, or employee."²⁰⁹³ It also prohibits "any person" from aiding or abetting another to engage in discriminatory practices.²⁰⁹⁴ Thus, any individual who meets the statutory definition of "employer" under the WLAD may be individually liable for WLAD violations.²⁰⁹⁵

²⁰⁸⁵ *Id.*

²⁰⁸⁶ *Nelson v. Productive Alternatives, Inc.*, 715 N.W.2d 452, 455-56 (Minn. 2006) (Minnesota Whistleblower Act does not preclude common law wrongful discharge actions premised on *Phipps*).

²⁰⁸⁷ Minn. Stat. § 181.935.

²⁰⁸⁸ *See Williams v. St. Paul, Ramsey Med. Ctr., Inc.*, 551 N.W.2d 483 (Minn. 1996); *O'Sullivan v. State*, No. 99-597, 1999 WL 1058238 (Minn. Ct. App. Nov. 23, 1999); *McLean v. Carlson Co., Inc.*, 777 F. Supp. 1480, 1483 (D. Minn. 1991).

²⁰⁸⁹ *Botz v. Omni Air Int'l*, 134 F. Supp. 2d 1042 (D. Minn. 2001), *aff'd*, 286 F. 3d 488 (8th Cir. 2002).

²⁰⁹⁰ *Hansen v. America Online, Inc.*, 96 P.3d 950, 952 (Utah 2004).

²⁰⁹¹ *Id.* at 953.

²⁰⁹² Title VII, the ADEA, the ADA, and the FMLA. 42 U.S.C. § 2000e(b); 29 U.S.C. § 630; *Miller v. Maxwell's Int'l Inc.*, 991 F.2d 583 (9th Cir. 1993), *cert. denied*, 510 U.S. 1109 (1994) (Title VII, ADA, ADEA); *Padway v. Palches*, 665 F.2d 965 (9th Cir. 1982) (Title VII). Individual supervisors and managers may be liable under Section 1981. *Gierlinger v. N.Y. State Police*, 15 F.3d 32 (2d Cir. 1994); *Al-Khazraji v. St. Francis Coll.*, 784 F.2d 505 (3d Cir. 1986), *aff'd on other grounds*, 481 U.S. 604 (1987); *Newsome v. McKesson*, 932 F. Supp. 1339, 1342-43 (D. Utah 1996) (under Title VII and ADEA, suit may only proceed against employers).

²⁰⁹³ RCW 49.60.040; *Brown v. Scott Paper Worldwide Co.*, 143 Wn.2d 349 (2001).

²⁰⁹⁴ RCW 49.60.220.

²⁰⁹⁵ *Brown*, 143 Wn.2d at 361. *But cf. Malo v. Alaska Trawl Fisheries, Inc.*, 92 Wn. App. 927 (1998) (co-workers not subject to personal liability under the WLAD).

Outside of the WLAD, individual supervisors or managers may be liable for discriminatory acts under various tort theories, including assault and battery, outrage, negligent infliction of emotional distress, tortious interference, and defamation.²⁰⁹⁶

(b) California Law

In California, an employer must indemnify its employees for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer. Indemnity applies even if the employee's conduct was unlawful, unless the employee, at the time, believed his or her conduct was unlawful.²⁰⁹⁷

(c) Minnesota Law

The Minnesota Supreme Court has not decided the question of individual liability under the MHRA. A federal court in Minnesota has held that supervisors and individuals cannot be held liable for discrimination under the MHRA because they do not meet the statutory definition of "employer."²⁰⁹⁸ A Minnesota state court has held that the narrow definition of "employer" for purposes of Minnesota whistleblower protection statute does not permit individual liability.²⁰⁹⁹ This statute's definition of "employer" is nearly identical to the MHRA's definition.²¹⁰⁰

Unlike the federal antidiscrimination laws, however, the MHRA also makes it an illegal discriminatory practice for "any person" to intentionally "aid" or "abet" another to engage in discriminatory practices forbidden by the Act.²¹⁰¹ The Minnesota Supreme Court has never held that this provision makes supervisors individually liable for aiding and abetting discrimination.²¹⁰² One federal court, however, used this provision to impose personal liability on three college administrators who failed to take appropriate action to halt retaliatory harassment against a student after they became aware of the harassment.²¹⁰³ Furthermore, a Minnesota Court of Appeals case allowed an employer and one of its employees to be held jointly and severally liable for MHRA violations.²¹⁰⁴ On the other hand, a Minnesota federal court recently held that a supervisory employee, acting in the course and scope of his or her employment, cannot be held liable for aiding and abetting his own discriminatory conduct in violation of the MHRA.²¹⁰⁵ The law thus remains unsettled on this issue.

²⁰⁹⁶ See Chapter X: Contract and Tort Claims.

²⁰⁹⁷ Cal. Lab. Code § 2802 (2008); *Farmers Ins. Group v. Cnty. of Santa Clara*, 11 Cal. 4th 992, 1004-05 (1995) (an employer will not be held vicariously liable for an employee's malicious or tortious conduct if the employee substantially deviates from the employment duties for personal purposes). See also *Haligovsky v. Superior Court of Los Angeles*, 200 Cal. App. 4th 983 (2011), stating there is no individual liability for discrimination or retaliation under Cal. Mil. & Vet. Code § 394.

²⁰⁹⁸ *Waag v. Thomas Pontiac, Buick, GMC, Inc.*, 930 F. Supp. 393, 407-08 (D. Minn. 1996); see also *Hubbell v. Better Bus. Bureau of Minn.*, 2009 WL 5184346, at *3 (D. Minn. Nov. 30, 2009) (stating conclusively that "[u]nder the MHRA, individual supervisors cannot be liable for discrimination" (noting the *Waag* decision)). A similar interpretation was adopted in relation to Missouri's version of the Human Rights Act. See *Lenhardt v. Basic Inst. of Tech., Inc.*, 55 F.3d 377, 379-81 (8th Cir. 1995) (concluding that "the Missouri Supreme Court would hold that the definition of the term employer in the MHRA does not subject employees, including supervisors or managers, to individual liability"); *Klotz v. CorVel Healthcare Corp.*, No. 05-1034, 2005 WL 3008515, at *3 (E.D. Mo. Nov. 9, 2005) (noting that "[s]ince *Lenhardt* was decided, neither the Missouri Supreme Court nor the Eighth Circuit Court of Appeals have addressed the issue of supervisor liability under the [Missouri Human Rights Act], and as a result *Lenhardt* remains binding precedent on this issue").

²⁰⁹⁹ *Obst v. Microtron, Inc.*, 588 N.W.2d 550, 553-54 (Minn. Ct. App. 1999).

²¹⁰⁰ Compare Minn. Stat. § 181.931, subd. 3, with Minn. Stat. § 363A.03, subd. 16.

²¹⁰¹ Minn. Stat. § 363A.14; *Ulrich v. City of Crosby*, 848 F. Supp. 861, 869 (D. Minn. 1994).

²¹⁰² *State by Beaulieu v. RSJ, Inc.*, 552 N.W.2d 695, 700 n.4 (Minn. 1996) (declining to decide whether individual defendant could be personally liable for aiding and abetting discrimination as corporate shareholder and officer).

²¹⁰³ *Smith v. Hennepin Tech. Ctr.*, No. 85-411, 1988 WL 53400, at *21 (D. Minn. July 21, 1988).

²¹⁰⁴ *Devane v. Sears Home Improvement Prods.*, No. 03-305, 2003 WL 22999363 (Minn. Ct. App. Dec. 23, 2003) (relying on the "aid" and "abet" language to support its conclusion).

Notwithstanding potential liability under the MHRA, however, an individual supervisor may be liable to an employee for discriminatory acts under various tort theories, including assault and battery,²¹⁰⁶ intentional infliction of emotional distress,²¹⁰⁷ negligent infliction of emotional distress, tortious interference,²¹⁰⁸ and defamation.²¹⁰⁹

Depending on the circumstances, an employer may be required to defend and indemnify a supervisor or other employee who has been sued for discrimination in his or her individual capacity. Indemnification is required if the employee was acting in the performance of the duties of the employee's position, the employee was not guilty of intentional misconduct, willful neglect of the duties of the employee's position, or bad faith, and the employee has not been indemnified by another person.²¹¹⁰

SECTION 9.8 DAMAGES

(a) Punitive Damages

Punitive damages are not available under Washington law.²¹¹¹ In contrast, punitive damages are available under federal law for intentional discrimination in violation of Title VII and the ADA, subject to a cap according to the number of employees the employer has.²¹¹² Punitive damages for a successful Section 1981 plaintiff are not subject to a cap.²¹¹³ Generally, punitive damages are awarded only when the discriminatory conduct was particularly egregious, which means that the employer had an evil motive or state of mind.²¹¹⁴ The standard for punitive damages under Title VII and Section 1981, however, is malice or reckless indifference to federally protected rights.²¹¹⁵ To be liable for punitive damages, an employer must at least discriminate in the face of a perceived risk that its actions will violate federal law.²¹¹⁶ Furthermore, an employer may not be vicariously liable for punitive damages for the discriminatory employment decisions of managerial agents where the decisions are contrary to the employer's good faith efforts to comply with the law.²¹¹⁷ An employer may avoid liability for punitive damages for the acts of its managers if the employer can show that it made a good faith effort to establish and enforce an anti-discrimination policy.²¹¹⁸

The U.S. Supreme Court has held that punitive damages that far outweigh the compensatory damages awarded in a case can violate due process. In *State Farm Mut. Auto. Ins. Co. v. Campbell*,²¹¹⁹ the Court ruled

²¹⁰⁵ *Hubbell v. Better Bus. Bureau of Minn.*, 2009 WL 5184346, at *3 (D. Minn. Nov. 30, 2009) (stating that “the proper rule is that an individual supervisor . . . cannot be liable for aiding and abetting unless the individual is acting in an individual capacity, outside the scope of his or her employment, or the individual is alleged to have aided other employees’ discrimination. Without such a rule, all supervisors could be held individually liable for discrimination, which is contrary to the rule set out in . . . *Waag* [that supervisors cannot be individually liable under the MHRA as an ‘employer’]”).

²¹⁰⁶ *Johnson v. Ramsey Cnty.*, 424 N.W.2d 800 (Minn. Ct. App. 1988).

²¹⁰⁷ *Smith v. Hennepin Tech. Ctr.*, No. 85-411, 1988 WL 53400 (D. Minn. July 21, 1988).

²¹⁰⁸ *Nordling v. N. States Power*, 478 N.W.2d 498, 506 (Minn. 1991).

²¹⁰⁹ *Cox v. Crown Coco, Inc.*, 544 N.W.2d 490 (Minn. Ct. App. 1996).

²¹¹⁰ Minn. Stat. § 181.970.

²¹¹¹ *Dailey v. N. Coast Life Ins. Co.*, 129 Wn.2d 572 (1996).

²¹¹² 42 U.S.C. § 1981a.

²¹¹³ *Kim v. Nash Finch Co.*, 123 F.3d 1046, 1062 (8th Cir. 1997).

²¹¹⁴ *See Kolstad v. Am. Dental Ass’n*, 527 U.S. 526 (1999).

²¹¹⁵ *Kim*, 123 F.3d at 1063.

²¹¹⁶ *Kolstad*, 527 U.S. 526. The Ninth Circuit Court has similarly declined to extend RCW 49.52 *et seq.*, which allows employees to receive double damages when the employer consciously withholds wages, to violations of Washington anti-discrimination statutes. *Hemmings v. Tidyman’s, Inc.*, 285 F.3d 1174 (9th Cir. 2002), *cert. denied*, 537 U.S. 1110 (2003).

²¹¹⁷ *Id.*

²¹¹⁸ *Id.* But see *Passantino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493, 517 (9th Cir. 2000) (punitive damages may be imposed without regard to the corporation’s good faith efforts to comply with Title VII when the manager in question is sufficiently senior).

that defendants should be punished for conduct which harmed the plaintiff, and not for being “an unsavory individual or business.”²¹²⁰ The Court stated that few awards that exceeded a single-digit ratio between punitive and compensatory damages would satisfy due process.²¹²¹

Punitive damages are available in California.²¹²² California law authorizes a fine up to \$150,000 to an aggrieved person who files a charge with the DFEH, where the respondent is guilty of oppression, fraud, or malice.²¹²³ Punitive damages are also available in Minnesota.²¹²⁴

In 2009, the California Supreme Court for the first time directly addressed the federal constitutional limitations in awarding punitive damages. In *Roby v. McKesson Corp.*, an employee who suffered from panic attacks sued her former employer and supervisor, alleging wrongful discharge in violation of public policy, harassment, failure to accommodate, and discrimination under the FEHA.²¹²⁵ The jury found in the employee’s favor and awarded her \$3.5 million in compensatory damages and \$15 million in punitive damages against the employer, as well as \$500,000 in compensatory damages and \$3,000 in punitive damages against the supervisor for harassment. On appeal, the court of appeals concluded that the award of punitive damages against the employer exceeded the federal constitutional limit and ordered a reduction of punitive damages to \$2 million. The California Supreme Court, affirming in part, and reversing in part, concluded that a one-to-one ratio between compensatory and punitive damages was the constitutional limit available in that case, given the relatively low degree of reprehensible conduct, the significant compensatory damages awarded, and the large disparity between the available civil penalties and punitive damages awarded by the jury.

(b) Back Pay and Front Pay

Washington, California, Minnesota and federal law allow for the potential recovery of back pay and front pay.²¹²⁶ Back pay is available under the UADA.²¹²⁷ Back pay and front pay damages are available under the WLAD, even if the plaintiff cannot prove actual or constructive discharge.²¹²⁸ Back pay is the reasonable value of lost past earnings and fringe benefits from the date of the alleged wrongful conduct to the date of trial. Front pay is a type of actual damages representing lost future earnings, or the difference between what the employee would have earned from his former employer and the amount, if any, he could expect to earn from his new employer.²¹²⁹ The plaintiff must prove that the loss of back pay and front pay were proximately caused by the employer’s unlawful discrimination.²¹³⁰ Generally, an offer of reinstatement will terminate an employee’s right to recover back pay damages.²¹³¹ However, this is not the case when the employee rejects the offer based on objectively reasonable grounds.²¹³²

²¹¹⁹ 538 U.S. 408 (2003).

²¹²⁰ *Id.* at 423.

²¹²¹ *Id.* at 425-25; *see also Gober v. Ralph’s Grocery Co.*, 137 Cal. App. 4th 204, 223 (2006) (holding that a ratio of 6:1 punitive award to compensatory award of damages was sufficient to punish Ralph’s and deter it and others from similar conduct in the future).

²¹²² Cal. Gov’t Code § 12970(a)(3).

²¹²³ Cal. Gov’t Code § 12970(d).

²¹²⁴ Minn. Stat. § 363A.29, subd. 4.

²¹²⁵ 47 Cal. 4th 686 (2009).

²¹²⁶ 42 U.S.C. § 2000e-5(g); RCW 49.60.030(2); *Ray v. Miller Meester Adver.*, 684 N.W.2d 404, 407 (Minn. 2004); Minn. Stat. § 363A.29, subd. 5.

²¹²⁷ Utah Code Ann. § 34A-5-107(9)(b).

²¹²⁸ *Martini v. Boeing*, 137 Wn.2d 357 (1999).

²¹²⁹ *Hayes v. Trulock*, 51 Wn. App. 795, 802 (1988).

²¹³⁰ *Martini*, 137 Wn.2d 357.

²¹³¹ *Hayes v. Trulock*, 51 Wn. App. at 802.

²¹³² *Kastanis v. Educ. Employees Credit Union*, 122 Wn.2d 483, 500-01 (1994).

Front pay awarded in Title VII and ADA claims is not subject to the damages cap imposed on compensatory damages.²¹³³

To recover damages the plaintiff must prove actual, reasonable pecuniary loss.²¹³⁴ The damages award is subject to reduction by the amount a plaintiff could earn using reasonable mitigation efforts to seek alternative employment.²¹³⁵ The burden of proving failure to mitigate is on the defendant-employer.²¹³⁶ To satisfy its burden, the employer must show that there were suitable positions available and that the plaintiff failed to use reasonable care and diligence seeking them.²¹³⁷ Furthermore, once discrimination has been found, any doubts concerning back pay are to be resolved against the employer.²¹³⁸

An employer may rely upon after-acquired evidence of wrongdoing to limit the amount of the damages award.²¹³⁹ This rule applies in cases where, during the discovery phase of the lawsuit, the employer learns about serious workplace wrongdoing that would have led to the plaintiff's legitimate termination. In such cases, damages can be calculated only from the date of the unlawful termination to the date the employer discovered the legitimate basis for termination.

Certain offsets may also apply to a plaintiff's award of damages, if properly asserted at trial. For example, workers' compensation benefits may be offset against a plaintiff's damage award for lost wages.²¹⁴⁰ On the other hand, the employer is not entitled to an offset for its liability for damages by amounts received by the employee for unemployment compensation.²¹⁴¹ Applying what is called the "collateral source rule," the employer is not permitted to benefit from the fact that the employee had accrued enough working time to be eligible for unemployment compensation.²¹⁴²

Title VII and the WLAD allow a successful employee-plaintiff to obtain an offset for additional federal income tax consequences resulting from a judgment for back pay and front pay that places the person in a higher tax bracket.²¹⁴³ This offset does not extend to additional tax consequences resulting from non-economic damage awards.²¹⁴⁴ Under Washington law, a plaintiff may wait to request a tax offset until after a verdict has been entered in his or her favor.²¹⁴⁵

²¹³³ *Pollard v. E.I. duPont de Nemours & Co.*, 532 U.S. 843 (2001). *See also Hemmings v. Tidyman's, Inc.*, 285 F.3d 1174 (9th Cir. 2002) (holding that the cap imposed by Title VII on compensable damages is constitutional).

²¹³⁴ *See, e.g., Davis v. L.A. Unified Sch. Dist.*, 152 Cal. App. 4th 1122 (2007) (an employee who was wrongfully demoted was not entitled to full back pay for a period when he was not available to work due to a non-work-related illness).

²¹³⁵ *Goodman v. Boeing Co.*, 75 Wn. App. 60 (1994).

²¹³⁶ *Henningsen v. Worldcom, Inc.*, 102 Wn. App. 828, 846 (2000).

²¹³⁷ *Id.*

²¹³⁸ *Id.* (holding that employer did not prove plaintiff failed to mitigate her back pay damages when there was evidence plaintiff worked on a limited basis and employer presented no evidence that employment comparable to her position was in fact available).

²¹³⁹ *Janson v. N. Valley Hosp.*, 93 Wn. App. 892 (1999) (Washington); *McKennon v. Nashville Banner Publ'g. Co.*, 513 U.S. 352 (1995) (federal).

²¹⁴⁰ *Wheeler v. Catholic Archdiocese of Seattle*, 124 Wn.2d 634, 638-41 (1994).

²¹⁴¹ *Hayes*, 51 Wn. App. 795.

²¹⁴² *Id.*

²¹⁴³ *Blaney v. Int'l Assoc. of Machinists & Aerospace Workers, Dist. No. 160*, 151 Wn.2d 203 (2004) (plaintiff was entitled to recover the additional taxes she would have to pay from having her award of front pay and back pay paid as a lump sum, placing her in the highest tax bracket, rather than paid yearly as would have occurred had she been properly hired); *see Pham v. City of Seattle*, 159 Wn.2d 527, 535 (2007) (stating that Title VII has been interpreted to provide the equitable remedy of offsetting additional federal income tax consequences of damages awards).

²¹⁴⁴ *Id.* at 527 (plaintiffs were not entitled to supplemental damages to cover tax consequences attributable to an award for emotional distress; stating that several federal cases do not extend offsets to non-economic damages).

²¹⁴⁵ *Hirata v. Evergreen State Ltd. P'ship No. 5*, 124 Wn. App. 631 (2004).

(c) Emotional and Physical Damages

A plaintiff may recover for alleged emotional and physical damages upon proof of causation between the defendant's wrongful acts and the injuries suffered. In Washington, a plaintiff must present medical testimony that is convincing enough to remove the issue from the realm of speculation and conjecture.²¹⁴⁶ The testimony must sufficiently establish that the injury-producing situation "probably" or "more likely than not" caused the subsequent condition.²¹⁴⁷

In Utah, the UADA pre-empts state law tort claims, but does not pre-empt other claims for breach of implied contract, intentional infliction of emotional distress, malicious interference with contractual relations, and negligent employment of harassers.²¹⁴⁸

(d) Attorney's Fees

In any action where the plaintiff recovers back pay and front pay damages, the plaintiff may also recover statutory attorney's fees.²¹⁴⁹ Washington, Minnesota, California, and Utah law provide for an award of attorney's fees to the employer if the employee's claim was frivolous and unreasonable.²¹⁵⁰ Washington also does not allow limiting of attorneys' fees in sexual harassment claims.²¹⁵¹

SECTION 9.9 STATUTES OF LIMITATIONS

Discrimination or retaliation actions brought under Title VII, the ADA, or the ADEA must be filed with the EEOC within 180 or 300 days of the alleged discriminatory act to meet the statute of limitations.²¹⁵²

The Lilly Ledbetter Fair Pay Act was signed into law in January 2009 to reverse a recent U.S. Supreme Court decision²¹⁵³ and amend the federal discrimination statutes to allow employees to bring claims based on allegedly discriminatory compensation long after the decision about their rate of pay is made.²¹⁵⁴ The Act makes it clear that a discriminatory act occurs each time compensation is paid pursuant to a discriminatory compensation decision. The 180/300 day filing period is reset every time an employee receives a paycheck that is in part affected by a discriminatory decision.²¹⁵⁵ Back pay damages can be awarded for up to two years preceding the date the employee filed the EEOC charge.²¹⁵⁶ The Act applies to all claims of pay discrimination under Title VII, the ADEA, the ADA, and the Rehabilitation Act that are pending on or after May 28, 2007.²¹⁵⁷ The Act does not apply to failure-to-promote claims.²¹⁵⁸

²¹⁴⁶ See *Xiang v. Peoples Nat'l Bank of Wash.*, 63 Wn. App. 572, 582 (1991).

²¹⁴⁷ *Id.*

²¹⁴⁸ See e.g., *Retherford v. AT&T Communications of Mountain States, Inc.*, 844 P.2d 949, 966-67 (Utah 1992).

²¹⁴⁹ RCW 49.48.030. *Accord Gaglidari v. Denny's Rest.*, 117 Wn.2d 426 (1991); see also Utah Code Ann. § 34A-5-107(9)(b) (along with back pay and benefit).

²¹⁵⁰ RCW 4.84.185. *Biggs v. Vail*, 119 Wn.2d 129 (1992) (to be entitled to such an award, the employer would have to prove that the lawsuit in its entirety was frivolous). In California, the case also must be meritless; Minn. Stat. § 363A.29, subd. 2; Utah Code Ann. § 34A-5-107(8)(b).

²¹⁵¹ See *Little v. Baker*, 164 Wn. App. 1028 (2011).

²¹⁵² See EEOC Guidance: Filing a Charge of Discrimination at <http://www.eeoc.gov/employees/charge.cfm>; see also *Levis v. City of Chicago*, 130 S. Ct. 2191 (2010) (Title VII disparate impact claim may arise not only from the adoption of an employer policy which has a disparate impact upon individuals in a protected class, but also in all future implementations of the practice covered by the policy).

²¹⁵³ In *Ledbetter v. Goodyear Tire & Rubber Co.*, the employee-plaintiff argued that her employer committed an act of discrimination each time it issued a paycheck based on discriminatory evaluations. 550 U.S. 168 (2007). The Supreme Court rejected that argument, and held that the only actionable discrimination was the act of deciding what to pay her. *Id.* Because that decision was made too far in the past, the court dismissed her entire claim. *Id.*

²¹⁵⁴ Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2 (2009).

²¹⁵⁵ *Id.* at sec. 3.

²¹⁵⁶ *Id.*

²¹⁵⁷ *Id.* at sec. 6.

A discrimination claim brought under Washington law must be filed within three years of the alleged discriminatory act.²¹⁵⁹ In California, a discrimination charge must be filed within one year from the date of the alleged unlawful practice.²¹⁶⁰ The California Supreme Court recently held that when an employee voluntarily pursues an established, internal administrative procedure, the statute of limitations is tolled on that employee's FEHA claim.²¹⁶¹

A California court recently held that, "[w]hen a private association . . . establishes an internal grievance mechanism . . . failure to exhaust those administrative remedies precludes any subsequent private civil action," even when there is no statutory or contractual requirement.²¹⁶²

The time limitation for filing a discrimination claim under the Minnesota Human Rights Act, either as a charge with the MDHR or as a private action in district court, is one year after the occurrence of the discriminatory practice.²¹⁶³ This period of limitations may be tolled if the parties are engaged in voluntary dispute resolution.²¹⁶⁴

The limitations period begins to run when the employee is advised of the discriminatory action.²¹⁶⁵ Thus, if an employee is informed in January that he or she will be terminated in May, the limitations period begins to run in January. Further, the limitations period begins to run upon "the first application of an unfair discriminatory practice, employment policy, or seniority system to a new person," thereby establishing a basis for a new claim each time the practice is applied to a new person.²¹⁶⁶ If an employee files a charge with the MDHR, the employee must serve a lawsuit within 45 days after receipt of the right to sue letter issued by the MDHR.²¹⁶⁷

An employee generally is not entitled to a jury trial under the MHRA. If the MHRA claim is brought in federal court (usually accompanying a Title VII claim) however, an employee may be entitled to a jury trial.²¹⁶⁸

Utah does not have a limitations period which specifically addresses claims based on employment discrimination. However, the U.S. District Court has applied Utah's "catch-all" four-year statute to ERISA claims²¹⁶⁹ and appears it would apply the same to statute of limitations to claims arising under the UADA. Notice or knowledge of discriminatory motivation is not prerequisite for employment discrimination cause of action to accrue.²¹⁷⁰ On the contrary, it is knowledge of an adverse employment decision itself that triggers running of the statute of limitations.²¹⁷¹

²¹⁵⁸ *Noel v. Boeing Co.*, 622 F.3d 266 (3d Cir. 2010).

²¹⁵⁹ *See Milligan v. Thompson*, 90 Wn. App. 586 (1998) (citing RCW 4.16.080(2) and *Martinez v. City of Tacoma*, 81 Wn. App. 228 (1996)).

²¹⁶⁰ Cal. Gov't Code § 12960.

²¹⁶¹ *McDonald v. Antelope Valley Cmty. Coll. Dist.*, 45 Cal. 4th 88 (2008).

²¹⁶² *Palmer v. Regents of the Univ. of Cal.*, 107 Cal. App. 4th 899 (2003) (exhaustion of administrative remedies could be an affirmative defense even when there is no statutory or contractual requirement).

²¹⁶³ Minn. Stat. § 363A.28, subd. 3.

²¹⁶⁴ *Id.*

²¹⁶⁵ *Turner v. IDS Fin. Servs., Inc.*, 471 N.W.2d 105, 108 (Minn. 1991); *Anderson v. Nw. Nat'l. Life Ins. Co.*, 480 N.W.2d 363, 365 (Minn. Ct. App. 1992).

²¹⁶⁶ Minn. Stat. § 363A.28, subd. 4.

²¹⁶⁷ Minn. Stat. § 363A.33, subd. 1.

²¹⁶⁸ *Kampa v. White Consol. Indus., Inc.*, 115 F.3d 585 (8th Cir. 1997).

²¹⁶⁹ *Pickering v. USX Corp.*, 809 F. Supp. 1501, 1540-41 (D. Utah 1992).

²¹⁷⁰ *Davidson v. America Online, Inc.*, 337 F.3d 1179, 1187 (10th Cir. 2003).

²¹⁷¹ *Id.*

(a) Continuing Violations

(i) Federal Law

In hostile work environment cases, there are some unique issues related to the statute of limitations. The U.S. Supreme Court ruled, in *National Railroad Passenger Corporation v. Morgan*, that courts must consider the entire scope of a hostile work environment claim to determine employer liability, including alleged behavior that occurred outside the statutory time period, as long as some act contributing to that hostile environment took place within the statutory time period.²¹⁷² In this opinion, the Court avoided reference to the “continuing violation doctrine” discussed by the Ninth Circuit Court of Appeals in the lower case.²¹⁷³

(ii) Washington Law

Prior to the Supreme Court’s ruling in *Morgan*, decisions of the Washington Court of Appeals had adopted the Ninth Circuit’s continuing violation doctrine. Under the continuing violation doctrine, courts may consider actions that would otherwise be barred by the applicable limitation period.²¹⁷⁴ The plaintiff who fails to meet the statute of limitations requirement for the discriminatory actions at issue must demonstrate two elements: (1) a continuing violation exists, either serial or systemic; and (2) the violation continued into the limitations period. A serial violation is a series of related acts, at least one of which occurred within the limitations period, whereas, a systemic violation involves an employer-wide policy or practice.²¹⁷⁵

To prove a continuing violation, plaintiff must show that the “early occurrences were part of a series of continuing violations that relate to subsequent incidents that were the subject of timely administrative proceedings and therefore not barred.”²¹⁷⁶ To determine if the violation continued into the limitations period, the court considers whether the more recent acts “involve the same type of discrimination as those committed before the period.”²¹⁷⁷ The court must consider whether there is either a common type of discrimination, such as harassment, or a common type of employment action, such as repeated denial for promotions. However, it is not necessary for every incident of discrimination prior to the limitations period to be of the same type, as long as there is a corresponding type of discrimination within the period. If at least one of the discriminatory acts in the series falls within the limitations period, and there is a substantial relationship between the timely and untimely claims, the continuing violation doctrine allows the plaintiff to reach back and recover for the earlier acts outside the limitation period.²¹⁷⁸ In addition, “the existence of a hostile work environment does not constitute a continuing violation *per se*.”²¹⁷⁹

The Washington Court of Appeals set out the factors to consider in evaluating whether a “serial” violation has occurred: (1) whether the alleged acts involve the same type of discrimination tending to connect them in a continuing violation; (2) whether the alleged acts are recurring; and (3) most importantly, whether the untimely act had the degree of permanence that should have triggered the employee’s awareness of and duty to assert his or her rights.²¹⁸⁰

²¹⁷² 536 U.S. 101 (2002).

²¹⁷³ *Morgan v. Nat’l R.R. Passenger Corp.*, 232 F.3d 1008 (9th Cir. 2000), *aff’d in part, rev’d in part*, 536 U.S. 101 (2002).

²¹⁷⁴ *Morgan*, 232 F.3d at 1014; *State v. Boeing Co.*, 105 Wn. App. 1, 8 (2000).

²¹⁷⁵ *Morgan*, 232 F.3d at 1015-16; *Boeing*, 105 Wn. App. at 8-9.

²¹⁷⁶ *Anderson v. Reno*, 190 F.3d 930, 936 (9th Cir. 1999).

²¹⁷⁷ *Fielder v. UAL Corp.*, 218 F.3d 973, 986 (9th Cir. 2000).

²¹⁷⁸ *Milligan v. Thompson*, 90 Wn. App. 586, 595 (1998).

²¹⁷⁹ *Boeing*, 105 Wn. App. at 8.

²¹⁸⁰ *See Morgan v. Nat’l R.R. Passenger Corp.*, 232 F.3d 1008 (9th Cir. 2000), *aff’d in part, rev’d in part*, 536 U.S. 101 (2002).

(iii) California Law

The California Supreme Court has applied the continuing violation doctrine to an employee's retaliation claims in the case of *Yanowitz v. L'Oreal USA*.²¹⁸¹ The California court departed from *Morgan*, in which the U.S. Supreme Court barred application of the continuing violation doctrine for discrimination and retaliation claims. *Yanowitz* held that the continuing violation doctrine is available to plaintiffs asserting discriminatory retaliation under FEHA, and thus, a series of separate retaliatory acts collectively may constitute an adverse employment action.²¹⁸²

(iv) Minnesota Law

The Minnesota Supreme Court has also adopted the continuing violation doctrine in cases of employment discrimination.²¹⁸³ According to *Hubbard*, under the continuing violation doctrine the statute of limitations is tolled when the employer's discriminatory conduct "indicates a systematic repetition of the same policy and constitutes a sufficiently integrated pattern to form, in effect, a single discriminatory act."²¹⁸⁴

(v) Utah Law

The 10th Circuit has held that under proper circumstances, an employee may recover for discriminatory acts that occurred prior to the statutory limitations period if they are part of continuing policy or practice that includes act or acts within the statutory period.²¹⁸⁵ The employee may establish a continuing violation by showing either that: (1) a series of related acts was taken against him, with one or more of those acts occurring within the limitations period, or (2) the employer maintained company-wide policy of discrimination both before and during the limitations period.²¹⁸⁶ In analyzing whether alleged discriminatory acts are sufficiently related to constitute a continuing violation or whether they are discrete acts which must be regarded as individual violations, the Court uses three-part inquiry to determine whether there was a continuing violation: (i) subject matter, whether violations constitute same type of discrimination; (ii) frequency; and (iii) permanence, whether nature of violations should trigger employee's awareness of the need to assert her rights and whether consequences of the act would continue even in absence of a continuing intent to discriminate.²¹⁸⁷

SECTION 9.10 ADMINISTRATIVE REQUIREMENTS AND ENFORCEMENT

(a) Enforcement Agencies

Claims of employment discrimination in Washington are most frequently filed with either the Equal Employment Opportunity Commission ("EEOC") or the Washington Human Rights Commission ("WHRC"). Claims of employment discrimination in Utah are most frequently handled by the EEOC or the Utah Division of Antidiscrimination and Labor.²¹⁸⁸

The EEOC investigates discrimination claims brought under Title VII, the ADEA, the Equal Pay Act, and the ADA. The WHRC investigates claims brought under the WLAD. Because all of these statutes and ordinances prohibit many of the same types of discrimination, complainants frequently file charges with

²¹⁸¹ 36 Cal. 4th 1028 (2005).

²¹⁸² See also *Dominguez v. Wash. Mut. Bank*, 168 Cal. App. 4th 714 (2008) (illustrating a recent application of the continuing violation doctrine).

²¹⁸³ See *Hubbard v. United Press Int'l, Inc.*, 330 N.W.2d 428, 441 n.11 (Minn. 1983).

²¹⁸⁴ *Id.*

²¹⁸⁵ *Davidson v. America Online, Inc.*, 337 F.3d 1179, 1183-84 (10th Cir. 2003).

²¹⁸⁶ *Id.* at 1184.

²¹⁸⁷ *Id.*

²¹⁸⁸ Utah Code Ann. § 34A-5-107(1)(d).

more than one agency, alleging multiple statutory violations. The agencies, pursuant to their work-sharing agreements, then decide which one will investigate the charge. An agency determination that the charge has no merit does not preclude the employee from bringing suit on the claim. Accordingly, it is often necessary to consider a longer-term strategy in deciding how to respond to an agency's initial investigation of a charge of discrimination.

The California Fair Employment and Housing Commission ("FEHC") is charged with enforcing the California Fair Employment and Housing Act.

(i) Charge-Filing Requirements

Federal anti-discrimination statutes require the complainant to file a charge with the appropriate administrative agency prior to commencing an action in state or federal court. Title VII, the ADEA, and the ADA require that a charge of discrimination initially be filed with the EEOC. Under the WLAD, an individual has the option of filing a charge with the WHRC or commencing a lawsuit.²¹⁸⁹ Thus, the WLAD does not require plaintiffs to "exhaust" their administrative remedies before filing suit. The time limitation for filing an employment discrimination claim with the WHRC is six months after the occurrence of the alleged discriminatory act.²¹⁹⁰

In California, the Department of Fair Employment and Housing ("DFEH") instituted new regulations which came into effect on October 7, 2011 regarding the filing, investigating and processing of discrimination and harassment claims. The regulations make it easier for claimants to file their complaints and initiate a DFEH investigation. The new regulations do not require the claimant to sign the complaint. Instead, the complaint can be signed by the claimant's attorney or other designated representative. The DFEH will accept an unsigned complaint if neither the claimant nor an authorized representative can sign it before the statute of limitations expires. The new procedural regulations allow for liberal construction of complaint. Additionally, the new procedural regulations allow the DFEH to accept complaints that appear untimely on their face and to investigate whether the complaint actually was brought within the stature of limitations.

(ii) Title VII and ADA Claims

If the plaintiff files an EEOC charge, there is a limitation on the time within which a lawsuit must be filed in state or federal court. Under Title VII and the ADA, following the filing of a charge with the EEOC, the agency has 180 days to investigate the matter.²¹⁹¹ The agency may: (1) find that there is no reasonable cause to believe that discrimination has occurred and dismiss the charge; (2) issue a right-to-sue letter; or (3) bring an action on the charge in its own name. If the EEOC issues a "right to sue" letter to the complainant, he or she has 90 days within which to commence an action in an appropriate court.²¹⁹² Failure to file a lawsuit within 90 days of receipt of the letter bars the claim.

The start of the limitations period begins on the date on which a right-to-sue notice letter arrived at the claimant's address of record. The Ninth Circuit has a rebuttable presumption that the plaintiff received the right-to-sue letter within three days of its mailing.²¹⁹³

²¹⁸⁹ WAC 162-08-062.

²¹⁹⁰ RCW 49.60.230(2); WAC 162-08-071.

²¹⁹¹ 42 U.S.C. § 2000e-5(f)(1).

²¹⁹² *Id.*

²¹⁹³ *Payan v. Aramark Mgmt. Servs.*, 495 F.3d 1119 (9th Cir. 2007) (conjecture that mail might have been delayed and evidence that did not suggest routine mail failure were insufficient to rebut presumption).

(iii) ADEA Claims

For ADEA claims, the charging party may bring a civil action 60 days after filing an EEOC charge.²¹⁹⁴ A right-to-sue letter is not required. However, if a right-to-sue letter is issued by the EEOC, the action must be filed within 90 days after receipt.²¹⁹⁵

(b) Investigation Procedures

Once a charge of discrimination is filed with an enforcement agency, the employer is notified by mail with a copy of the charge. The charge identifies the agency involved and the parties charged, and summarizes the allegations. The agency will then commence an investigation. It will request a statement of the employer's position and/or request answers to a list of written questions, and may interview witnesses.²¹⁹⁶

(i) Agency Determinations

The agency will issue a determination, unless the charge is withdrawn or settled during the investigation, as to whether there is "reasonable cause" to believe that the employer engaged in a discriminatory practice. If the agency makes a "no reasonable cause" finding, the agency will close its file. If there is a finding of "reasonable cause," the agency may proceed to an administrative mediation or hearing or may refer the claim back to the charging party for a private civil action.²¹⁹⁷

SECTION 9.11 CLASS ACTIONS

An increasingly utilized method of enforcing rights under Title VII and other employment discrimination laws is the class action lawsuit. These class action lawsuits can result in substantial liability for employers.²¹⁹⁸ Discrimination claims are particularly suitable for class action because employees are often similarly situated with each other. To form a class, employees must show numerosity (the class is so numerous that joinder of class members is impracticable), commonality (there are questions of law or fact common to the class), typicality (the claims or defenses of the class representatives are typical of those of the class), and adequacy (the class representatives will fairly and adequately protect the interests of the class).²¹⁹⁹

In 1997, the Eighth Circuit approved class certification of a discrimination claim.²²⁰⁰

In 2007, the Ninth Circuit approved class certification of more than 1.5 million current and former female employees of Wal-Mart in a sex discrimination case, the largest class certification in history.²²⁰¹ In 2010, the Ninth Circuit upheld the class certification decision after an *en banc* rehearing.²²⁰² However, the U.S. Supreme Court reversed the Ninth Circuit's decision, denying class certification.²²⁰³

²¹⁹⁴ 29 U.S.C. § 633(b).

²¹⁹⁵ *Id.*

²¹⁹⁶ See generally WAC 162-08-071 to -097; Utah Code Ann. § 34A-5-107.

²¹⁹⁷ See generally WAC 162-08-098; Utah Code Ann. § 34A-5-107.

²¹⁹⁸ FedEx recently agreed to pay a consent decree of \$55 million to a class of minority employees, even while strongly denying it discriminated against the class, in order to resolve the long-running litigation. *Satchell v. Fed. Express Corp.*, No. 03-02659, 2007 WL 1114010 (N.D. Cal. Apr. 13, 2007).

²¹⁹⁹ 29 U.S.C. § 23(a). See also *Wal-Mart, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) where the U.S. Supreme Court stated that all class members needed to suffer the same injury and that individual monetary claims could not be certified for a class action.

²²⁰⁰ *Jenson v. Eveleth Taconite Co.*, 130 F.3d 1287 (8th Cir. 1997).

²²⁰¹ The class size was reduced by the Ninth Circuit *en banc* to include only those employees currently employed by Wal-Mart at the time the case was filed. *Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168 (9th Cir. 2007).

²²⁰² *Dukes v. Wal-Mart, Inc.*, 603 F.3d 571 (9th Cir. 2010), cert. granted, 131 S. Ct. 795 (2010).

²²⁰³ *Wal-Mart, Inc. v. Dukes*, 131 S. Ct. 2541 (2011); but see *Ross v. RBS Citizens, N.A.*, 667 F.3d 900 (7th Cir.), petition for cert. filed, 81 U.S.L.W. 3072 (Aug. 1, 2012) (certifying a wage and hour class action post *Wal-Mart, Inc. v. Dukes*).

Company-wide policies also united a nationwide class of 15,000 Boeing employees alleging race discrimination in compensation and promotions, retaliation and hostile work environment. The Washington court determined that certification was warranted despite the breadth and diversity of the class with regard to business units, salaried and hourly employees, and locations.²²⁰⁴ Discrimination class action cases are often settled out of court for large sums. Home Depot, Inc. settled a sex-discrimination class action suit in 1997 for \$104 million. In 1996, Texaco, Inc. paid \$176 million to settle a race discrimination class action lawsuit. Coca-Cola paid \$192 million to settle a discrimination class action in 2000.

²²⁰⁴ *Williams v. Boeing Co.*, 225 F.R.D. 626 (W.D. Wash. 2005).

CHAPTER X

CONTRACT AND TORT CLAIMS

SECTION 10.1 EMPLOYMENT AT WILL

Washington, Minnesota, California, and Utah law include a presumption that employment is “at-will.”²²⁰⁵ At-will employment means that either the employer or employee can terminate the employment relationship at any time for any reason not prohibited by law, with or without prior notice.²²⁰⁶ Until roughly 30 years ago, the at-will rule was the legal principle that governed the employment relationship in cases in which there was not an express agreement to the contrary between the employer and employee, or between the employer and the employee’s union. Unsurprisingly, there was little employment-related litigation during this period. In recent years the at-will rule has been eroded by statutes and court decisions, resulting in many exceptions to the rule. Now, an unhappy ex-employee may have a number of claims upon which to base a lawsuit against an employer, including various contract and tort claims.

SECTION 10.2 CONTRACT CLAIMS

(a) Handbook Claims

Many employers publish employee handbooks that describe their employment policies. Courts have recognized that policies contained in an employee handbook or personnel manual disseminated to employees may constitute an enforceable contract between an employer and employee.²²⁰⁷ In order for a handbook policy to constitute a binding contract, the following elements must exist:²²⁰⁸

- the handbook must contain an offer, definite in form, that affects the employment;
- the offer must be “communicated” to the employee via dissemination of the handbook;
- the employee must accept the offer; and
- the employee must provide consideration (something in return).

Generally, the employee’s continued performance of his job duties after receiving the handbook constitutes an acceptance of the offer and necessary consideration.²²⁰⁹

Specific procedural guarantees regarding employee discipline and discharge are more likely to be construed as a contract than are very general statements of policy.²²¹⁰ For example, if the handbook outlines a progressive discipline policy providing for verbal warnings, written warnings and suspension before

²²⁰⁵ *Cabaness v. Thomas*, 232 P.3d 486, 508 (Utah 2010); *Roberts v. Atlantic Richfield Co.*, 88 Wn.2d 887, 891 (1977); *Pine River State Bank v. Mettelle*, 333 N.W.2d 622, 627 (Minn. 1983). This presumption also applies under California law. Cal. Lab. Code § 2922. See this Chapter, Section 10.11 for more information on California law on wrongful discharge.

²²⁰⁶ The most important restrictions on an employer’s ability to discharge an employee are federal and state laws prohibiting discrimination on the basis of such criteria as race, gender, age, and disability. These claims are discussed in detail in Chapter IX.

²²⁰⁷ *Cabaness*, 232 P.3d at 502; *Lee v. Fresenius Med. Care, Inc.*, 741 N.W.2d 117 (Minn. 2005); *Pine River State Bank v. Mettelle*, 333 N.W.2d 622 (Minn. 1983).

²²⁰⁸ *Gagliardi v. Denny’s Rest., Inc.*, 117 Wn.2d 426 (1991); see *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219 (1984); *Pine River State Bank v. Mettelle*, 333 N.W.2d 622, 626 (Minn. 1983); *Cabaness*, 232 P.3d at 502-03 & n.8.

²²⁰⁹ *Id.*

²²¹⁰ *Birge v. Fred Meyer, Inc.*, 73 Wn. App. 895 (1994) (general policy statement does not modify at-will employment); *Lewis v. Equitable Life Assurance Soc’y*, 389 N.W.2d 876, 883 (Minn. 1986); *Harvet v. Unity Med. Ctr., Inc.*, 428 N.W.2d 574, 577 (Minn. Ct. App. 1988).

discharge, a court could conclude that the employer is contractually bound to exhaust this system of progressive discipline before terminating the employee.²²¹¹ A disclaimer denying any intent to alter the at-will employment relationship will generally preclude a contract claim, but the disclaimer must be “conspicuous.”²²¹² For example, a progressive discipline policy will not give rise to a breach of contract if it also states that the employer can depart from the procedure at the employer’s discretion.²²¹³

Employers may unilaterally modify the employee handbook at any time, upon reasonable notice to employees.²²¹⁴ However, if the handbook specifies how it may be modified, the employer should modify the handbook in a manner consistent with any modification rules set forth in the handbook to avoid an employee’s claim that the modified handbook is unenforceable.²²¹⁵

In order for an at-will employee to prevail on a claim of wrongful termination on the basis of statements in the employer’s policy manual, the employee must prove: (1) that the statements in the policy manual amounted to a promise of specific treatment in specific situations; (2) that the employee justifiably relied upon any such promises; and (3) that the promise of specific treatment was breached.²²¹⁶

It is insufficient for an employee to claim that a general atmosphere of job security induced him or her to remain on the job. Rather, the employee must point to a specific promise on which the employee reasonably relied that induced the employee to remain on the job.²²¹⁷

(b) Promissory Estoppel

Plaintiffs often couple contract claims with claims of promissory estoppel, which is a claim that a non-contractual promise should be made enforceable to avoid an injustice. Generally, promissory estoppel is used where an employee has relied on the promise of an employer in the absence of an actual contract. In such a circumstance, a contract may be implied where the employer made a: (1) promise which; (2) the employer should reasonably expect to cause the employee to change his or her position; and (3) which does cause the employee to change his or her position; (4) in justifiable reliance on that promise; and (5) in such a manner that injustice can be avoided only by enforcement of the promise.²²¹⁸

Promissory estoppel is commonly asserted where an offer of employment is rescinded, or the employee is terminated shortly after commencing work. In the classic case, an applicant for a position is informed that he or she was hired for the position and, in reliance on that promise, resigns from his or her current job. However, before the new job starts, the new employer revokes its offer of employment. The plaintiff would be entitled to seek recovery for the damages suffered as a result of quitting the earlier job, if the terms of the offer were sufficient to form a binding contract.²²¹⁹

²²¹¹ *Meleen v. Hazelden Found.*, 740 F. Supp. 687 (D. Minn. 1990).

²²¹² *Swanson v. Liquid Air Corp.*, 118 Wn.2d 512, 527 (1992); *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 231 (1984).

²²¹³ *See, e.g., Clark v. Sears Roebuck & Co.*, 110 Wn. App. 825, 831 (2002).

²²¹⁴ *Govier v. N. Sound Bank*, 91 Wn. App. 493 (1998); *Cole v. Red Lion*, 92 Wn. App. 743 (1998); *Payne v. Sunnyside Cmty. Hosp.*, 78 Wn. App. 34 (1995); *Gagliardi v. Denny’s Rests., Inc.*, 117 Wn.2d 426 (1991).

²²¹⁵ *Doolittle v. Small Tribes of W. Wash.*, 94 Wn. App. 126 (1999).

²²¹⁶ *Bulman v. Safeway, Inc.*, 144 Wn.2d 335, 340 (2001); *see also Carlson v. Lake Chelan Cmty. Hosp.*, 116 Wn. App. 718, 729 (2003).

²²¹⁷ *Bulman*, 144 Wn.2d at 343.

²²¹⁸ *Chen v. State*, 86 Wn. App. 183 (1997); *see also Bulman*, 144 Wn.2d at 343; *Grouse v. Group Health Plan, Inc.*, 306 N.W.2d 114, 116 (Minn. 1981); *Johnson v. U.S. Bancorp*, No. 03-308, 2003 WL 22015838, at *3 (Minn. Ct. App. Aug. 26, 2003) (unpublished); *Easton v. Wycoff*, 295 P.2d 332, 333 (Utah 1956).

²²¹⁹ *See Grouse*, 306 N.W.2d 114.

(c) Oral Promises

An employee may allege the existence of an oral contract specifying certain terms and conditions of employment, most often for “permanent” or “long-term” employment. To prove such a claim, the employee must show:²²²⁰

- an offer definite in form was made;²²²¹
- the offer was communicated to the employee;
- the employee accepted the offer; and
- there was adequate consideration.

Because there is no writing to support the existence of a contract, courts tend to view these claims skeptically and require a strong showing by the employee.²²²² General statements regarding personnel policy and job security, even when they appear to promise permanent employment, have been held insufficient to establish an enforceable promise.²²²³

Ordinarily, employment contracts for a specific term in excess of one year must be in writing. However, a contract for permanent or lifetime employment need not be in writing. In Utah, however, a contract for lifetime employment or a contract for an indefinite duration need not be in writing and such oral contracts do not violate the statute of frauds.²²²⁴

(d) Implied Covenant of Good Faith and Fair Dealing

Washington courts have made it clear that they will not alter the at-will nature of employment based on an implied covenant of good faith and fair dealing in the employment relationship.²²²⁵ Accordingly, unless an employment agreement unambiguously limits an employer’s discretion to terminate an employee, the employee is terminable at-will.²²²⁶

Numerous decisions have made it clear that Minnesota courts will not imply a covenant of good faith and fair dealing into the employment relationship as a matter of law.²²²⁷ A federal court in Minnesota, however, has held that as a matter of public policy, an employee owes the employer a duty of loyalty. The court found an implied contractual obligation on the part of the employee to observe rudimentary principles of

²²²⁰ See, e.g., *Winspear v. Boeing Co.*, 75 Wn. App. 870, 881, n.4 (1994) (oral assurances may create binding contract if elements creating express contract are met).

²²²¹ See, e.g., *Andrus v. Dep’t of Transp.*, 128 Wn. App. 895 (2005) (oral statement that “you’re our number one choice and I’m offering you the job” without starting date, salary or benefit information was not a definite offer because it lacked reasonably certain terms).

²²²² *Braziel v. Loram Maint. of Way, Inc.*, 943 F. Supp. 1083 (D. Minn. 1996); *Degen v. Investors Diversified Servs., Inc.*, 110 N.W.2d 863, 866 (Minn. 1961).

²²²³ *Winspear*, 75 Wn. App. at 876 (absent elements creating express contract, an oral promise by an employer is insufficient to modify an otherwise at-will employment relationship); *Drobny v. Boeing Co.*, 80 Wn. App. 97, 107 (1995) (in the absence of a written policy providing promises of specific treatment in specific situations, oral representations by an employee’s supervisor are insufficient to establish an enforceable promise); *Evans v. GTE Health Sys.*, 857 P.2d 974, 977 (Utah Ct. App. 1993) (“general expressions of long-term employment or job advancement do not convert an at-will employment contract to a termination-only for cause contract.”).

²²²⁴ *Pasquin v. Pasquin*, 988 P.2d 1, 5 & n.6 (Utah Ct. App. 1999).

²²²⁵ See *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219 (1984).

²²²⁶ See *Armstrong v. Richland Clinic, Inc.*, 42 Wn. App. 181, 185-86 (1985) (to alter the at-will presumption, an employment contract must limit the conditions under which the employee may be terminated); see *Thompson v. St. Regis*, 102 Wn.2d at 228 (“[W]hile an employer may agree to restrict or limit his right to discharge an employee, to imply such a restriction on that right from the existence of a contractual right, which, by its terms has no restrictions, is internally inconsistent”).

²²²⁷ *Hunt v. IBM Mid-Am. Employees Fed. Credit Union*, 384 N.W.2d 853, 858 (Minn. 1986); *Guerico v. Prod. Automation Corp.*, 664 N.W.2d 379, 387 (Minn. Ct. App. 2003); *Lindgren v. Harmon Glass Co.*, 489 N.W.2d 804, 810 (Minn. Ct. App. 1992); see also *Poff v. W. Nat’l Mut. Ins. Co.*, 13 F.3d 1189 (8th Cir. 1994). The implied covenant of good faith and fair dealing does not apply to job offers or to initial negotiations for employment. See *Anderson v. Alorica, Inc.*, No. 03-3248, 2004 WL 1118635, at *6-7 (D. Minn. May 18, 2004).

appropriate behavior. The court upheld the employer's right to terminate the employee without notice for indecently exposing himself.²²²⁸

Similarly, Utah courts have also made it clear that, although a covenant of good faith and fair dealing is implied into every contract, the covenant cannot be construed to change an indefinite-term, at-will employment contract into a contract that requires an employer to have good cause to justify a discharge.²²²⁹ Instead, the covenant of good faith and fair dealing “protects an employee from denial of rights under the contract, and from arbitrary termination.”²²³⁰

SECTION 10.3 IMPLIED CONTRACT UNDER CALIFORNIA LAW

California was the first state to establish the presumption of at-will employment. Since that time, a significant array of statutory laws and judicial doctrines have emerged to limit employers' ability to discharge their employees. In *Foley v. Interactive Data Corp.*,²²³¹ the court established an analysis to determine whether an implied-in-fact contract to terminate only for cause exists. Under this analysis, a court looks to four factors: (1) the personnel policies and practices of the employer; (2) the employee's longevity of service; (3) actions or communications by the employer reflecting assurances of continued employment; and (4) practices in the industry.²²³² Courts have held that an employee's longevity of service alone cannot form the basis for an implied contract claim. As under Washington and Minnesota law, employers must pay close attention to written policies and include a clear introductory disclaimer to avoid a finding of implied contract.

Unlike Washington and Minnesota, a covenant of good faith and fair dealing is implied in *every* contract under California law. *Foley* limited recovery on breach of good faith and fair dealing claims to contract damages. Notably, breach of contract, without more, will not give rise to a valid claim under this doctrine.²²³³

SECTION 10.4 TORT CLAIMS

Many employment-related lawsuits include one or more tort claims. These legal rights are not the creation of the legislature or the parties' contract, they are “common law” rights created by the courts. They are of interest to plaintiffs for a variety of reasons; they usually allow recovery of damages for emotional pain and suffering, they may allow for punitive damages, and they provide a right to a jury trial. The most commonly alleged tort claims in employment lawsuits are defamation; intentional or negligent infliction of emotional distress; negligence in hiring, retention, or supervision of employees; tortious interference with an employment contract; and termination in violation of public policy.

SECTION 10.5 DEFAMATION

Employers are frequently confronted with claims of defamation, particularly with regard to comments surrounding the termination of employment.²²³⁴ To establish a claim of defamation, a plaintiff must show that a statement of fact:²²³⁵

²²²⁸ *Griep v. Yamaha Motor Corp., USA*, 120 F. Supp. 2d 1196 (D. Minn. 2000).

²²²⁹ *Brebany v. Nordstrom, Inc.*, 812 P.2d 49, 55 (Utah 1991).

²²³⁰ *Dubois v. Grand Central*, 872 P.2d 1073, 1078-79 (Utah Ct. App. 1994).

²²³¹ This is considered to be the seminal case on wrongful discharge in California, addressing claims for breach of the covenant of good faith and fair dealing, breach of implied contract to terminate only for cause, and discharge in violation of public policy. 47 Cal. 3d 654 (1988).

²²³² *Id.* at 676.

²²³³ *Id.* at 677-78.

- was published by communication to someone other than the plaintiff;
- was false; and
- tended to harm the plaintiff's reputation (*i.e.*, lower him or her in the estimation of the community).

The statement forming the basis of the defamation claim must contain a fact that is false. A statement of fact is false to the extent it falsely expresses or implies provable *facts*, regardless of whether the statement is a statement of fact or a statement of opinion. A statement of fact is not false to the extent it does not express or imply provable facts, but rather communicates only ideas or opinions.²²³⁶ To determine whether a statement is a fact or opinion, courts consider: (1) the medium and context in which the statement was published; (2) the audience to whom it was published; and (3) whether the statement implies that it is supported by undisclosed facts.²²³⁷

(a) Publication and Compelled Self-Publication

While the first element of a defamation claim requires communication of the statement to someone other than the plaintiff, in theory this element can be satisfied even if no statement is ever made by the employer to any third party, under the doctrine of “compelled self-publication.” Under this doctrine, an employer can be liable for the plaintiff's own communication of the statement to third parties if: (1) the plaintiff is operating under a “strong compulsion” to republish the defamatory statement; and (2) the defendant knows or should know of the circumstances creating the strong compulsion at the time he communicates the defamatory statement to the plaintiff.²²³⁸ For example, republication may be foreseeably required when the plaintiff applies for a job and needs to explain a negative reference.²²³⁹ Such a publication must truly be “compelled.” A plaintiff's voluntary repetition of the statement to others will not support a defamation claim.²²⁴⁰ To date, Washington has rejected use of the “compelled self-publication” doctrine.²²⁴¹

In Minnesota, courts have held that even an internal communication of the statement, within a corporate employer, may be sufficient to constitute “publication.”²²⁴² The Minnesota Supreme Court has held that conduct alone, without spoken words, is insufficient to sustain a defamation claim. In *Bolton v. Department of Human Services*, the Court found that the simple act of silently escorting the employee to the exit door upon his termination was not defamatory as a matter of law.²²⁴³

²²³⁴ *Board of Regents v. Roth*, 408 U.S. 564 (1972) (terminated employee has a constitutional interest in clearing his name when stigmatizing information regarding the reason for the termination is public disclosed); see also *Cox v. Roskelley*, 359 F.3d 1105 (9th Cir. 2004). In Washington, there is no cause of action for negligent dissemination of unsubstantiated information. *Corey v. Pierce County*, 154 Wn. App. 752 (2010).

²²³⁵ *Caruso v. Local Union No. 690*, 107 Wn.2d 524 (1987); *Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910, 919-20 (Minn. 2009); *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252, 255 (Minn. 1980); *Oaks Gallery & Country Store-Winona, Inc.*, 613 N.W.2d 800, 803 (Minn. Ct. App. 2000); but see *Van Hoven v. Pre-Employee.com, Inc.*, 156 Wn. App. 879 (2010) (defamation action against consumer reporting agency was statutorily precluded because plaintiff did not dispute that the agency's report accurately reported the information the agency had gathered, nor did plaintiff allege that the agency acted with malice or willful intent to injure); *Oman v. Davis Sch. Dist.*, 194 P.3d 956, 972 (Utah 2008).

²²³⁶ *Schmalenberg v. Tacoma News, Inc.*, 87 Wn. App. 579, 590-91 (1997).

²²³⁷ *Dunlap v. Wayne*, 105 Wn.2d 529, 539 (1986).

²²³⁸ See *Davis v. Consol. Freightways*, 29 Cal. App. 4th 354 (1994).

²²³⁹ *Id.*; see also *Lewis v. Equitable Life Assurance Soc'y*, 389 N.W.2d 876, 886 (Minn. 1986); *Schackmann v. Cathedral High Sch.*, No. 04-2435, 2005 WL 2077372 (Minn. Ct. App. Aug. 30, 2005).

²²⁴⁰ *Id.*; *Davis v. Consol. Freightways*, 29 Cal. App. 4th 354 (1994); see also *Pfluger v. Southview Chevrolet Co.*, 967 F.2d 1218, 1220 (8th Cir. 1992).

²²⁴¹ *Hill v. J.C. Penney, Inc.*, 70 Wn. App. 225 (1993); see also *Lunz v. Neuman*, 48 Wn.2d 26 (1955).

²²⁴² *Frankson v. Design Space Int'l*, 394 N.W.2d 140, 143 (Minn. 1986).

²²⁴³ *Bolton v. Dep't of Human Servs.*, 540 N.W.2d 523 (Minn. 1995).

(b) Conditional Privilege

One important defense available to employers faced with defamation claims is that of privilege. If made on a proper occasion, with proper motive, and based upon reasonable or probable cause, even defamatory statements are conditionally privileged, and therefore will not lead to liability.²²⁴⁴

For example, statements made to others in a company who have a legitimate common interest in the information, are conditionally privileged. Thus, complaints of sexual harassment in the workplace, and statements made by individuals investigating those complaints, are conditionally privileged.²²⁴⁵ Likewise, statements that a group of employees were terminated after a thorough investigation determined that they violated company rules, made to demonstrate that the company intends to enforce such rules, are conditionally privileged.²²⁴⁶ Minnesota courts have held that the communication to an employee of the reason for his or her termination is privileged.²²⁴⁷ The courts have noted that if it were otherwise, employers would simply refuse to inform employees of the reasons for discharge.

In addition, statements made to protect the public or a third party are conditionally privileged. Accordingly, providing a reference for a former employee to a prospective employer is conditionally privileged.²²⁴⁸

To overcome this privilege and proceed with a defamation claim, the plaintiff must show that the statements were made with “actual malice.” In Washington, this requires a showing of knowledge or reckless disregard as to the falsity of a statement.²²⁴⁹ In Minnesota, this requires a showing that the statements were made from ill will and improper motives, or without cause and wantonly for the purpose of injuring the plaintiff.²²⁵⁰ Abuse also may be shown by publication of the defamatory statement for some improper purpose, by excessive publication, or by publication not reasonably believed to be necessary to accomplish the alleged purpose of publication.²²⁵¹ Merely establishing falsity of the statements is not enough to overcome the privilege,²²⁵² the totality of the defendant’s knowledge *before* publication is considered in making the determination.²²⁵³ In Utah, the privilege is overcome if the defendant acted with malice.²²⁵⁴ Evidence of malice includes indications that the publisher made the statements with ill will, that the statements were excessively published, or that the publisher did not reasonably believe his statements were true.²²⁵⁵

(c) Minnesota Statutory Protection

The Minnesota legislature provided another “privilege” in enacting the Minnesota Termination Statute, Minn. Stat. § 181.933. Under that statute, an involuntarily terminated employee may request an explanation of the reason for the termination. The request must be in writing, and it must be made within 15 working

²²⁴⁴ *Lawson v. Boeing Co.*, 58 Wn. App. 261 (1990); *see also Bol v. Cole*, 561 N.W.2d 143, 149 (Minn. 1997) (quoting *Stuempges*, 297 N.W.2d at 256-57); *Ferguson v. Williams & Hunt, Inc.*, 221 P.3d 205, 214 (Utah 2009) (“[T]his qualified privilege protects an employer’s communications to other interested parties concerning the reasons for an employee’s discharge.”).

²²⁴⁵ *Id.*; *Lambert v. Morehouse*, 68 Wn. App. 500 (1993).

²²⁴⁶ *Messerly v. Asamera Minerals, (U.S.) Inc.*, 55 Wn. App. 811 (1989).

²²⁴⁷ *Frankson v. Design Space Int’l*, 394 N.W.2d 140, 143-44 (Minn. 1986); *Brooks v. Doherty, Rumble & Butler*, 481 N.W.2d 120, 125 (Minn. Ct. App. 1992).

²²⁴⁸ *See Ecyer v. N.Y. Life Ins. Co.*, 101 Wash. 247 (1918).

²²⁴⁹ *See, e.g., Messerly*, 55 Wn. App. 811.

²²⁵⁰ *Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910, 920-21 (Minn. 2009); *Lewis*, 389 N.W.2d at 891; *Stuempges*, 297 N.W.2d at 257.

²²⁵¹ *Henderson v. Pennwalt Corp.*, 41 Wn. App. 547 (1985).

²²⁵² *Messerly*, 55 Wn. App. 811; *Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910, 920 (Minn. 2009).

²²⁵³ *Id.*

²²⁵⁴ *Wayment v. Clear Channel Broad., Inc.*, 116 P.3d 271, 288 (Utah 2005).

²²⁵⁵ *Id.* (noting that the malice standard is different than the “actual malice” required under the First Amendment for public figures”).

days after termination. Within 10 working days after receiving such a request, the employer must supply in writing “the truthful reason for the termination.”²²⁵⁶ The statute provides that no claim of defamation can be based upon the statement provided by the employer in response to the request.

In addition, the Minnesota legislature provides some protection from defamation actions under Minn. Stat. § 181.962. Under that statute, a communication by an employee of information obtained through a review of the employee’s personnel record cannot be the subject of a defamation action, unless the employee satisfies certain prerequisites. Specifically, the employee must dispute the specific information in the personnel record, the employer must fail to remove the disputed information, the employee must submit a position statement, and the employer must fail to include a copy of that statement with the disputed information.²²⁵⁷

(d) Potential Insurance Coverage

One reason that defamation claims are frequently asserted in wrongful termination cases is that they often fall within employers’ insurance coverage. While most general liability policies do not cover claims of employment discrimination or breach of contract, many do cover claims of defamation. An employer faced with this or any other employment-related claim should carefully review any insurance policy that may provide coverage.

SECTION 10.6 INVASION OF PRIVACY

Under California’s Constitution, “all people” are given the right to pursue and obtain privacy. Washington courts have declined to interpret the Washington Constitution as creating a statutory right of privacy. However, Washington does recognize a common law right of privacy, consistent with the principles set forth in the Restatement (Second) of Torts.²²⁵⁸ There are several varieties of privacy invasion giving rise to a cause of action. Each is detailed below. Minnesota recognizes three of these common law privacy causes of action: (1) publication of private facts; (2) intrusion upon seclusion; and (3) appropriation of name or likeness.²²⁵⁹ Although the law is relatively new and undeveloped in Minnesota, one court has held that the standards set forth in the Restatement of Torts apply.

Utah also recognizes common law claims for invasion of privacy.²²⁶⁰ Invasion of privacy encompasses four different torts: (1) unreasonable intrusion upon the seclusion of another; (2) appropriation of the other’s name or likeness; (3) unreasonable publicity given to the other’s private life; and (4) publicity that unreasonably places the other in a false light before the public.²²⁶¹

(a) Publicity Placing Person in False Light

An employee may bring a false-light claim when an employer: (1) publishes a materially false statement that would be highly offensive to a reasonable person; and (2) the employer knew of, or recklessly disregarded, the falsity of the publication and the false light in which the other would be placed.²²⁶² An employee could bring a false-light claim for the same type of conduct as could support a defamation claim.²²⁶³ The difference between the tort of defamation and the tort of false-light invasion of privacy is that a defamation action is primarily concerned with compensating the injured party for damage to

²²⁵⁶ Minn. Stat. § 181.933; *Deli v. Univ. of Minn.*, 511 N.W.2d 46, 50 (Minn. Ct. App. 1994); see also *Amin. v. Flagstone Hospitality Mgmt., L.L.C.*, No. 03-1181, 2005 WL 3054599 (D. Minn. Nov. 14, 2005).

²²⁵⁷ Minn. Stat. § 181.962, subd. 2; *Lloyd v. In Home Health, Inc.*, 523 N.W.2d 2 (Minn. Ct. App. 1994).

²²⁵⁸ *Reid v. Pierce Cnty.*, 136 Wn.2d 195, 205 (1998).

²²⁵⁹ *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231 (Minn. 1998) (adopting framework for analysis from Restatement (Second) of Torts, §§ 652B (intrusion upon seclusion), 652C (misappropriation) & 652D (publication of private facts)).

²²⁶⁰ See *Cox v. Hatch*, 761 P.2d 556, 563 (Utah 1988).

²²⁶¹ *Id.*

²²⁶² *Eastwood v. Cascade Broad. Co.*, 106 Wn.2d 466, 470 (1986), citing Restatement (Second) of Torts § 652E; *Jacob v. Bezzant*, 212 P.3d 535, 544 (Utah 2009).

reputation, while an invasion of privacy action is primarily concerned with compensating for injured feelings or mental suffering.²²⁶⁴

(b) Publication of Private Facts

An employer who publicizes a matter concerning the private life of an employee is liable for invasion of privacy, if the matter publicized is of a kind that: (1) would be highly offensive to a reasonable person; and (2) is not of legitimate concern to the public.

“Publicity” should be distinguished from “publication,” which in the defamation context means even a single communication to a third party. In the privacy context, “publicity” means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge.²²⁶⁵ Still, a limited disclosure of private facts to a group of co-workers may constitute disclosure to the general public. Also, unlike a defamation claim, the truth of the information communicated is not a defense to liability.

An employer typically will not be liable if it has a justifiable business reason for sharing certain disciplinary information with co-workers. However, employers should take precautionary measures to ensure that medical and personnel information is kept confidential and disclosed only when there is a legitimate business need for disclosure. This includes:²²⁶⁶

- medical information, such as medical history, personal health information, drug test results, and HIV information; and
- personnel information, such as performance and discipline history, compensation information, termination reasons, and personal information learned through the job interview process.

(c) Intrusion Upon Seclusion

In order to establish a claim of intrusion upon seclusion, an employee must establish that the employer intentionally intruded upon the employee’s solitude or private affairs in which the employee had a legitimate and reasonable expectation of privacy, and that the intrusion would be highly offensive to a reasonable person.²²⁶⁷ The intrusion can be a physical intrusion into a place where the employee intentionally secluded himself or herself, eavesdropping on an employee’s conversation, inquiring into an employee’s private concerns, or inappropriate use of social media.²²⁶⁸ Further protecting an employee’s privacy, effective January 1, 2013, California employers are prohibited from requiring applicants and employees to disclose or access social media information.²²⁶⁹

²²⁶³ See *Jacob*, 212 P.3d at 544 (“A false light claim is closely allied with an action for defamation, and the same considerations apply to each.”).

²²⁶⁴ *Eastwood v. Cascade Broad. Co.*, 106 Wn.2d 466, 470 (1986).

²²⁶⁵ Restatement (Second) of Torts § 652D, cmt. a; *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550 (Minn. 2003) (quoting the Restatement (Second) of Torts).

²²⁶⁶ Such information may also be protected under other statutes such as the ADA, FMLA, HIPAA and Washington’s new statute on personally identifiable information, as described in other chapters.

²²⁶⁷ Restatement (Second) of Torts § 652B; *Reid v. Pierce Cnty.*, 136 Wn.2d 195, 206 (1998); *Doe v. Gonzaga Univ.*, 143 Wn.2d 687, 705-06 (2001), *rev’d on other grounds*, 536 U.S. 273 (2002); *Stien v. Marriott Ownership Resorts, Inc.*, 944 P.2d 374, 378 (Utah Ct. App. 1997).

²²⁶⁸ Restatement (Second) of Torts § 652B, cmt. b. Under the Stored Communications Act, 18 U.S.C. § 2701, it is illegal for an employer to have someone send a friend request on a social media website so that the employer can gain access to an employee’s or applicant’s profile, unless the employer discloses the reason for the friend request. Additionally, under this act it is unlawful for an employer to intentionally access stored communications without authorization or to intentionally exceed authorization to access the stored password, the employer cannot ask an employee or applicant to give his or her password to an online account or profile, and an employer cannot have another employee give the employer access to their own account so that the employer can snoop on other employees.

²²⁶⁹ Cal. AB-1844 (2012).

This cause of action for intrusion upon seclusion could arise where the employer monitors the workplace with surveillance cameras, regularly monitors employee e-mail and telephone communications, searches an employee's locker, office, desk, monitors an employee's Internet use, or searches other information stored on the employee's computer. An effective electronic data and communications policy that puts employees on notice of the employer's intent to conduct such activities can reduce an employee's expectation of privacy.²²⁷⁰ In addition, employers should ensure that employees have bathroom privacy, privacy in providing drug or alcohol samples, and private areas to change clothes if necessary for the job.

This cause of action also could arise in the context of a sexual harassment claim in which a female employee alleges that her supervisor sexually harassed her by regularly asking personal questions about her sex life or her marriage. Employers should be diligent in eradicating sexual harassment and thoughtfully conduct investigations into personal relationships in response to a complaint of sexual harassment.²²⁷¹

(i) Investigations

In *Doe v. Gonzaga*, the Washington Supreme Court held that Gonzaga University invaded a student's right to privacy by investigating his personal sexual history in response to an allegation of sexual misconduct toward another student.²²⁷² Although Gonzaga contended that the investigation was not highly offensive, the Court found that it was, particularly because Gonzaga inquired into John Doe's personal relationships, habits, and physical anatomy.²²⁷³ In other words, the investigation went too far.

Based on this case, employers are advised to make sure their investigations do not delve into highly personal matters that may not have a direct bearing on the allegation at issue.

(d) Appropriation of Name or Likeness

In order to establish a claim of appropriation of name or likeness, an employee must show that his or her name or likeness was appropriated to another's use or benefit.²²⁷⁴ An employer's use of an employee's photograph or name for commercial purposes could give rise to such a cause of action.

(e) California's Constitutional Right to Privacy

In addition to the common law right of privacy claims recognized under Minnesota, Washington, and Utah law, California employers are governed by the State Constitution's explicit recognition of the right to privacy.²²⁷⁵ To prevail in a constitutional privacy claim, an employee must prove the following: (1) a legally protected privacy interest; (2) a reasonable expectation of privacy on the plaintiff's part; and (3) conduct

²²⁷⁰ In *Holmes v. Petrovich Dev. Co., LLC*, 191 Cal. App. 4th 1047 (2011), the California Court of Appeal held that e-mails sent between an employee and her attorney regarding possible legal action against the employer did not constitute "confidential communication between client and lawyer" within the meaning of Cal. Evid. Code § 952. The court reasoned that because the employee was explicitly told that (1) it was the company's policy that its computers were to be used only for company business and that employees were prohibited from using them to send or receive personal e-mail, (2) the company would monitor its computers for compliance with this company policy and thus might "inspect all files and messages ... at any time," and (3) she had been explicitly advised that employees using company computers to create or maintain personal information or messages "have no right of privacy with respect to that information or message," her action of e-mailing her attorney from her work computer was "akin to consulting her lawyers in her employer's conference room, in a loud voice, with the door open, so that any reasonable person would expect that their discussion of her complaints about her employer would be overheard by" the employer. However, the court noted that attorney-client communication does not lose its privileged character for the sole reason that it is communicated by electronic means or because persons involved in the delivery, facilitation, or storage of electronic communication may have had access to the content of the communication; rather, the facts of this particular case showed that the employee waived her attorney-client privilege by sending e-mails from her work computer.

²²⁷¹ See Chapter IX: Employment Discrimination.

²²⁷² 143 Wn.2d 687, 706 (2001), *rev'd on other grounds*, 536 U.S. 273 (2002).

²²⁷³ *Id.*

²²⁷⁴ Restatement (Second) of Torts § 652C.

²²⁷⁵ Cal. Const. art I, § 1. See, e.g., *Hill v. NCAA*, 7 Cal. 4th 1 (1994) (constitutional right to privacy prohibited NCAA mandatory post-season drug testing).

by the defendant constituting a serious invasion of privacy.²²⁷⁶ California courts have recognized valid privacy claims in certain cases of employee drug and medical testing.²²⁷⁷

In a recent opinion, *Hernandez v. Hillsides*, the California Supreme Court provided guidance to employers about the reasonable scope, purpose, and methods of conducting employee surveillance in the workplace.²²⁷⁸ The case involved two female employees who sued their employer, a residential facility for abused and neglected children, for conducting hidden, after-hours video surveillance in their semi-private office in order to determine who was accessing pornographic websites. Even though the court found that the employer had intruded upon the reasonable expectation of privacy of the two employees, it nonetheless dismissed their claims, finding that the employer's acts were not so serious, egregious or offensive as to warrant liability. The evidence showed that the employer never activated the camera during regular business hours, and only recorded video on three occasions, at night, over a three-week period. The Court's ruling was largely driven by the unique facts of the case, including the employer's role as a caretaker for sexually abused children. In its decision, the Court also noted that an employer who wishes to install surveillance equipment inside employee offices should provide notice to its employees that they will be subjected to the risk of such surveillance.

SECTION 10.7 OUTRAGE AND NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

The torts of outrage and negligent infliction of emotional distress are often alleged in employment litigation, but are seldom successful.

(a) Outrage/Intentional Infliction of Emotional Distress

A claim of outrage, which Washington courts equate with intentional infliction of emotional distress, is usually based upon some conduct by the employer that the employee regards as unusually hostile or offensive. To prevail on this claim, the employee must show that:²²⁷⁹

- the conduct was extreme and outrageous;
- the conduct was intentional or reckless;
- the conduct caused emotional distress; and
- the emotional distress was severe.²²⁸⁰

Courts have stated that for conduct to be “extreme and outrageous,” it must be “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.”²²⁸¹ In order to prevail on this claim, a plaintiff must suffer emotional distress “so extreme or severe that no reasonable man could be expected to endure it.”²²⁸² Courts have ruled that emotional reactions such as depression, insomnia, alcohol abuse, stomach disorders, and high blood pressure are not sufficiently severe to support this claim.²²⁸³ Minnesota courts

²²⁷⁶ *Hill*, 7 Cal. 4th at 20-21.

²²⁷⁷ See *Norman-Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260 (9th Cir. 1998); *Luck v. S. Pac. Transp. Co.*, 218 Cal. App. 3d 1 (1990); *Semore v. Pool*, 217 Cal. App. 3d 1087 (1990).

²²⁷⁸ 47 Cal. 4th 272 (2009).

²²⁷⁹ *Rive v. Janovich*, 109 Wn.2d 48, 61 (1987).

²²⁸⁰ *Hubbard v. United Press Int'l, Inc.*, 330 N.W.2d 428, 439 (Minn. 1983); *Johnson v. Spencer*, No. 08-0108, 2008 WL 5335443 (Minn. Ct. App. Dec. 23, 2008); *Stead-Bowers v. Langley*, 636 N.W.2d 334, 342 (Minn. Ct. App. 2001); see also *Russell v. Thomson Newspapers, Inc.*, 842 P.2d 896, 905 (Utah 1992).

²²⁸¹ *Dicomes v. State*, 113 Wn.2d 612 (1989).

²²⁸² *Lee v. Columbian, Inc.*, 64 Wn. App. 534, 539 (1991); see also *Hubbard*, 330 N.W.2d at 439; *Stead-Bowers*, 636 N.W.2d at 343; *Cabaness v. Thomas*, 232 P.3d 486, 500 (Utah 2010) (“To be considered outrageous, the conduct must evoke outrage or revulsion; it must be more than unreasonable, unkind, or unfair.”).

have repeatedly stated that claims for intentional infliction of emotional distress are strongly disfavored and “sharply limited to cases involving particularly egregious facts.”²²⁸⁴ Expert testimony is required to prove causation in emotional distress claims.²²⁸⁵ Employment claims are rarely sufficiently severe to satisfy this very high standard of “extreme and outrageous conduct.”

The Washington Supreme Court case, *Robel v. Roundup Corp.*, indicates a possible shift to requiring less proof in an outrage claim.²²⁸⁶ In *Robel*, the Court held that a former employee who had been repeatedly teased and harassed by co-workers and a supervisor, with the knowledge of management, for filing a workers’ compensation claim had presented sufficient evidence of outrageous conduct to present to a jury. The Court emphasized the fact that the harassment occurred at work with a person in authority engaging in the harassing activity, stating “[a] plaintiff’s status as an employee may entitle him to a greater degree of protection from insult and outrage by a supervisor with authority over him than if he were a stranger.”²²⁸⁷ The holding in *Robel* may lead to an increase in outrage claims against employers.

In Washington, plaintiffs claiming outrage do not need to establish that the symptoms of their emotional distress constitute a diagnosable emotional disorder.²²⁸⁸

California law recognizes the claim of intentional infliction of emotional distress. In addition to the elements required to prevail on a claim of outrage under Washington law, California requires that plaintiffs prove both actual and proximate causation.²²⁸⁹

(b) Negligent Infliction of Emotional Distress

Claims for negligent infliction of emotional distress are often asserted in employment litigation. In the employment context, Washington recognizes a cause of action for negligent infliction of emotional distress under extremely limited circumstances. The Washington Supreme Court has held that a defendant has a general duty to avoid the negligent infliction of emotional distress. However, the Court also recognized that emotional distress is a “fact of life” and there are limitations on one’s liability.²²⁹⁰

A claim of negligent infliction of emotional distress is tested against the standard negligence principles of duty, breach, causation, and injury.²²⁹¹ Whether a duty is owed is a question of law.²²⁹² In Washington, unlike other jurisdictions, there is no requirement of physical impact or threat of immediate invasion of the plaintiff’s personal security. However, to be compensable, the plaintiff’s mental and emotional suffering must be manifested by objective symptoms, susceptible to medical diagnosis and proved through medical evidence.²²⁹³ This claim requires objective evidence regarding the severity of the distress and the causal link between the defendant’s conduct “and the subsequent emotional reaction.”²²⁹⁴ Further, for physical

²²⁸³ See, e.g., *Lawson v. Boeing Co.*, 58 Wn. App. 261 (1990) (symptoms of depression, loss of appetite, libido, energy, sleeplessness, and increased headaches are not a sign of distress above the level which is a fact of life and do not constitute severe emotional distress); *Spurrell v. Bloch*, 40 Wn. App. 854 (1985) (tears, loss of appetite, and anxiety are not signs of extreme emotional distress above the level which is a fact of life); see also *Hubbard*, 330 N.W.2d at 440.

²²⁸⁴ *Id.* at 439; *Langeslag v. KYMN, Inc.*, 664 N.W.2d 860, 864 (Minn. 2003).

²²⁸⁵ *Wittner v. Enbridge, Inc.*, No. 06-1049, 2007 WL 152533 (Minn. Ct. App. Jan. 23, 2007).

²²⁸⁶ 148 Wn.2d 35 (2002).

²²⁸⁷ *Id.*; *White v. Monsanto Co.*, 585 So.2d 1205, 1210 (La. 1991).

²²⁸⁸ See *Kloepfel v. Bokor*, 149 Wn.2d 192 (2003).

²²⁸⁹ See *Trevise v. Blue Cross of Cal.*, 209 Cal. App. 3d 878, 883 (1989).

²²⁹⁰ *Hunsley v. Giard*, 87 Wn.2d 424 (1976).

²²⁹¹ *Reid*, 136 Wn.2d 195; *Chea v. Men’s Wearhouse, Inc.*, 85 Wn. App. 405, amended on recons. in part by, 971 P.2d 520 (1997) (negligent infliction of emotional distress is a cognizable claim when it does not arise solely from racial remarks and does not result from employer’s disciplinary acts or personality dispute).

²²⁹² *Calboun v. Liberty Nw. Ins. Corp.*, 789 F. Supp. 1540 (W.D. Wash. 1992).

²²⁹³ *Hunsley*, 87 Wn.2d 424; see also *Kloepfel v. Bokor*, 149 Wn.2d 192 (2003).

²²⁹⁴ *Hegel v. McMabon*, 136 Wn.2d 122 (1998).

symptoms to meet the objective symptom requirement, “they must constitute a diagnosable emotional disorder.”²²⁹⁵

The mere fact of termination will not give rise to a claim for negligent infliction of emotional distress. Therefore, termination of at-will employment (absent a violation of public policy) is not actionable.²²⁹⁶ Nor is breach of an employment contract²²⁹⁷ or conduct arising during employment actionable, if it constitutes a workplace dispute or employee discipline.²²⁹⁸ For example, in *Bishop v. State*, the plaintiff alleged that her supervisor’s attitude toward her was poor, that the supervisor would scream at her, criticize her clothing, single her out when she did something wrong, and yell at her rather than explain things. The court determined that the plaintiff had no cause of action, reasoning that employers do not owe employees a duty to avoid negligent infliction of emotional distress caused by disputes between supervisors and employees.²²⁹⁹

When alleged in conjunction with a discrimination claim, claims for intentional or negligent infliction of emotional distress must be based on conduct separate from the conduct alleged in support of the discrimination claim or the claims will be dismissed as duplicative.²³⁰⁰

In *Rothwell v. Nine Mile Falls Sch. Dist.*, the Washington Court of Appeals held that state workers’ compensation statute does not bar intentional and negligent infliction of emotional distress claims of a school custodian who suffered post-traumatic stress disorder (“PTSD”) after being ordered to clean up the suicide scene of a student whom the custodian knew personally.²³⁰¹ The custodian was also ordered to clean up the candles and cards left at the scene of the suicide and to search for bombs in various classrooms. The appellate court concluded that the suit could proceed because the custodian’s PTSD was not an injury or occupational disease under the Industrial Insurance Act as it did not result from a single traumatic event; rather, it resulted from a series of incidents over a period of a few days.

Minnesota law on this subject is in a state of some confusion. For a plaintiff to establish this claim, the employee must generally show that he was in a zone of danger of physical impact, reasonably feared for the employee’s safety, and consequently suffered severe emotional distress with resultant physical injury.²³⁰² Since employment claims rarely involve any “zone of danger,” this theory is unavailable to most plaintiffs.

The courts have established an exception to this general rule, however, permitting a plaintiff to recover damages for mental anguish or suffering for a direct invasion of his rights, such as defamation, malicious prosecution, or other willful, wanton or malicious conduct.²³⁰³ It is still not altogether clear what will constitute “willful, wanton, or malicious conduct” under this theory. It does seem clear, however, that a claim of employment discrimination alone will not meet this requirement and thereby support this additional claim.²³⁰⁴

In Utah, a defendant is liable for negligent infliction of emotional distress if he unintentionally causes emotional distress to another that results in illness or bodily harm and the defendant should have realized

²²⁹⁵ *Id.* at 135.

²²⁹⁶ *Calboun*, 789 F. Supp. at 1548.

²²⁹⁷ *Hitter v. Bellevue Sch. Dist. No. 405*, 66 Wn. App. 391, *review denied*, 120 Wn.2d 1013 (1992).

²²⁹⁸ *Bishop v. State*, 77 Wn. App. 228 (1995).

²²⁹⁹ *Id.*

²³⁰⁰ *Anaya v. Graham*, 89 Wn. App. 588 (1998) (intentional); *Francom v. Costco Wholesale Corp.*, 98 Wn. App. 845 (2000) (negligent).

²³⁰¹ 149 Wn. App. 771 (2009).

²³⁰² *Stead-Bowers*, 636 N.W.2d at 343; *Wallin v. Minn. Dep’t of Corr.*, 598 N.W.2d 393 (Minn. Ct. App. 1999); *Stadler v. Cross*, 295 N.W.2d 552, 553 (Minn. 1980); *Lee v. Metro. Airport Comm’n*, 428 N.W.2d 815 (Minn. Ct. App. 1988).

²³⁰³ *Bohdan v. Alltool Mfg. Co.*, 411 N.W.2d 902, 907 (Minn. Ct. App. 1987); *Lee*, 428 N.W.2d at 823-24.

²³⁰⁴ *Lindgren v. Harmon Glass Co.*, 489 N.W.2d 804, 811 (Minn. Ct. App. 1992).

that his conduct involved an unreasonable risk of causing the distress and should have realized that the distress might result in injury or bodily harm.²³⁰⁵

SECTION 10.8 OTHER NEGLIGENCE CLAIMS

Washington, California, Minnesota, and Utah recognize three negligence causes of action in the employment setting where an employee causes injury while acting outside the scope of his or her employment: negligent hiring, negligent retention, and negligent supervision.

(a) Negligent Hiring

Under Washington law, an employer may be liable for injuries caused by one of its employees acting outside the scope of employment, if: (1) the employer knew or, in the exercise of ordinary care, should have known of the employee's unfitness; and (2) the hiring of the employee proximately caused the plaintiff's injuries.²³⁰⁶ Under Minnesota law, an employer may be held liable for injuries caused by one of its employees, if the employer knew or should have known at the time of hiring that the employee could present a threat of physical injury to others.²³⁰⁷ An employer therefore has a duty, under appropriate circumstances, to make a reasonable background investigation on job applicants prior to hiring.²³⁰⁸ The circumstances under which such an investigation must be made, and the scope of the required investigation, depend on the particular position involved and the corresponding threat to other persons. For example, the Minnesota Supreme Court first recognized a cause of action for negligent hiring in the case of *Ponticas v. K.M.S. Invs.*²³⁰⁹ In *Ponticas*, the defendant, an apartment complex owner, failed to contact any references and failed to inquire into employment gaps when it hired a manager. In light of the risk posed by granting the manager unlimited access to tenants' apartments via a pass key, the Court found that the employer's failure to investigate was negligent and that the employer was liable for the subsequent rape of a tenant.

In *Ponticas*, the Court was careful to point out that there is not a duty to check the criminal record of all applicants for all jobs, and that a contrary rule would make the rehabilitation of ex-convicts extremely difficult. This message was taken to heart in *Yunker v. Honeywell, Inc.* In *Yunker*, an employee of the defendant had been previously convicted of murdering a co-worker.²³¹⁰ After his release from prison, Honeywell hired him as a custodian. He then began stalking another co-worker, eventually murdering her at her home. Even in light of the employee's prior murder conviction, the Court held that the employer was not liable for the second murder. The Court noted that as a custodian, the employee had no contact with the general public and very limited contact with co-workers. The duties of his job therefore did not pose a danger to others, unlike the job of the apartment manager in *Ponticas*.

Under the tort of negligent hiring, an employer owes a duty to the injured third party, entirely independent of the employer's vicarious liability under the doctrine of *respondeat superior*, which applies when employees' torts are committed within the scope of employment.²³¹¹

Under the tort of negligent hiring, an employer's duty is limited to foreseeable victims and then only to prevent the tasks, premises, or instrumentalities entrusted to an employee from endangering others.²³¹² Generally, an employer owes a duty to an injured plaintiff if the employee's job enabled and was closely

²³⁰⁵ *Anderson Dev. Co. v. Tobias*, 116 P.3d 323, 339 (Utah 2005).

²³⁰⁶ See, e.g., *Carlsen v. Wackenhut Corp.*, 73 Wn. App. 247, 252 (1994).

²³⁰⁷ *McKenzie v. Lunds, Inc.*, 63 F. Supp. 2d 986 (D. Minn. 1999); *Benson v. Nw. Airlines, Inc.*, 561 N.W.2d 530 (Minn. Ct. App. 1997).

²³⁰⁸ See *Peck v. Siau*, 65 Wn. App. 285, 288 (1992).

²³⁰⁹ *Ponticas v. K.M.S. Invs.*, 331 N.W.2d 907 (Minn. 1983).

²³¹⁰ *Yunker v. Honeywell, Inc.*, 496 N.W.2d 419 (Minn. Ct. App. 1993).

²³¹¹ See this Chapter, Section 10.12: Employer Liability for Employee's Act (Vicarious Liability).

²³¹² See, e.g., *Niece v. Elmview Group Home*, 131 Wn.2d 39, 56 (1997).

connected to the assault.²³¹³ Thus, whether an employer is liable in any specific case depends on the circumstances, including the particular job involved and the corresponding threat to other persons.²³¹⁴

For example, in *Carlsen v. Wackenbut*, the defendant-employer, who supplied security guards at a rock concert, was liable for a security guard's subsequent sexual assault of a young female concert attendee because it failed to contact any references or inquire about employment gaps when it hired the security guard.²³¹⁵ In light of the risk posed by cloaking the security guard with a veneer of authority, the court held that a jury could reasonably have determined the defendant was liable for negligence based on its failure to investigate.

In contrast, an employer is not liable for the intentional or criminal acts of an employee if the association between the victim and the employee is not occasioned by the employee's job.²³¹⁶ For example, in *Betty Y. v. Al-Hellou*, the employer was not liable for its employee's rape of a 14-year-old boy, even though the employee met the boy through his job.²³¹⁷ The employee was a manual laborer hired to rehabilitate vacant apartments; the boy lived in an apartment building on the same block as the complex where the employee was working. In distinguishing *Carlsen* from *Betty Y.*, the court explained that the employee was not hired to work with potential victims, the rape did not occur on the work premises, nothing about the job premises made it more likely that the employee would be put in contact with potential victims, and, most importantly, the job facilities did not enable the employee to commit the rape. Thus, the tasks, premises, and instrumentalities entrusted to the employee were not what endangered the victim and the employer could not have foreseen the potential for harm.

An employer also will not be liable if it satisfied the duty it owed to the victim. In *Scott v. Blanchet High Sch.*, the defendant-school district owed a duty to students which was satisfied by conducting a reasonable background investigation.²³¹⁸ Therefore, the school was not liable for the hiring of a teacher who engaged in a sexual relationship with a high-school student. The court held that the school took reasonable care in hiring the teacher by contacting his references and, in the course of two interviews, querying him about his views regarding premarital sexual behavior.²³¹⁹

For each position, an employer must determine whether a background investigation is necessary and, if so, the scope of the investigation. All background checks, if used, must comply with applicable law.

The Washington Human Rights Commission guidelines require the scope of pre-employment inquiries concerning arrests to include the following questions:²³²⁰

- whether charges are still pending, have been dismissed, or led to a criminal conviction involving behavior that would adversely affect job performance; and
- whether the arrest occurred within the last 10 years.

Exempt from this rule are law enforcement and state agencies, school districts, and businesses and other organizations that have a direct responsibility for the supervision, care, or treatment of children, mentally ill persons, developmentally disabled persons, or other vulnerable adults.²³²¹

²³¹³ *Betty Y. v. Al-Hellou*, 98 Wn. App. 146 (1999).

²³¹⁴ See *Crisman v. Pierce County Fire Prot. Dist. No. 21*, 115 Wn. App. 16 (2002).

²³¹⁵ 73 Wn. App. 247, 252 (1994); see also *Rucshner v. ADT, Sec. Sys., Inc.*, 149 Wn. App. 665 (2009).

²³¹⁶ *Lynn v. Labor Ready, Inc.*, 136 Wn. App. 295 (2006) (employer was not liable for negligent hiring of sex offender with a history of violence against women to work at a women's shelter, where the offender's murder of female was at a site distant from and unrelated to the shelter, little evidence suggested that offender and victim met or had contact at the shelter, and there was direct evidence that the offender and victim met each other and had a relationship before the offender was hired).

²³¹⁷ 98 Wn. App. 146.

²³¹⁸ 50 Wn. App. 37 (1987).

²³¹⁹ *Id.* at 39.

²³²⁰ WAC 162-12-140. More information on reference check procedures can be found in Chapter I.

(b) Negligent Retention/Supervision

An employer has a duty to refrain from retaining employees with known dangerous proclivities.²³²² An employer is liable for injuries caused by one of its employees, even if the employee's injurious conduct occurs outside the scope of employment, if the employer knew, or should have known, that the employee could present a threat to others and fails to take further action such as investigation, discharge or reassignment.²³²³

The negligent retention doctrine focuses on what the employer came to know, or should have come to know, about an employee during the course of the employment relationship. The negligent hiring doctrine focuses on what the employer knew or should have known at the time of hiring.²³²⁴ In a claim for negligent supervision, an employer can be liable for injuries caused by an employee acting outside the scope of employment if it knew the employee presented danger or risk to others and failed to properly supervise the employee in a manner that would have prevented the injury.

The doctrines of negligent hiring and negligent retention/supervision converge in creating liability for risks created by exposing members of the public to a potentially dangerous person when the employer knew or should have known that the employee was violent or aggressive and might engage in injurious conduct.²³²⁵ In Minnesota, a claim for negligent retention is limited to situations involving a threat of or actual physical injury,²³²⁶ which may include physical acts of sexual misconduct.²³²⁷

A claim of negligent supervision is something entirely different. It is not based on any harmful tendencies of employees, or anything that the employer knows or should know about its employees' background. The basis of this claim is that the employer has somehow failed to control and supervise an employee's job performance. The employer's duty extends specifically to controlling employees' actions on the employer's premises, and controlling the employees' use of the employer's property, in order to prevent physical injury to others.²³²⁸

Minnesota courts have indicated a willingness to recognize negligent supervision claims where an employer has knowledge of sexual harassment, the employer fails to act to prevent further harassment, and the harassment continues, resulting in a threat of or actual physical injury to the harassed employee.²³²⁹

In the context of a sexual harassment claim, however, a common law negligence claim based on an employer's duty to supervise the workplace and remedy any harassment is preempted by the Minnesota Human Rights Act ("MHRA") when the common law duty of care is the same as the statutory duty of care.²³³⁰

Likewise, a common law claim based on a duty to accommodate a disability, even when styled as a negligent supervision claim, may be preempted by the MHRA.²³³¹

²³²¹ *Id.*

²³²² *Thompson v. Campbell*, 845 F. Supp. 665, 676 (D. Minn. 1994).

²³²³ *McKenzie v. Lunds, Inc.*, 63 F. Supp. 2d 986 (D. Minn. 1999); *Yunker v. Honeywell, Inc.*, 496 N.W.2d 419, 423 (Minn. Ct. App. 1993).

²³²⁴ *Peck*, 65 Wn. App. at 288; see also *Johnson v. Peterson*, 734 N.W.2d 275, 277-78 (Minn. Ct. App. 2007).

²³²⁵ *Thompson v. Everett Clinic*, 71 Wn. App. 548, 555 (1993); *Yunker*, 496 N.W.2d at 422; *Jackson v. Righter*, 891 P.2d 1387, 1392 (Utah 1995) ("In the context of a claim for negligent supervision or retention, a duty may arise when an employer could reasonably be expected, consistent with the practical realities of an employer-employee relationship, to appreciate the threat to a plaintiff of its employee's actions and to act to minimize or protect against that threat.")

²³²⁶ See, e.g., *Bruchas v. Preventive Care, Inc.*, 553 N.W.2d 440, 443 (Minn. Ct. App. 1996); *Leidig v. Honeywell, Inc.*, 850 F. Supp. 796, 807 (D. Minn. 1994).

²³²⁷ See, e.g., *Mandy v. Minn. Mining & Mfg.*, 940 F. Supp. 1463, 1472 (D. Minn. 1996).

²³²⁸ *Semrad v. Edina Realty, Inc.*, 493 N.W.2d 528, 534 (Minn. 1992); *Mandy*, 940 F. Supp. at 1472.

²³²⁹ See, e.g., *Oslin v. State*, 543 N.W.2d 408 (Minn. Ct. App. 1996); *Mandy*, 940 F. Supp. at 1470-72.

²³³⁰ *Grozdanich v. Leisure Hills Health Ctr., Inc.*, 25 F. Supp. 2d 953, 981 (D. Minn. 1998).

(c) Employee Injury Torts

Employees who are injured on the job are often eligible for workers' compensation.²³³² In general, an employer is not liable for injuries to the employees of an independent contractor unless the employer retains the right to control and direct the manner in which the independent contractor's employees perform their work.²³³³ Additionally, in Washington an employer now faces financial repercussions if it does not protect employees from certain serious hazards. The state requires businesses to address serious safety violations and fix the underlying hazards while appealing any safety and health citations issued by the state Department of Labor and Industries. The penalty for failure to abate a serious hazard, defined as circumstances having the possibility of serious injury or death, ranges from a one-time fine of \$500 to a maximum fine of \$7,000 per day for each day the violation goes uncorrected.

(d) Misrepresentation in Recruiting

California law specifically prohibits fraudulent misrepresentation in the context of recruiting.²³³⁴ In the case of *Lazar v. Super. Court*, an employee prevailed on a "promissory fraud" claim where he was induced to leave a stable job and move his family from New York to California by the defendant's knowing misrepresentations regarding salary increases and the financial state of the defendant's company.²³³⁵ When the defendant terminated the plaintiff two years later, he sued for wrongful discharge under various contract and tort claims, including false representations to induce relocation under California Labor Code section 970. The court held that the employee could pursue tort claims against the employer for fraudulent inducement of the employment contract.²³³⁶

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A Washington employer may be liable to a present or former employee if it provides knowingly false or deliberately misleading information about the employee, or acts with reckless disregard for the truth.²³³⁸ It is unclear whether an employer in Washington may be liable in negligence for failing to disclose information when providing a reference for a former employee or in responding to requests for information. At least one court rejected this possibility in *Richland Sch. Dist. v. Mabton Sch. Dist.*, in which a Washington Court of Appeals found that a school did not owe another school a duty to disclose that a custodian had been terminated for suspected child molestation and inappropriate comments made to other children.²³³⁹ However, the Court noted that had the school district actually provided false information, rather than omitting information, the result might have been different.²³⁴⁰ Additionally, the case was brought under a negligent misrepresentation theory, and the Court found the theory did not apply to employers providing information about former employees to a prospective employer.²³⁴¹ This case leaves open the possibility that an employer may be liable under another tort theory.

²³³¹ *Hoover v. Norwest Private Mortgage Banking*, 605 N.W.2d 757 (Minn. Ct. App. 2000), *rev'd in part on other grounds*, 632 N.W.2d 534 (Minn. 2001).

²³³² Limited information on workers' compensation can be found in Chapter VI.

²³³³ *Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 119-22 (2002); *see also Kinney v. Space Needle Corp.*, 121 Wn. App. 242 (2004); *Tverberg v. Fillner Constr., Inc.*, 49 Cal. 4th 518 (2010); *see Magana v. Dave Roth Const.*, 215 P.3d 143, 151 (Utah 2009).

²³³⁴ Cal. Lab. Code § 970.

²³³⁵ 12 Cal. 4th 631 (1996).

²³³⁶ *Id.* at 635.

²³³⁷ *See* Chapter II: Terms and Conditions of Employment (also discussing employment references).

²³³⁸ RCW 4.24.730.

²³³⁹ 111 Wn. App. 377 (2002).

²³⁴⁰ *See id.* at 392.

²³⁴¹ *Id.*

California courts have held that, where a special relationship exists between the parties, misrepresentations or omissions that would present a substantial, foreseeable risk of injury to third persons may subject the employer to liability.²³⁴² In *Randi W. v. Muroc Joint Unified Sch. Dist.*,²³⁴³ a 13-year-old girl who had been sexually molested by a school vice principal brought claims, including negligent misrepresentation and fraud, against other school districts and their employees for submitting references recommending the vice principal without disclosing his history of sexual molestations. The California Supreme Court held that the plaintiff's allegations were sufficient to support her fraud and negligent misrepresentation claims. First, the defendants owed plaintiff a duty not to misrepresent the character of the vice principal since it was reasonably foreseeable that an employer would hire the vice principal after reading the recommendation letters and that, as a result of being hired, he would molest a student such as the plaintiff.²³⁴⁴ Second, the defendants' letters were not merely non-disclosures, but were "misleading half-truths."²³⁴⁵ Third, the plaintiff was entitled to protection since she suffered physical injury resulting from the reliance of the district that ultimately hired the vice principal.²³⁴⁶ Fourth, plaintiff adequately pled causation between defendants' misconduct and her injuries.²³⁴⁷

SECTION 10.10 TORTIOUS INTERFERENCE WITH EMPLOYMENT CONTRACT

Claims for tortious interference with contractual relations or business expectancy are being raised with increasing frequency in employment litigation. In order to establish this claim, the plaintiff must prove the following elements:²³⁴⁸

- the existence of a valid contractual relationship or business expectancy;
- that defendant had knowledge of that relationship or expectancy;
- that defendant intentionally interfered, inducing or causing a breach or termination of the relationship or expectancy;
- that defendant interfered for an improper purpose or used improper means; and
- resultant damages to the plaintiff.

Once these elements are established, the defendant bears the burden of justifying the interference or showing that the actions were privileged.²³⁴⁹

This claim applies to a "contract" of employment and has been applied in cases of at-will employment, in which it could be argued that there is no "contract" in the first place. As this claim requires a third party's interference with a contract, an employer cannot interfere with its own contract with an employee.²³⁵⁰ If a supervisor terminates an employee pursuant to his company duties, the actions are those of the employer and there can be no personal liability on the part of the supervisor. The supervisor is privileged to interfere with another employee's employment contract with the employer, if the supervisor acts in good faith, believing that his actions are in furtherance of the employer's business.²³⁵¹

²³⁴² See *Randi W. v. Muroc Joint Unified Sch. Dist.*, 14 Cal. 4th 1066 (1997).

²³⁴³ *Id.*

²³⁴⁴ *Id.* at 1078.

²³⁴⁵ *Id.* at 1082.

²³⁴⁶ *Id.* at 1084.

²³⁴⁷ *Id.*

²³⁴⁸ *Commodore v. Unin. Mech. Contractors, Inc.*, 120 Wn.2d 120, 137 (1992); see also *Kjesbo v. Ricks*, 517 N.W.2d 585, 588 (Minn. 1994) (elements are: the existence of a contract; the alleged wrongdoer's knowledge of the contract; intentional procurement of its breach; without justification; which causes damage).

²³⁴⁹ *Id.*

²³⁵⁰ *Nordling v. N. States Power Co.*, 478 N.W.2d 498, 505 (Minn. 1991); *Guercio v. Prod. Automation Corp.*, 664 N.W.2d 379, 389 (Minn. Ct. App. 2003).

A plaintiff also may bring a tortious interference claim based on a former employer's intentional persuasion of other prospective employers not to hire a current or former employee. However, the absence of bad motive or malice on the part of the defendant should defeat this claim. For example, the defendant's good faith assertion of its legal rights in attempting to enforce a non-competition agreement should not constitute improper interference.²³⁵² In addition, an employer's subjectively honest assessment of a past employee's job performance in the course of an employment reference is proper, and thus should not support a claim for tortious interference.

The Ninth Circuit ruled in 2007 that, under California law, an employer may be liable for inducing a breach of contract by recruiting a competitor's employees after it knew that the employees were under a one-year employment contract. In *CRST Van Expedited, Inc. v. Werner Enter.*, the original employer hired truck drivers under an employment contract requiring them to remain employed for one year after the completion of an employer-funded training program. Two drivers completed the training program and signed the agreement. One month later, a competitor began recruiting the employees, despite knowledge of their one year contract and warnings from the original employer against interference. The employees moved to the competitor the next month. The original employer sued the new employer for intentional interference with contract. The Ninth Circuit held that because the new employer knew of the employment contracts, and still solicited the drivers for hire, it could be liable for intentional interference with those employment contracts.²³⁵³

Tortious interference with contract claims do not extend to a supervisor who interferes with another employee's contract with the employer, if the supervisor acts in good faith, believing that his actions are in furtherance of the employer's business. For example, if a supervisor terminates an employee pursuant to his company duties, the actions are those of the employer and no personal liability extends to the supervisor.

However, a company officer or agent can be liable for tortious interference with a contract if he acts outside the scope of his duties (*i.e.*, if he is acting for his personal benefit). For example, if the supervisor's actions are predominantly motivated by malice and bad faith, personal ill-will, spite, hostility, or a deliberate intent to harm the other employee, the supervisor may be individually liable.²³⁵⁴

A related claim is that of tortious interference with prospective business advantage. To prevail on this claim, the plaintiff must prove that the defendant intentionally and improperly interfered with a prospective contractual relation, by

- inducing or otherwise causing a third person not to enter into the prospective business relationship; or
- preventing the plaintiff from acquiring the prospective relationship.²³⁵⁵

A plaintiff who claims that a former employer intentionally persuaded other prospective employers not to hire him could bring this claim, for example. The absence of a bad motive or malice on the part of the defendant, however, will defeat this claim. In addition, an employer's subjectively honest assessment of a past employee's job performance in the course of an employment reference is proper, and thus cannot support a claim for tortious interference.²³⁵⁶

²³⁵¹ See *Giusti v. Sterling Wentworth Corp.*, 201 P.3d 966, 979 (Utah 2009).

²³⁵² *Leingang v. Pierce County Med. Bureau, Inc.*, 131 Wn.2d 133 (1997); *Dauphin v. Smith*, 42 Wn. App. 491 (1986).

²³⁵³ The court noted that had the employees been "at will" the original employer would not have had a claim. 479 F.3d 1099 (9th Cir 2007).

²³⁵⁴ *Ferguson v. Michael Foods, Inc.*, 74 F. Supp. 2d 862 (D. Minn. 1999); *Wallin v. Minn. Dep't of Corr.*, 598 N.W.2d 393 (Minn. Ct. App. 1999); *Guercio*, 664 N.W.2d at 389; *Giusti*, 201 P.3d at 979.

²³⁵⁵ *United Wild Rice, Inc. v. Nelson*, 313 N.W.2d 628, 633 (Minn. 1982); see also *Am. Bldg. Contractors, Inc. v. Asset Restoration & Remodeling, LLC*, No. 09-294, 2009 WL 3736022 (Minn. Ct. App. Nov. 10, 2009) (listing elements).

²³⁵⁶ *Hunt v. Univ. of Minn.*, 465 N.W.2d 88, 96 (Minn. Ct. App. 1991).

Note that a Minnesota employer may be held vicariously liable for an employee's non-compliance with a prior employer's non-solicitation agreement where such non-compliance is a well-known industry hazard: for example, where the "risk of employees misappropriating trade secrets is a well-known hazard in the insurance industry."²³⁵⁷

SECTION 10.11 WRONGFUL TERMINATION

(a) Wrongful Constructive Discharge

To establish the tort of wrongful constructive discharge in Washington, an employee must show: (1) that the employer deliberately made the working conditions intolerable for the employee; (2) that a reasonable person in the employee's position would be forced to resign; (3) that the employee resigned solely because of the intolerable conditions; and (4) that the employee suffered damages.²³⁵⁸ An employee may show conditions are intolerable by demonstrating aggravating circumstances or a continuous pattern of discriminatory treatment.²³⁵⁹

Washington courts have not insisted on a technical "resignation" to prove constructive discharge, but have focused on whether the employee permanently left the job because of intolerable working conditions created by the employer.²³⁶⁰ The Seventh Circuit has held that an employee must remain on the job until after any investigation into the matter is completed to present a case of constructive discharge under Title VII.²³⁶¹ While not binding in the Ninth Circuit, this decision may be persuasive to local courts faced with similar issues.

To prevail on a claim for wrongful constructive discharge under California law, the employer must either deliberately create the intolerable working conditions that trigger resignation, or at a minimum, must know about them and fail to remedy the situation in order to force the employee to resign.²³⁶² The conditions must be sufficiently extraordinary and egregious so that a reasonable person faced with the same conditions would have no reasonable alternative except to quit. In *Turner v. Anheuser-Busch, Inc.*, the plaintiff's claim failed because he could point only to "single, trivial, or isolated acts" of employer misconduct. According to the court, working conditions must either be unusually aggravated or amount to a continuous pattern to support a constructive discharge claim.

Under Utah law, a resignation under working conditions that a reasonable employee would consider intolerable is equivalent to a termination.²³⁶³ An employee who is constructively discharged has a cause of action for wrongful termination.²³⁶⁴

(b) Termination in Violation of Public Policy

Another exception to "at-will" employment is the tort of wrongful discharge in violation of public policy. Under this theory, an employer may not terminate an employee if such termination contravenes a clear mandate of public policy.²³⁶⁵ This tort is becoming an increasingly popular tool in the hands of plaintiffs' employment lawyers.

In order to bring a claim of wrongful discharge in violation of public policy, an employee must establish the following:²³⁶⁶

²³⁵⁷ *Hagen v. Burmeister & Assoc., Inc.*, 633 N.W.2d 497, 505 (Minn. 2001).

²³⁵⁸ *Haubry v. Snow*, 106 Wn. App. 666, 677 (2001).

²³⁵⁹ *Id.*

²³⁶⁰ *See Korslund v. DynCorp Tri-Cities Servs., Inc.*, 156 Wn.2d 168 (2005).

²³⁶¹ *Cooper-Schut v. Visteon Auto. Sys.*, 361 F.3d 421 (7th Cir. 2004).

²³⁶² *Turner v. Anheuser-Busch, Inc.*, 7 Cal. 4th 1238 (1994).

²³⁶³ *Touchard v. La-Z-Boy, Inc.*, 148 P.3d 945, 954 (Utah 2006).

²³⁶⁴ *Id.*

- a clear public policy exists;
- the public policy would be jeopardized or the employee reasonably believes it will be jeopardized;
- the employee was terminated because he or she engaged in conduct protected by the public policy; and
- the employer has no overriding justification for the discharge.

Terminating an employee based on the employee's involvement in one of the following activities may contravene fundamental public policy:²³⁶⁷

- refusing to commit an act the employee reasonably believes is illegal;
- performing a public duty or obligation;²³⁶⁸
- exercising a legal right; and
- reporting employer misconduct.

In *Danny v. Laidlaw Transit Serv., Inc.*, the Washington Supreme Court recognized a claim for wrongful termination in violation of public policy for terminating an individual taking leave related to domestic violence. The Court held that protecting oneself and children from domestic abuse is a public duty.²³⁶⁹

All employers, regardless of size, are subject to these suits. This leads employees to use this tort to bring discrimination claims against employers who are not subject to Washington's Law Against Discrimination ("WLAD") because of their small size.²³⁷⁰ In *Roberts v. Dudley*, the court allowed an employee, whose employer was not subject to the WLAD, to bring a sex discrimination claim against her employer because there was clear legislative evidence that sex discrimination is in violation of public policy.²³⁷¹

To bring a claim for wrongful discharge in violation of public policy, an employment relationship must exist. In *Awana v. Port of Seattle*, a Washington appellate court refused to allow an employee of a subcontractor, Alpha, to sue a prime contractor, the Port of Seattle, for the tort of wrongful termination in violation of public policy. The employee reported Port of Seattle workplace safety irregularities. Soon thereafter, the employee was terminated by Alpha. The court ruled that Alpha, not the Port of Seattle, controlled the employment relationship, and therefore the employee could not sue the Port of Seattle.²³⁷²

²³⁶⁵ See *Thompson v. St. Regis*, 102 Wn.2d 219 (1984). See, e.g., *Franklin v. Monadnock Co.*, 151 Cal. App. 4th 252 (2007) (former employee's claim for wrongful termination in violation of public policy may proceed where employee was terminated because he complained to employer about threats of violence by a co-worker and reported criminal assault to the police, based on the public policies requiring employers to provide a safe and secure workplace and encouraging employees to report credible threats of violence in the workplace); *Touchard*, 148 P.3d at 955 (Utah 2006) ("Having concluded that the public policy exception applies to both actual and constructive discharge. . .").

²³⁶⁶ *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931 (1996); see also *Ellis v. City of Seattle*, 142 Wn.2d 450, 461 (2000), amended (2001) (in circumstances involving potential serious physical harm there is no requirement that the act actually be illegal, only that the employee has a reasonable belief that such is illegal); *Briggs v. Nova Servs.*, 166 Wn.2d 794 (2009) (corporation did not violate clear public policy when it terminated two managers who wrote a letter expressing dissatisfaction with the performance of a director); *Travis v. Tacoma Pub. Sch.*, 120 Wn. App. 542 (2004) (employee who resigns likely cannot state a claim for wrongful termination).

²³⁶⁷ See *Dicomes v. State of Wash.*, 113 Wn.2d 612 (1989); *Blinka v. WSB4*, 109 Wn. App. 575 (2001); see also *Ellis v. City of Seattle*, 142 Wn.2d 450, 461 (2000) (holding that there is no requirement that the act actually be illegal, only that the employee has a reasonable belief that such is illegal).

²³⁶⁸ See, e.g., *Gaspar v. Peshastin Hi-Up Growers*, 131 Wn. App. 630, 638 (2006) (holding that there is a limited but clear public policy encouraging citizens to cooperate with law enforcement officials when requested).

²³⁶⁹ *Danny v. Laidlaw Transit Serv., Inc.*, 165 Wn.2d 200 (2008).

²³⁷⁰ See *Roberts v. Dudley*, 140 Wn.2d 58 (2000) (Washington Supreme Court allowed an employee of a clinic with fewer than eight employees to bring a sex discrimination claim against her employer under the tort of termination in violation of public policy even though the Washington Law Against Discrimination does not apply to employers with fewer than eight employees).

²³⁷¹ *Id.*

Typically, Washington Courts have applied this tort only in narrow circumstances where a clearly articulated mandate of public policy exists, such as a statute, regulation, constitutional provision, or prior judicial decision.²³⁷³ For example, the Washington State Supreme Court has held that zoning and building codes can satisfy this requirement.²³⁷⁴

To establish a claim of termination in violation of public policy under California law, the public policy must be: (1) embodied in a statute or constitutional provision; (2) for the benefit of the public; (3) articulated at the time of discharge; and (4) fundamental and substantial.²³⁷⁵ California courts have held that employees who work for companies with fewer than five employees (and thus are not covered under the state's Fair Employment and Housing Act ("FEHA")), cannot establish a claim for wrongful termination in violation of public policy on FEHA alone.²³⁷⁶ While certain internal executions may not be protected under the "internal affairs doctrine," that doctrine does not apply to officers of foreign corporations.²³⁷⁷

Employers in California may be able to argue that an employee must exhaust internal grievance procedures before pursuing a civil action for wrongful termination in violation of public policy.²³⁷⁸

Under Utah law, employers have a duty not to terminate an employee in violation of "clear and substantial public policy."²³⁷⁹ Utah courts have identified four categories that invoke a "clear and substantial public policy": (1) discharging an employee for refusing to commit an illegal or wrongful act; (2) discharging an employee for performing a public obligation; (3) discharging an employee for exercising a legal right or privilege; and (4) discharging an employee for reporting an employer's criminal activities to the appropriate authorities.²³⁸⁰ Most recently, the Utah Supreme Court has held that firing an employee for claiming workers' compensation benefits violates clear and substantial public policy.²³⁸¹

(c) Termination in Violation of Sarbanes-Oxley Act

Employees who are discharged after reporting certain business irregularities may have a whistle-blower claim under the Sarbanes-Oxley Act.²³⁸² The Sarbanes-Oxley Act prevents companies from discharging, demoting, suspending, or threatening employees because of their involvement in certain protected activities, such as providing information relating to fraud against shareholders.²³⁸³ Employees who believe they have been discriminated against by a company in violation of the Sarbanes-Oxley Act must file a complaint with the OSHA area director within 180 days of the alleged violation of the Act.²³⁸⁴

²³⁷² Employees also may be prevented from using the tort of wrongful termination in violation of public policy to re-litigate discrimination cases already settled under other administrative proceedings. *Awana v. Port of Seattle*, 121 Wn. App. 429 (2004).

²³⁷³ *Rose v. Anderson Hay and Grain Co.*, 168 Wn. App. 474 (2012) (no claim for wrongful discharge violation of public policy when federal statute provided adequate remedy).

²³⁷⁴ *Hubbard v. Spokane County*, 146 Wn.2d 699, 709 (2002); see also *Reninger v. Dep't of Corr.*, 134 Wn.2d 437 (1998).

²³⁷⁵ *Sequoia Ins. Co. v. Super. Court*, 13 Cal. App. 4th 1472 (1993); *Barbosa v. IMPCO Technologies, Inc.*, 179 Cal. App. 4th 1116 (2009) (holding that public policy protects an employee from being terminated for making a mistaken but good faith claim to overtime compensation); see also *Silguero v. Creteguard, Inc.*, 187 Cal. App. 4th 60 (2010) (employer's honoring of employee's non-competition agreement with former employer is void and unenforceable under Cal. Bus. & Prof. Code. § 16600 and employee's complaint alleges facts against employer for wrongful termination in violation of public policy for honoring such agreement out of "respect and understanding with colleagues in the same industry," notwithstanding employer's belief that "non-compete clauses are not legally enforceable" in California).

²³⁷⁶ See, e.g., *Jennings v. Marralle*, 8 Cal. 4th 121 (1994).

²³⁷⁷ *Lidow v. Superior Court*, 206 Cal. App. 4th 351 (2012) (CEO terminated after complaints about accounting "irregularities" at foreign parent company).

²³⁷⁸ See *Palmer v. Regents of the Univ. of Cal.*, 107 Cal. App. 4th 899 (2003).

²³⁷⁹ *Touchard v. La-Z-Boy Inc.*, 148 P.3d 945, 948 (Utah 2006).

²³⁸⁰ *Ryan v. Dan's Food Stores, Inc.*, 972 P.2d 395, 408 (Utah 1998).

²³⁸¹ *Touchard*, 148 P.3d at 948.

²³⁸² See Chapter IX: Employment Discrimination. *Richards v. Lexmark Int'l Inc.*, DOL ALJ, No. 2004-SOX-00049 (Oct. 1, 2004).

²³⁸³ 29 C.F.R. pt. 1980.102.

(d) Termination in Violation of Dodd-Frank Act

Under the Dodd-Frank Act, an employee may receive a large bounty for whistleblowing if they supply the Securities and Exchange Commission (“SEC”) with information that results in an action brought by the SEC under the securities laws that results in monetary sanctions exceeding \$1,000,000.²³⁸⁵ An employee who is discharged after reporting such information or initiating, testifying in, or assisting in any investigation or action based upon such information may bring an action in federal court against the employer.²³⁸⁶ An employee must file a complaint within three years after the employee knew or reasonably should have known of facts material to the right of action, or within six years after the violation occurred.²³⁸⁷

SECTION 10.12 EMPLOYER LIABILITY FOR EMPLOYEE’S ACT (VICARIOUS LIABILITY)

Under a doctrine called *respondet superior*, an employer may be vicariously liable for its employees’ negligence in causing injuries to third parties, if the employee was acting within the scope of employment at the time of the occurrence.²³⁸⁸ Generally, an employee’s actions are “within the scope of employment” if:²³⁸⁹

- the actions are the kind the employee was employed to perform;
- the actions occur substantially within authorized limits of time and space; and
- the employee is working, at least in part, to serve the employer.

The Washington Supreme Court held in *Robel v. Roundup Corp.*, that an employer may be liable for a manager’s participation in lewd name calling that occurred while the manager was engaged in his job duties in the deli of a grocery store.²³⁹⁰ Although the employer never authorized the name calling, and the manager did not serve the employer by participating in the behavior, the court held the employer liable since the behavior occurred: (1) on company property; (2) during working hours, and (3) while the manager was being paid to interact with co-workers and customers.²³⁹¹

In other circumstances, employers are not liable for the acts of their employees. For instance, employers are not liable for intentional or criminal harmful acts of employees done outside the scope of employment.²³⁹² Businesses are not liable to third persons for injuries resulting from negligent acts of their

²³⁸⁴ 29 C.F.R. pt. 1980.103(d); Pub. L. No. 111-203, § 922 (2010), amending 18 U.S.C. § 1514A.

²³⁸⁵ See Chapter IX: Employment Discrimination.

²³⁸⁶ Pub. L. No. 111-203, § 922 (2010).

²³⁸⁷ Somewhat confusingly, the Dodd-Frank Act also provides that in no event shall any action be brought more than 10 years after the violation took place. The SEC must issue final regulations implementing the relevant Dodd-Frank Act provisions by April 17, 2011, which will hopefully provide clarity on how the 10-year time limitation interacts with the three and six year time limitations.

²³⁸⁸ *Dickinson v. Edwards*, 105 Wn.2d 457, 466 (1986) (an employer’s vicarious liability for injuries caused by an employee to a fellow employee can be limited by the fellow servant doctrine and workers’ compensation laws); see *Bennett v. Messick*, 76 Wn.2d 474 (1969); *Sutton v. Byer Excavating, Inc.*, 271 P.3d 169, 171 (Utah Ct. App. 2012).

²³⁸⁹ *Hays v. Lake*, 36 Wn. App. 827 (1984). See, e.g., *PCO, Inc. v. Christensen, Miller*, 150 Cal. App. 4th 384 (2007) (holding a law firm liable for the acts of a non-equity partner, regardless of internal agreements concerning the partner’s separate practice, where the evidence showed the firm listed the partner as a named partner and promoted him as the “head of the firm’s white collar criminal defense practice” on its website; and the partner used the firm’s letterhead and identified his affiliation with the firm on the record); *Birkner v. Salt Lake Cnty.*, 771 P.2d 1053, 1056-57 (Utah 1989).

²³⁹⁰ *Robel v. Roundup Corp.*, 148 Wn.2d 35, 59 (2002).

²³⁹¹ *Id.* at 54.

²³⁹² *Niece v. Elmview Group Home*, 131 Wn.2d 39, 56 (1997); see also *Kephart v. Genuity, Inc.*, 136 Cal. App. 4th 280, 292 (2006) (holding that regardless of where and when an injury occurs, an employer will not be held liable where intentional misconduct does not arise from the conduct of the employer’s enterprise but instead arises from personal malice or as the result of personal compulsion).

hired independent contractors.²³⁹³ Similarly, in California, businesses that hire independent contractors are not liable to an independent contractor's employees or subcontractors for injuries sustained during work.²³⁹⁴

²³⁹³ *Henning v. Crosby Group*, 116 Wn.2d 131, 133 (1991).

²³⁹⁴ *See Michael v. Denbeste Transp., Inc.*, 137 Cal. App. 4th 1082 (2006).

CHAPTER XI

EMPLOYMENT RECORDS AND EMPLOYEE ACCESS TO RECORDS

SECTION 11.1 RECORD RETENTION REQUIREMENTS

Many federal and state laws require employers to maintain and preserve designated records and reports. The intentional destruction of employment documents to avoid potential liability in either anticipation of litigation or during the course of litigation is unlawful.²³⁹⁵ Therefore, even when destroying records pursuant to a records-destruction policy, employers must exercise care to avoid destroying documents that may be relevant to litigation or anticipated litigation.

The passage of the Sarbanes-Oxley Act of 2002 places renewed emphasis on document retention. This Act makes it a criminal offense to knowingly destroy, alter, or falsify records with the intent to obstruct or influence a federal investigation, bankruptcy proceeding or audit.²³⁹⁶

The following tables are summaries of some of the more important record-keeping requirements applicable to private sector employers:

(a) Employee Recruitment and Advertising

Employment Record	Retention	Authority
With regard to apprenticeship programs, certain employers must file an Apprenticeship Information Report EEO-2 every year and keep the following records for all applicants: names, addresses, sex, race or national origin, dates of applications (including the chronological order in which applications were received), test papers, interview records, requests for reasonable accommodation, and any other information needed to complete the EEO-2.	Two years or the apprenticeship period, whichever is longer.	Title VII of Civil Rights Act of 1964, 42 U.S.C. § 2000e-8(c); 29 C.F.R. §§ 1602.15-21.
Immigration and Naturalization Service Form I-9 (Employment Eligibility Verification Form) in the case of the recruiting or referral for a fee (without hiring).	Three years after the date of the recruiting or referral.	Immigration and Nationality Act, 8 U.S.C. § 1324a(b)(3).
Job orders given to employment agencies or labor organizations for recruitment.	One year from date of personnel action.	Age Discrimination in Employment Act, 29 U.S.C. § 626(a); 29 C.F.R. § 1627.3(b)(1)(iii).

²³⁹⁵ *Capellupo v. FMC Corp.*, 126 F.R.D. 545 (D. Minn. 1989).

²³⁹⁶ Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 802(a) (codified at 18 U.S.C. §§ 1519-20).

Employment Record	Retention	Authority
Employment advertisements or notices to the public or employees regarding job openings, training programs, promotions, and overtime opportunities.	One year from date of personnel action.	Age Discrimination in Employment Act, 29 U.S.C. § 626(a); 29 C.F.R. § 1627.3(b)(1)(vi).
(b) Employee Hiring, Firing, Promotion and Transfer		
Employment Record	Retention	Authority
Any personnel or employment record having to do with hiring, promotion, demotion, transfer, lay-off or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship.	One year from date of event.	Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-8(c); 29 C.F.R. § 1602.14.
Employers with 100 or more employees must file and maintain annually an Employer Information Report form EEO-1. A copy of the most recent report shall be retained at all times at each reporting unit, or at company or divisional headquarters.	One year. The form should be completed annually on or before September 30.	Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-8(c); 29 C.F.R. § 1602.7.
Immigration and Naturalization Service Form I-9 (Employment Eligibility Verification Form).	Three years after hire or one year after termination, whichever is later.	Immigration and Nationality Act, 8 U.S.C. § 1324a(b)(3).
Job applications and resumes submitted to the employer in response to job advertisements, including records pertaining to the failure or refusal to hire any person, and records for temporary positions.	One year from date of event.	Age Discrimination in Employment Act, 29 U.S.C. § 626(a); 29 C.F.R. § 1627.3(b)(1)(i).
Records pertaining to promotion, demotion, transfer, selection for training, layoff, recall, or discharge of any employee.	One year from date of event.	Age Discrimination in Employment Act, 29 U.S.C. § 626(a); 29 C.F.R. § 1627.3(b)(1)(ii).
Test papers, which disclose the results of any employer-administered test considered in connection with any personnel action.	One year from date of event.	Age Discrimination in Employment Act, 29 U.S.C. § 626(a); 29 C.F.R. § 1627.3(b)(1)(iv).

Employment Record	Retention	Authority
Results of any physical examination considered in connection with any personnel action.	One year from date of event.	Age Discrimination in Employment Act, 29 U.S.C. § 626(a); 29 C.F.R. § 1627.3(b)(1)(v).
Records pertaining to applicants for apprenticeships in Minnesota, whether accepted or rejected. Records should be maintained in manner that permits identification of minority and female applicants.	Five years.	Minn. R. 5200.0420.
Records including the name, address, and date of birth of each employee, and hours worked and wages paid for each employee.	Three years.	Utah Minimum Wage Act, Utah Code Ann. § 34-40-201.

(c) Employee Compensation

Employment Record	Retention	Authority
Payroll records, including records of wages and hours, collective bargaining agreements, plans, trusts, and individual employment contracts, written agreements or memoranda summarizing the terms of oral agreements or understandings with employees, and sales and purchase records in such form as the employer maintains records in the ordinary course of business.	Three years.	Fair Labor Standards Act, 29 U.S.C. § 211(c); 29 C.F.R. § 516.5(a)-(c).
Basic time and earnings cards or sheets on which are entered the daily starting and stopping time of the individual employees, wage rate tables, order, shipping and billing records, records of additions to or deductions from wages and total additions to or deductions from wages paid each period, and records used in determining costs, depreciation and charges if such costs and charges are involved in wage calculation.	Two years.	Fair Labor Standards Act, 29 U.S.C. § 211(c); 29 C.F.R. § 516.6(a)-(c); National Labor Relations Act, 29 U.S.C. § 206(d)(1); 29 C.F.R. § 1620.32.
Payroll or other records for each employee which contain name, address, date of birth, occupation, rate of pay and compensation earned each week.	Three years.	Age Discrimination in Employment Act, 29 U.S.C. § 626; 29 C.F.R. § 1627.3(a).

Employment Record	Retention	Authority
Washington Administrative Code requires employers to keep and preserve payroll records including the name, address, occupation, date of birth if under eighteen, time of day and day of week on which the employee's workweek begins, hours worked each workday and total hours worked each workweek, total daily or weekly straight-time earnings, total overtime excess compensation for the workweek, total additions to or deductions from wages each pay period, total wages paid each pay period, and date of payment and pay period covered by payment.	Three years.	Washington Administrative Code 296-126-050, 296-128-010, 296-128-020.
Records including the name, address, and occupation of each employee, the rate of pay and the amount paid each pay period to each employee, and the hours worked each day in each workweek by each employee.	Three years.	Minnesota Fair Labor Standards Act, Minn. Stat. § 177.30.

(d) Employee Benefit Plans

Employment Record	Retention	Authority
All employee benefit plans, such as pension and insurance plans and copies of any seniority systems and merit systems which are in writing.	Duration of plan, plus one year.	Age Discrimination in Employment Act, 29 U.S.C. § 626; 29 C.F.R. § 1627.3(b)(2).
All employers are required to file a description or report under ERISA and must maintain records in regard to all documents pertaining to the disclosures required in the report, including vouchers, work sheets, receipts, and resolutions.	Six years after filing date.	Employee Retirement and Income Security Act, 29 U.S.C. § 1027.

(e) Leaves of Absence

Employment Record	Retention	Authority
Basic payroll and employee data, including name, address, occupation, rate or basis of pay and terms of compensation, daily and weekly hours worked for pay period, additions to or deductions from wages, and total compensation paid.	Three years.	Family and Medical Leave Act, 29 U.S.C. § 2616(b); 29 C.F.R. §§ 825.500(b)-(c).
Dates FMLA leave is taken by FMLA-eligible employees.	Three years.	Family and Medical Leave Act, 29 U.S.C. § 2616(b); 29 C.F.R. §§ 825.500(b)-(c).

Employment Record	Retention	Authority
The hours of FMLA leave if leave is taken in increments of less than one full day.	Three years.	Family and Medical Leave Act, 29 U.S.C. § 2616(b); 29 C.F.R. §§ 825.500(b)-(c).
Copies of notices of leave furnished by the employee under the FMLA, if in writing, and copies of all general and specific notices given to employees as required under the FMLA.	Three years.	Family and Medical Leave Act, 29 U.S.C. § 2616(b); 29 C.F.R. §§ 825.500(b)-(c).
All documents (including written and electronic records) describing employee benefits or employer policies and practices regarding the taking of paid and unpaid leaves.	Three years.	Family and Medical Leave Act, 29 U.S.C. § 2616(b); 29 C.F.R. §§ 825.500(b), (c)(5).
Premium payments of employee benefits.	Three years.	Family and Medical Leave Act, 29 U.S.C. § 2616(b); 29 C.F.R. §§ 825.500(b), (c)(6).
Records of any dispute between the employer and an eligible employee regarding designation of leave as FMLA leave, including any written statement from the employer or employee of the reasons for the designation and for the disagreement.	Three years.	Family and Medical Leave Act, 29 U.S.C. § 2616(b); 29 C.F.R. §§ 825.500(b), (c)(7).

(f) Charges of Discrimination

Employment Record	Retention	Authority
All records, including personnel records, pertaining to any charge of discrimination.	Until the conclusion of the matter.	Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-8(c); 29 C.F.R. § 1602.14; Americans with Disabilities Act, 42 U.S.C. § 12117(a); 29 C.F.R. § 1602.14; Age Discrimination in Employment Act, 29 U.S.C. § 626(a); 29 C.F.R. § 1627.3(b)(3).
All records pertaining to the involuntary discharge of any employee.	One year from date of discharge.	Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-8(c); 29 C.F.R. § 1602.14; Americans with Disabilities Act, 42 U.S.C. § 12117(a); 29 C.F.R. § 1602.14.
Records of complaints of disability discrimination, including personnel and employment records.	Until final conclusion.	Rehabilitation Act of 1973, 29 U.S.C. § 793, 41 C.F.R. § 60-741.81.

Employment Record	Retention	Authority
Records concerning persons with disabilities (including requests for reasonable accommodations).	One year from date record made or personnel action taken, whichever is later.	Americans with Disabilities Act, 42 U.S.C. § 12117(a); 29 C.F.R. § 1602.14.

(g) Drug and Alcohol Testing

Employment Record	Retention	Authority
Records related to positive test results and/or refusals to take required drug and/or alcohol tests, driver evaluation and referrals.	Five years.	Controlled Substances and Alcohol Use and Testing, 49 C.F.R. § 382.401.
Equipment calibration documentation, records related to administration of alcohol and controlled substances testing programs, copy of annual calendar year summary.	Five years.	Controlled Substances and Alcohol Use and Testing, 49 C.F.R. § 382.401.
Records related to collection process, including collection logbooks, documents relating to random-selection process, reasonable suspicion testing, post-accident testing, documents verifying employee's inability to provide breath for testing, consolidated annual calendar year summaries.	Two years.	Controlled Substances and Alcohol Use and Testing, 49 C.F.R. § 382.401.
Records related to negative test results.	One year.	Controlled Substances and Alcohol Use and Testing, 49 C.F.R. § 382.401.
Records related to controlled substance testing training.	Two years after individual ceases to perform function.	Controlled Substances and Alcohol Use and Testing, 49 C.F.R. § 382.401.

(h) Government Contractors

Employment Record	Retention	Authority
Personnel/employment records made or kept by contractor including requests for accommodation, results of physical examinations, job advertisements and postings, applications and resumes, tests and test results, interview notes, and other records relating to hiring, assignment, promotion, demotion, transfer, lay-off, voluntary termination, compensation, requests for reasonable accommodation, and selection for training or apprenticeship. [Government contractors with 150 or more employees and with government contract of \$150,000 or more.]	Two years from date of making record of action or date of action, whichever is later.	Exec. Order No. 11,246; 41 C.F.R. § 60-1.12; Rehabilitation Act, 29 U.S.C. § 793; 41 C.F.R. § 60-741.80; Vietnam Era Veteran's Readjustment Assistance Act of 1974, 41 C.F.R. § 60-250.80.
Same records as listed above. [Government contractors with less than 150 employees and government contract of less than \$150,000.]	One year from date of making record of action or date of action, whichever is later.	Exec. Order No. 11,246; 41 C.F.R. § 60-1.12; Rehabilitation Act, 29 U.S.C. § 793; 41 C.F.R. § 60-741.80; Vietnam Era Veteran's Readjustment Assistance Act of 1974, 41 C.F.R. § 60-250.80.
Records relating to involuntary termination. [Government contractors with 150 or more employees and with government contract of \$150,000 or more.]	Two years from date of termination.	Exec. Order No. 11,246; 41 C.F.R. § 60-1.12; Rehabilitation Act, 29 U.S.C. § 793; 41 C.F.R. § 60-741.80; Vietnam Era Veteran's Readjustment Assistance Act of 1974, 41 C.F.R. § 60-250.80.
Records relating to involuntary termination. [Government contractors with less than 150 employees and government contract of less than \$150,000.]	One year from date of termination.	Exec. Order No. 11,246; 41 C.F.R. § 60-1.12; Rehabilitation Act, 29 U.S.C. § 793; 41 C.F.R. § 60-741.80; Vietnam Era Veteran's Readjustment Assistance Act of 1974, 41 C.F.R. § 60-250.80.
Personnel records relevant to a complaint of discrimination or compliance review or action, such as personnel or employment records related to the aggrieved person and all employees with similar position, including application forms and test papers.	Until conclusion of matter.	Exec. Order No. 11,246; 41 C.F.R. § 60-1.12; Rehabilitation Act, 29 U.S.C. § 793; 41 C.F.R. § 60-741.80; Vietnam Era Veteran's Readjustment Assistance Act of 1974, 41 C.F.R. § 60-250.80.

Employment Record	Retention	Authority
Written affirmative action program with supporting documents, including evaluations, documents regarding compliance with EEO anti-discrimination and affirmative action regulations, test records and results.	Retention period not specified. Five years recommended.	Exec. Order No. 11,246; 41 C.F.R. § 60-1.40(a).

SECTION 11.2 E-DISCOVERY AND SPOILIATION OF EVIDENCE

It is important to briefly mention the topics of electronic discovery and spoliation of evidence, as the proliferation of electronic data has led to a growing body of law surrounding these issues. While this handbook is not meant as a comprehensive guide to electronic discovery and spoliation issues, it is worth noting some basic principles.

A company's obligation to preserve evidence arises when they have notice that the evidence is relevant to litigation or when a party reasonably anticipates litigation.²³⁹⁷ When a party reasonably anticipates litigation, it must suspend its general document retention and destruction policy and put a "litigation hold" in place to preserve relevant documents.²³⁹⁸ A litigation hold is merely the first step in this process. Companies and their counsel must be vigilant to oversee compliance with the litigation hold and monitor the efforts to retain and produce the relevant documents. A company does not need to preserve every scrap of paper in their business, but must preserve evidence that is reasonably likely to be the subject of a discovery request, even before that discovery request is received.²³⁹⁹ Failure to preserve relevant documents may lead a court to find that there has been spoliation of evidence, possibly leading to monetary sanctions in litigation, an adverse jury inference, and even an entry of judgment in the opposing party's favor.

A leading line of cases on electronic discovery and spoliation of evidence is known as the *Zubulake* line of cases, authored by Judge Scheindlin in the Southern District of New York.²⁴⁰⁰ In a 2010 case, *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of America Sec., LLC*, Judge Scheindlin authored another opinion on this topic that provides some illumination regarding the severity of conduct at issue and the possible sanctions handed down by the court as a consequence.²⁴⁰¹ When analyzing a party's conduct in preserving relevant evidence, a court may distinguish between negligent and grossly negligent conduct. The following is a non-exhaustive list of acts that have been found negligent, leading to the imposition of monetary sanctions:

- failure to actively supervise preservation efforts and the search for records (*e.g.* delegating the search to assistants without "meaningful supervision");
- failure to perform broad enough searches, by failing to identify all key custodians and collect their information or by failing to perform adequate computer searches; and
- failure to preserve backup tapes in certain circumstances.²⁴⁰²

²³⁹⁷ See *Best Buy Stores, L.P. v. Developers Diversified Realty Corp., DDR GLH, LLC*, 247 F.R.D. 567, 570 (D. Minn. 2007); see also *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 685 F. Supp. 2d 456 (S.D.N.Y. 2010).

²³⁹⁸ *Pension Comm.*, 685 F. Supp. 2d at 466.

²³⁹⁹ *Best Buy Stores*, 247 F.R.D. at 570.

²⁴⁰⁰ See generally *Pension Comm.*, 685 F. Supp. 2d 456 (discussing the *Zubulake* opinions).

²⁴⁰¹ *Id.*

²⁴⁰² See *id.* at 488-96.

The following is a non-exhaustive list of actions that have been found to be grossly negligent, leading to an adverse jury instruction as well as monetary sanctions:

- failure to issue a written litigation hold;
- failure to identify all of the key players and to ensure that their electronic paper and records are preserved;
- failure to cease the deletion of e-mail or to preserve the records of former employees that are in a party's possession, custody, or control; and
- failure to preserve backup tapes when they are the sole source of relevant information or when they relate to key individuals, if the relevant information maintained by those key individuals is not obtainable from readily accessible sources.²⁴⁰³

The imposition of sanctions will vary and be heavily dependent on the facts of each case. By working with counsel to develop a thoughtful and deliberate document preservation plan, employers may be able to avoid monetary sanctions or other penalties in subsequent litigation.

SECTION 11.3 LILLY LEDBETTER FAIR PAY ACT OF 2009

The passage of the Lilly Ledbetter Fair Pay Act of 2009 indirectly places a renewed emphasis on document retention. The Ledbetter Act adopts what is commonly referred to as the “paycheck rule,” meaning that the statute of limitations restarts every time someone receives a paycheck or other remuneration that has been impacted, in some way, by a prior discriminatory decision.²⁴⁰⁴ The Ledbetter Act revives an immeasurable number of claims that previously would have been time-barred because they were based on decisions made decades ago.

The Ledbetter Act thus imposes additional evidentiary and administrative burdens on employers. While the employee retains the burden to prove that discrimination occurred, employers likely will be forced to defend against an employee's recitation of events with little remaining evidence and long after key documents have been lost or recycled. Despite the record-keeping requirements outlined above, records reflecting compensation policies and key decisions should be maintained, indefinitely for now, until the courts begin to define the parameters of the Ledbetter Act.

SECTION 11.4 EMPLOYEE ACCESS TO PERSONNEL RECORDS

(a) Washington Law

Washington law provides certain rights to employees with respect to their personnel records. Every employer must, at least annually upon the request of an employee, permit that employee to inspect any or all of his or her own personnel file(s).²⁴⁰⁵ The statute does not contain a definition of what constitutes an employee's “personnel files.” In an unbinding administrative policy, the Washington Department of Labor & Industries has interpreted “personnel files” to generally include all records of employment and other information required for business or legal purposes, including the following:²⁴⁰⁶

- records of employment and such other information required for business or legal purposes;
- documents containing employees' qualifications;
- verification of training completed;

²⁴⁰³ *Id.* at 471.

²⁴⁰⁴ Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2 (Jan. 29, 2009).

²⁴⁰⁵ RCW 49.12.240.

²⁴⁰⁶ While not technically binding on any employer, this enforcement guidance indicates how the Department would respond to a request for enforcement if an employee believed that his or her rights had been violated. *See* Washington Department of Labor & Industries Administrative Policy - E.S.C. 7 (Jan. 2, 2002), <http://www.lni.wa.gov/workplacernights/files/policies/esc7.pdf>.

- signed job descriptions;
- supervisor's files;
- all performance evaluations, letters of commendation and letters of reprimand;
- salary, sick and other vacation leave hours; and
- summaries of benefits and other similar information.

Each employer must make such files available at the location where the requesting employee works or at a mutually convenient location agreed upon between employer and employee within a reasonable period of time (typically 10 business days or less) after the employee's request.²⁴⁰⁷

In addition, an employee may annually petition the employer to review all information in the employee's personnel files that are regularly maintained by the employer. The employer must then determine if there is any irrelevant or erroneous information in the files, and must remove all such information. If an employee does not agree with the employer's determination, the employee may, at his or her request, have placed in the files a written statement containing the employee's rebuttal or correction.²⁴⁰⁸

A former employee retains this right of rebuttal or correction for two years following separation of employment.²⁴⁰⁹

While a plain reading of this statute appears to grant a former employee only the right to respond to derogatory information, the Department of Labor & Industries has taken the position that former employees retain the right to inspect their personnel files after termination.²⁴¹⁰

Employees' rights regarding their personnel files do not apply to records relating to the investigation of a possible criminal offense or records compiled in preparation for an impending lawsuit which would not be available to another party under the rules of pretrial discovery.²⁴¹¹

(b) Minnesota Law

The Minnesota Personnel Record Review and Access Act also provides certain rights to employees with respect to their personnel records.²⁴¹² In essence, the statute requires that an employee be given periodic access to his or her "personnel record," and it provides the employee an opportunity to dispute certain information in that record. The "personnel record" review provisions extend to any "person who has one or more employees."²⁴¹³ The balance of the law applies to any employer located in Minnesota with 20 or more employees (excluding public employers subject to the Minnesota Data Practices Act).²⁴¹⁴

(i) Contents of a Personnel Record

To the extent they are maintained by an employer, an employee has the right to review his or her personnel records, including:²⁴¹⁵

²⁴⁰⁷ RCW 49.12.250(1); Washington Department of Labor & Industries Administrative Policy — ES.C.7 (Jan. 2, 2002), <http://www.lni.wa.gov/workplacerrights/files/policies/esc7.pdf>.

²⁴⁰⁸ RCW 49.12.250(2).

²⁴⁰⁹ RCW 49.12.250(3).

²⁴¹⁰ See Washington Department of Labor & Industries Administrative Policy — ES.C.7 (Jan. 2, 2002), <http://www.lni.wa.gov/workplacerrights/files/policies/esc7.pdf>.

²⁴¹¹ RCW 49.12.260.

²⁴¹² Minn. Stat. §§ 181.960-181.966.

²⁴¹³ Minn. Stat. § 181.961, subd. 4.

²⁴¹⁴ Minn. Stat. § 181.960, subd. 3.

²⁴¹⁵ Minn. Stat. § 181.960, subd. 4; Minn. Stat. § 181.961.

- Applications for employment;
- Wage and salary history;
- Notices of commendation, warning, disciplinary action or termination;
- Authorizations for deductions or withholdings from pay;
- Fringe benefit information;
- Leave records; and
- Employment history with the employer (salary and compensation history; job titles; dates of promotions, transfers, or other changes; attendance records; performance evaluations; and retirement record).

Not included in the statutory definition of a personnel record are:²⁴¹⁶

- Written references about the employee, including letters of reference supplied to the employer by another person;
- Education records maintained by an institution;
- Results of employer testing, except a cumulative test score;
- Information relating to the employer's salary system or staff planning (including comments, judgments, recommendations, or ratings concerning expansion, downsizing, reorganization, job restructuring, future compensation plans, promotion plans, and job assignments);
- Written comments or data of a personal nature about a person other than the employee;
- Written comments or data kept by the employee's supervisor or an executive, administrative, or professional employee, provided the written comments or data are kept in the sole possession of the author of the record;
- "Privileged" information;
- Any portion of a co-worker's written or transcribed statement regarding the employee's job performance or misconduct that reveals the author's identity; or
- Medical reports and records.

Records related to an investigation of an employee are given special treatment. An employer may deny an employee access to an investigation record until the investigation is completed and the employer takes adverse personnel action based upon information contained in the record. When the investigation involves alleged criminal conduct, the employer is not required to permit the employee to review the investigation records until the prosecutor indicates that no action will be taken, or legal action is completed and the employer takes adverse personnel action based upon the information.²⁴¹⁷

Form I-9s should not be kept in employee personnel files. All Form I-9s should be put into one folder or notebook for U.S. Citizenship and Immigration Services.

(ii) Employee Access

For purposes of "access," Minnesota employers with *one* or more employee(s) must provide an employee with the opportunity to review his or her personnel record under certain conditions.²⁴¹⁸

An employee, including a former employee who left the employer less than one year before making the request, must submit a written request to the employer to review his or her personnel record.²⁴¹⁹ The

²⁴¹⁶ Minn. Stat. § 181.960, subd. 4(1)-(10).

²⁴¹⁷ Minn. Stat. § 181.960, subd. 4(2).

²⁴¹⁸ Minn. Stat. § 181.961, subds. 1, 4.

²⁴¹⁹ Minn. Stat. § 181.961, subd. 1.

employer must permit access within seven working days after receipt of the request (14 working days if the records are located outside of the state). A current employee may only review his or her records once in a six-month period. The employer must make the records available for review during the employer's normal hours of operation (not necessarily during the employee's working hours). The employer may require the presence of a supervisor or designee during the review. For separated employees, the employer must, upon written request, provide a copy of the personnel record to the former employee. Providing such a copy satisfies the employer's obligations to permit access. A separated employee can view his or her file one time per year "for as long as the . . . record is maintained."²⁴²⁰ The employer may not charge a fee for the copy.²⁴²¹

(iii) Requirement of Notice of Right to Review Personnel Record

Employers must provide written notice to all job applicants upon hire of the rights and remedies provided under the Minnesota Personnel Record Review and Access Act.²⁴²²

The Act is generally straightforward; however, it does leave open a few questions on implementation. For example, the statute does not define "written notice." Accordingly, employers may include the requisite notice in their new-hire materials either as a separate document or as a part of an employee handbook.

(c) California Law

Under California Law, every employee has the right to inspect his or her personnel records.²⁴²³ Employers must: (1) keep a copy of each employee's personnel records at the place where the employee reports to work; or (2) make the personnel records available at the place where the employee reports to work at reasonable intervals and at reasonable times; or (3) permit the employee to inspect the records at the location where they are stored with no loss of compensation to the employee.²⁴²⁴ According to the California Division of Labor Standards Enforcement, a reasonable interval is at least once per year. Reasonable times are during the regular business hours of the office where personnel records are maintained.

The right to inspect personnel files and records does not apply to records: (1) relating to the investigation of a possible criminal offense; or (2) letters of reference, or ratings, reports, or records that were obtained prior to the employee's employment, were prepared by identifiable examination committee members, or were obtained in connection with a promotional exam.²⁴²⁵

California's constitutional right to privacy protects employee personnel files from disclosure to third parties. Employers may not unilaterally waive the constitutionally-protected privacy rights of their employees.²⁴²⁶

Under California law, employers are required, upon request, to give employees or job applicants copies of any document that the employee or applicant signed relating to the obtaining or continuing of employment.²⁴²⁷

²⁴²⁰ *Id.*

²⁴²¹ Minn. Stat. § 181.961, subd. 2(d).

²⁴²² Minn. Stat. § 181.9631.

²⁴²³ Specific requirements and exceptions are listed under Cal. Lab. Code § 1198.5.

²⁴²⁴ *Id.*

²⁴²⁵ *Id.*

²⁴²⁶ California's constitutional privacy provision applies to both private and public employers, unlike Washington's constitutional privacy provision, which applies only to public employers.

²⁴²⁷ Cal. Lab. Code § 432.

(d) Utah Law

There is no law in Utah giving private sector employees the right to review their personnel files. State employees, however, have the right to examine and make copies of documents in their personnel files.²⁴²⁸

SECTION 11.5 DISPOSAL AND RETENTION OF RECORDS**(a) Washington Law**

Washington law requires all organizations, when disposing of personal information, to maintain the security and confidentiality of that information. "Personal information" includes financial and health information, such as account numbers, credit card numbers, and medical history or status information, as well as personal identification numbers issued by a government entity, such as Social Security number, driver's license number, and tax identification number. Employers must take all reasonable steps to destroy disposed of personal information in such a way that it becomes unreadable or undecipherable by any reasonable means. A private right to bring civil action is available for injuries caused by an organization's failure to comply with these requirements, and punitive damages may be awarded.²⁴²⁹

(b) Minnesota Law

Minnesota passed legislation in 2007 pertaining to the handling and protection of certain personal data, including Social Security numbers.²⁴³⁰ The Social Security Number Shield Act can impact employers to the extent they keep such employee information and should be considered in an employer's retention policies and practices.

Under the statute, employers must restrict access to this data to those employees who must use Social Security numbers in the performance of their job duties. The statute prohibits employers from publicly posting or displaying Social Security numbers and from printing Social Security numbers on employee discount cards and the like. The statute also prohibits employers from using Social Security numbers, either alone or as part of a larger identifier, as employee identification numbers for recordkeeping or other such purposes. Employers may, however, use part of the employee's Social Security number as an identifier.²⁴³¹

In communicating with employees, employers may not require that Social Security numbers be sent via the Internet unless the connection is secure, the number is encrypted, or the transmission is pursuant to federal law. Employers also may not print Social Security numbers on any items or materials the employer mails to employees, unless required to do so by federal law. Finally, employers are prohibited from selling Social Security numbers obtained during the course of business.²⁴³²

The statute provides that notwithstanding these provisions, employers are still permitted to use Social Security numbers in applications and forms sent via mail, including: (1) documents sent as part of an application or enrollment process; (2) documents sent to establish, amend, or terminate accounts, contracts, or policies; and (3) documents sent to confirm the accuracy of Social Security numbers. The statute does not, however, permit the employer to print Social Security numbers on the outside of such mailings.²⁴³³

²⁴²⁸ Utah Code Ann. § 67-18-1.

²⁴²⁹ RCW 19.215.005 -030.

²⁴³⁰ Minn. Stat. § 325E.59.

²⁴³¹ Minn. Stat. § 325E.59, subd. 1(a).

²⁴³² *Id.*

²⁴³³ *Id.*

(c) Utah Law

Under Utah's Protection of Personal Information Act, any person who conducts business in the state and maintains personal information must implement and maintain reasonable procedures to destroy, or arrange for the destruction of, records containing personal information that are not maintained.²⁴³⁴ The personal information must be destroyed by shredding, erasing, or by otherwise modifying the personal information to make the information indecipherable.²⁴³⁵

²⁴³⁴ Utah Code Ann. § 13-44-201(1).

²⁴³⁵ Utah Code Ann. § 13-44-201(2).

CHAPTER XII

REDUCTIONS IN FORCE, LAYOFFS, PLANT CLOSINGS, AND SEVERANCE

SECTION 12.1 REDUCTIONS IN FORCE

A reduction-in-force (“RIF”) program involves the layoff of employees. A RIF program should be comprehensive, with layoffs being only one step in a larger process. Comprehensive RIF programs should include the following: (1) evaluating company policies; (2) reviewing collective bargaining duties (if applicable); (3) creating a layoff plan; (4) instituting a hiring freeze; (5) conducting layoffs; and (6) offering outplacement services.

A RIF program typically involves multiple terminations which consequently enhance employers’ exposure to legal liability. Terminated employees may challenge a RIF as discriminatory under either a disparate treatment or disparate impact theory. An employer implementing a RIF may be called upon to justify both the necessity of a RIF and the chosen implementation methods.²⁴³⁶ Therefore, the importance of careful planning in advance of a RIF cannot be overemphasized.

Laws that may impact a RIF include the Age Discrimination in Employment Act (“ADEA”), the Americans With Disabilities Act (“ADA”), the Family and Medical Leave Act (“FMLA”), the National Labor Relations Act (“NLRA”), the Older Workers Benefits Protection Act (“OWBPA”), Consolidated Omnibus Budget Reconciliation Act (“COBRA”), Employee Retirement Income Security Act (“ERISA”), federal and state anti-discrimination laws, and state contract and tort law.

Employers should consider the following suggestions before implementing a RIF:

- adequately document employee performance issues and communicate performance problems to employees as they arise. Such actions assist the employer when it must justify RIF selections based on performance;
- assure that the company has a well-articulated reason for needing to control expenses by means of a RIF;
- ascertain the extent of the staffing reductions required with reasonable precision;
- develop objective criteria for selecting employees to be laid off. The more subjective the criteria used, the more vulnerable the criteria are to legal challenge. Salary level should not be used as the sole criterion for a RIF because of this criterion’s potential adverse effects on older, more experienced workers;
- when subjective criteria must be used, develop a set of evaluation guidelines. Once implemented, double-check selections made under these criteria against personnel file material containing warnings, evaluations, etc.;
- insulate from the selection process any supervisor whose ability to make impersonal and unbiased layoff decisions is in question;
- determine the selection criteria before any individual selections are made. The layoff or reduction plan should expressly provide that the plan and its implementation are intended to be non-discriminatory;

²⁴³⁶ A court in a discrimination lawsuit will scrutinize the criteria used in evaluating employees to determine whether the employer’s standards were merely a pretext for discrimination. *See* Chapter IX: Employment Discrimination.

- consider offering an early retirement option before implementing a RIF as an alternative method of achieving some or all of the necessary reductions. If the company does offer an early retirement program, present the program as a purely voluntary option. Offer the voluntary retirement incentives before plans for any involuntary RIF is completed and/or announced;
- review the number of employees involved to determine whether the RIF would result in a partial termination of a retirement plan, requiring vesting of the unvested amounts in the plan of employees terminated as part of the RIF;²⁴³⁷
- consider utilizing releases and separation agreements as a method for reducing exposure when terminating an employment relationship. If release agreements are used, make sure that they comply with the OWBPA;
- review the list of persons to be included in the RIF before implementing terminations to determine the plan's actual equal employment opportunity ("EEO") consequences. If the review uncovers potential EEO problems, identify the source of those problems and evaluate: (1) whether the pre-determined selection criteria have been properly and fairly applied; (2) whether the problematic selection criteria are genuinely necessary; and (3) whether the problematic selection criteria can be modified to lessen the negative EEO impact. While an adverse effect on a protected group of persons may not prevent the company from engaging in the RIF as planned, an adverse impact on such a group can provide the basis for a discrimination lawsuit, and the company must be able to articulate and ultimately prove legitimate business reasons for undertaking the RIF in this manner;
- ensure compliance with the Federal Worker Adjustment and Retraining Notification Act ("WARN"), which requires that employers provide advance written notice to employees and certain governmental bodies before conducting a "plant closing" or "mass layoff";
- identify and be explicit about the benefits afforded laid-off employees, such as severance pay, salary and insurance continuation, etc.;
- explain the layoff plan and the benefits package to each affected employee;
- limit the number of persons conveying the separation information and document their communications to affected employees;
- monitor the entire RIF closely to ensure that the plan is not subject to improvised modifications; and
- ensure that no new hires are placed in positions identical or similar to those of existing employees subject to layoff.

SECTION 12.2 THE WORKER ADJUSTMENT AND RETRAINING NOTIFICATION ACT OF 1988

The WARN Act²⁴³⁸ requires covered businesses to provide at least 60 calendar days advance written notice of a "plant closing" or "mass layoff." Several states have layoff notice statutes similar to the federal WARN Act, many of which apply to smaller employers and smaller layoffs than their federal counterpart.²⁴³⁹

²⁴³⁷ 29 U.S.C. §§ 2101 *et seq.*; 20 C.F.R. §§ 639.1 *et seq.*

²⁴³⁸ *Id.*

²⁴³⁹ *See, e.g.,* California, Cal. Lab. Code §§ 1400 *et seq.*; Connecticut, Conn. Gen. Stat. §§ 31-51n, 31-51o, 31-51s; Georgia, Ga. Code Ann. § 300-2-4-.10; Hawaii, Haw. Rev. Stat. §§ 394B *et seq.*; Illinois, 820 Ill. Comp. Stat. 65/1 *et seq.*; Maine, Me. Rev. Stat. Ann. tit. 26 §§ 625-B *et seq.*; Maryland, Md. Code Ann., Lab. & Empl. §§ 11-301 *et seq.*; Massachusetts, Mass. Gen. Laws Ann. 149 §§ 182, 151A, §§ 71A *et seq.*; Michigan, Mich. Comp. Laws Ann. §§ 450.732 *et seq.*; New Hampshire, N.H. Rev. Stat. Ann. 275-F:1 *et seq.*, 282-A:45-a; New Jersey, N.J. Rev. Stat. §§ 34:21-1 *et seq.*; New York, N.Y. Lab. Law §§ 840, 860 *et seq.*; North Dakota, N.D. Admin. Code 27-03-02-02; Ohio, Ohio Rev. Code Ann. § 4141.28(C); Oregon, Or. Rev. Stat. §§ 285A.516, 285A.519; Pennsylvania, 15 Pa. Cons. Stat. § 2581; Rhode Island, R.I. Gen. Laws § 28-14-4(c); Tennessee, Tenn. Code Ann. §§ 50-1-104, 50-1-601 *et seq.*; Virginia, 16 Va. Admin. Code § 5-60-10; and Wisconsin, Wis. Stat. §§ 109.07 *et seq.*

Importantly, the federal WARN Act does not pre-empt state law, or alter or limit rights of employees under state law. Consequently, employers contemplating a RIF must consult any applicable state notice law in addition to WARN to determine whether any notice obligations are implicated. Unlike some states, Washington does not have a “mini-WARN” statute requiring notification for WARN-covered RIFs.

California does have a mini-WARN statute, which varies from the federal law in terms of coverage, employer liability for violations, and exceptions to the notice requirement.²⁴⁴⁰ This section will focus on the parameters of the federal law. Employers with operations in California should carefully review the state and federal WARN provisions for a full understanding of the notification requirements.

Minnesota and Utah do not have a statute that imposes notice obligations in addition to those under WARN. However, Minnesota law does require that any notice required under the WARN Act be provided to the Minnesota Commissioner of Labor (in addition to the recipients specified in the WARN Act).²⁴⁴¹

(a) To Whom Does WARN Apply?

WARN applies to any business with 100 or more employees, excluding part-time employees, or with 100 or more employees who in the aggregate work at least 4,000 hours per week, exclusive of overtime hours.²⁴⁴² Two companies, each with less than 100 employees but with a combined total of 100 employees, may need to meet the WARN Act’s requirements if there is common ownership.²⁴⁴³ “Part-time employee” is defined as an employee who averages fewer than 20 hours per week or who had been employed for fewer than six of the 12 months preceding the date on which notice was required (even if employed full time).²⁴⁴⁴

(b) When Does WARN Apply?

WARN applies when a significant employment loss occurs as a result of a plant closing or mass layoff.²⁴⁴⁵ The key terms are “employment loss,” “plant closing,” and “mass layoff.” The WARN Act does not apply when a layoff occurs because of a government-ordered takeover, which is outside the control of a private employer.²⁴⁴⁶

An “employment loss” is: (1) an employment termination, other than a discharge for cause, voluntary departure, or retirement; (2) a layoff exceeding six months; or (3) a reduction in hours of work of more than fifty percent during each month of any six-month period.²⁴⁴⁷

A “plant closing” is defined as the permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units within a single site of employment, that results in an employment loss at the site during any 30-day period for 50 or more employees, excluding part-time employees.²⁴⁴⁸

A “mass layoff” is defined as a reduction in force at a single site of employment during any 30-day period, which results in an employment loss at the site for either:²⁴⁴⁹

²⁴⁴⁰ Cal. Lab. Code §§ 1400-1408.

²⁴⁴¹ Minn. Stat. § 116L.976.

²⁴⁴² 29 U.S.C. § 2101(a)(1); 20 C.F.R. §§ 639.1 *et seq.*

²⁴⁴³ *Childress v. Darby Lumber, Inc.*, 357 F.3d 1000 (9th Cir. 2004) (courts consider four factors: (1) common ownership; (2) common management; (3) centralized control of labor relations; and (4) interrelation of operations).

²⁴⁴⁴ 29 U.S.C. § 2101(a)(8).

²⁴⁴⁵ 29 U.S.C. § 2102.

²⁴⁴⁶ *See Deveraturda v. Globe Aviation Sec. Servs.*, 454 F.3d 1043 (9th Cir. 2006).

²⁴⁴⁷ 29 U.S.C. § 2101(a)(6).

²⁴⁴⁸ 29 U.S.C. § 2101(a)(2).

²⁴⁴⁹ 29 U.S.C. § 2101(a)(3).

- at least three-three percent of the employees (excluding part-time employees) and at least 50 employees (excluding part-time employees); or
- at least 500 employees (excluding part-time employees), regardless of what percentage of the work force the layoff constitutes.

Employees may dispute what constitutes a “single site of employment.” In *Bader v. N. Line Layers, Inc.*, the Ninth Circuit held that a construction company did not violate WARN for providing fewer than 60 days’ notice when it laid off 185 company employees because the layoffs did not occur at a single site of employment.²⁴⁵⁰ The court based its decision on the fact that no more than 35 employees worked at the company headquarters, the project sites were remote, and no single project site had more than 50 employees. Additionally, the workers were not “outstationed” from the headquarters office, most site employees were not residents of the state where the headquarters was located, employees did not need to be physically present at the headquarters, there was no evidence that the employees reported to the headquarters during the course of a project, or that the headquarters originated the employees’ work or was responsible for the day-to-day management of the majority of workers.²⁴⁵¹

WARN also provides that an employer must aggregate layoffs during a rolling 90-day period at a single site to determine if WARN applies. Unless the employer can demonstrate that the employment losses are the result of “separate and distinct” causes, the employer’s actions may be viewed as an attempt to avoid the notice requirements of the WARN Act.²⁴⁵²

(c) To Whom Must Notice Be Given?

An employer must give written notice at least 60 calendar days before a plant closing or mass layoff to each representative of affected unionized employees.²⁴⁵³ If there is no union representative, notice must be given to each affected employee; in other words, any employee who may experience an employment loss, including those employees on temporary leave or layoff who have a reasonable expectation of recall.²⁴⁵⁴ Seasonal employees must also receive adequate notice at least 60 days prior to the “employment loss.”²⁴⁵⁵ In *Marques v. Telles Ranch, Inc.*, the Ninth Circuit determined that seasonal employees suffered an “employment loss” on the date when they could have reasonably been recalled to work, and not on the date of actual termination. Therefore, the employer provided sufficient notice when it terminated the employees at the end of the season in November.²⁴⁵⁶

The employer also must give separate written notice to: (1) either the state dislocated worker unit or “the State or entity designated by the State to carry out rapid response activities under section 2864(a)(2)(A);” and (2) the chief elected official of the local government where the closing or layoff is to occur.²⁴⁵⁷

(d) What Must the Notice Contain?

All notice must be specific and based on the best information available to the employer at the time the notice is served.²⁴⁵⁸ Notice to each representative of affected employees must generally contain the following:²⁴⁵⁹

²⁴⁵⁰ *Bader v. N. Line Layers, Inc.*, 503 F.3d 813 (2007).

²⁴⁵¹ *Id.*

²⁴⁵² 29 U.S.C. § 2102(d).

²⁴⁵³ 29 U.S.C. §§ 2102 *et seq.*

²⁴⁵⁴ 29 U.S.C. § 2102.

²⁴⁵⁵ *Marques v. Telles Ranch, Inc.*, 131 F.3d 1331, *aff’d in part*, 133 F.3d 927 (9th Cir. 1997).

²⁴⁵⁶ *Id.*

²⁴⁵⁷ 29 U.S.C. § 2102(a)(2).

²⁴⁵⁸ 20 C.F.R. §§ 639.7(c)-(e).

²⁴⁵⁹ 20 C.F.R. § 639.7(c).

- name and address of the employment site;
- name and telephone number of a company official to contact for further information;
- statement as to whether the planned action is expected to be permanent or temporary and, if the entire plant is to be closed, a statement to that effect;
- expected date of the first separation and the anticipated schedule for making separations; and
- job titles of positions to be affected and the names of the workers currently holding affected jobs.

In addition to the second and third items above, notice to each unrepresented employee must include the following information:²⁴⁶⁰

- expected date of plant closing or mass layoff;
- expected date the individual employee will be separated; and
- indication as to whether or not bumping rights exist.

In addition to the first four items above, notice to the two governmental authorities must include the following information:²⁴⁶¹

- job titles of affected positions and the number of affected employees in each job classification;
- indication as to whether or not bumping rights exist; and
- name of each union representing affected employees and the name and address of the chief elected officer of each union.

(e) Exceptions to WARN's Notice Requirements

The WARN Act contains limited exceptions to its notice requirements.²⁴⁶² For example, a full 60-day notice need not be given if, as of the time that notice would have been required: (1) the employer was actively seeking capital or business which, if obtained, would have enabled the employer to avoid or postpone the shutdown and the employer reasonably and in good faith believed that giving the notice required would have precluded the employer from obtaining the needed capital or business; or (2) the closing or mass layoff is caused by business circumstances which were not reasonably foreseeable at the time that notice would have been required; or (3) the closing or mass layoff is due to a natural disaster.²⁴⁶³ Notice is not required if “the closing is of a temporary facility or . . . is the result of the completion of a particular project . . . and the affected employees were hired with the understanding that their employment was limited to the duration of the facility or the project.”²⁴⁶⁴ In addition, no notice need be given if the closing or layoff constitutes a strike or lockout not intended to evade the WARN requirements.²⁴⁶⁵ Because of the complexity of these exceptions, an employer must carefully analyze its situation before concluding that it is covered by an exception.²⁴⁶⁶

For example, in *Watson v. Michigan Indus. Holdings, Inc.*,²⁴⁶⁷ a company closed one of its plants on short notice. The company was financially fragile, but still economically viable, and shut down the plant as a

²⁴⁶⁰ 20 C.F.R. § 639.7(d) (quotations omitted).

²⁴⁶¹ 20 C.F.R. § 639.7(c).

²⁴⁶² 20 C.F.R. § 639.7.

²⁴⁶³ 29 U.S.C. § 2102(b).

²⁴⁶⁴ 29 U.S.C. § 2103(1).

²⁴⁶⁵ 29 U.S.C. § 2103(2).

²⁴⁶⁶ See 29 U.S.C. §§ 2101(b)(2), 2102(b), 2102(c), 2103(1)-(2).

²⁴⁶⁷ 311 F.3d 760 (6th Cir. 2002).

result of unexpected actions by the company's major client. The court found that the plant closing fell within a WARN notice exception.²⁴⁶⁸

In *Childress v. Darby Lumber, Inc.*,²⁴⁶⁹ a mill closed just one day after giving notice to its employees. The mill argued that WARN should not apply because of the "business circumstances" exception and the "faltering company" exception. The court refused to apply the business circumstances exception since the undisputed facts showed that the mill's closure was occasioned by a depressed lumber market, increased environmental controls, and increased cost of raw materials, circumstances management had been aware of for some time and which were not sudden, dramatic, or unexpected. The court also rejected the "faltering company" exception. Even though the mill was actively attempting to secure financing from a bank at the time notice should have been given to employees, the mill failed to prove that giving the employees the required 60-day notice would have precluded the mill from obtaining the bank loan it needed.²⁴⁷⁰

(f) Waiver of WARN Requirements

Employees may waive WARN claims under a severance agreement if the waiver meets specific requirements.²⁴⁷¹ In *Joe v. First Bank Sys., Inc.*,²⁴⁷² the employer offered a severance and release agreement to an employee the day after the employee's employment was terminated, instead of providing 60-days' notice under WARN. The court held that the employee had waived his right to damages for the employer's WARN violation because he knowingly and voluntarily signed the release, under the advice of an attorney.²⁴⁷³ Union employees also may waive their rights under WARN through a release in their collective bargaining agreement when the severance payments extend beyond the basic severance plan, therefore constituting valid consideration for the release.²⁴⁷⁴

(g) Remedies Under WARN

An aggrieved employee, governmental unit, or labor union can sue for violations of the WARN Act.²⁴⁷⁵ The U.S. Supreme Court has held that a labor union also may sue for damages on behalf of union members.²⁴⁷⁶ An employer may be liable to each affected employee for back pay and benefits for each day of the violation, up to a maximum of 60 days. The Ninth Circuit has held that back pay (damages for failure to provide adequate notice) is calculated by the number of workdays rather than calendar days, thus increasing potential damages for failure to comply.²⁴⁷⁷ Back pay also includes tips and holiday pay if the employee can prove that he or she reasonably expected to have earned the pay, but for a WARN violation.²⁴⁷⁸

²⁴⁶⁸ *Id.* See also *Gross v. Hale-Halsell Co.*, 554 F.3d 870 (10th Cir. 2009) (the employer did not have to comply with the WARN Act's notice requirements when it laid off approximately 200 workers three working days after learning of the loss of its largest customer).

²⁴⁶⁹ 357 F.3d 1000 (9th Cir. 2004).

²⁴⁷⁰ *Id.* at 1009.

²⁴⁷¹ See this Chapter, Section 12.4: Severance Plans.

²⁴⁷² 202 F.3d 1067 (8th Cir. 2000).

²⁴⁷³ *Id.*

²⁴⁷⁴ *LAM v. Compania Mexicana de Aviacion*, 199 F.3d 796 (5th Cir. 2000).

²⁴⁷⁵ 29 U.S.C. § 2104(b); *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544 (1996) (allowing union to sue for WARN violation).

²⁴⁷⁶ *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544 (1996).

²⁴⁷⁷ *Burns v. Stone Forest Indus., Inc.*, 147 F.3d 1182 (9th Cir. 1998), *cert. denied*, 525 U.S. 1040 (1998).

²⁴⁷⁸ *Local Joint Executive Board of Culinary/Bartender Trust Fund v. Las Vegas Sands*, 244 F.3d 1152 (9th Cir.), *cert. denied*, 534 U.S. 973 (2001).

In addition, with respect to an affected governmental unit, an employer may be required to pay a civil penalty of up to \$500 per day for failure to comply with the notice requirements. WARN also permits a court to award to the prevailing party reasonable attorneys' fees and costs.²⁴⁷⁹

The statute of limitations for civil actions under WARN is governed by state law.²⁴⁸⁰

Chart of State Laws and Regulations on Mass Separations

STATE	STATE LAW ANALOG
Alabama	ALA. ADMIN. CODE 480-4-3-.10
Alaska	None as of January 31, 2013
Arizona	None as of January 31, 2013
Arkansas	None as of January 31, 2013
California	CAL. LAB. CODE §§ 1400 <i>et seq.</i>
Colorado	None as of January 31, 2013
Connecticut	CONN. GEN. STAT. §§ 31-51n, 31-51o, 31-51s
Delaware	None as of January 31, 2013
Florida	None as of January 31, 2013
Georgia	None as of January 31, 2013
Hawaii	HAW. REV. STAT. §§ 394B <i>et seq.</i>
Idaho	None as of January 31, 2013
Illinois	820 ILL. COMP. STAT. 65/1 <i>et seq.</i>
Indiana	None as of January 31, 2013
Iowa	IOWA CODE §§ 84C.1-C.5
Kansas	KAN. STAT. § 44-616 KAN. ADMIN. REGS. 50-3-1, 50-3-2
Kentucky	None as of January 31, 2013
Louisiana	LA ADMIN. CODE TIT. 40, PART IV § 323(B)
Maine	ME. REV. STAT. TIT. 26 §§ 625-B <i>et seq.</i>
Maryland	MD. CODE ANN., LAB. & EMPL. §§ 11-301 <i>et seq.</i> MD. LAB., LIC. & REG. 09.32.02.06
Massachusetts	MASS. GEN. LAWS CH. 149 § 182; Ch. 151A §§ 71A <i>et seq.</i>

²⁴⁷⁹ 29 U.S.C. §§ 2104(3), (6).

²⁴⁸⁰ *N. Star Steel Co. v. Thomas*, 515 U.S. 29 (1995).

STATE	STATE LAW ANALOG
Michigan	MICH. COMP. LAWS ANN. §§ 450.731 <i>et seq.</i>
Minnesota	MINN. STAT. § 116L.976
Mississippi	None as of January 31, 2013
Missouri	None as of January 31, 2013
Montana	None as of January 31, 2013
Nebraska	None as of January 31, 2013
Nevada	None as of January 31, 2013
New Hampshire	N.H. REV. STAT. ANN. 275-F:1 <i>et seq.</i> ; 282-A:45-a N.H. CODE R. EMP. 303.13
New Jersey	N.J. REV. STAT. §§ 34:21-1 <i>et seq.</i>
New Mexico	None as of January 31, 2013
New York	N.Y. LAB. LAW §§ 840, 860-a <i>et seq.</i>
North Carolina	None as of January 31, 2013
North Dakota	N.D. ADMIN. CODE 27-03-02-02
Ohio	OHIO REV. CODE § 4141.28(C)
Oklahoma	None as of January 31, 2013
Oregon	OR. REV. STAT. §§ 285A.510-522
Pennsylvania	15 PA. CONS. STAT. § 2581 PHILA. MUN. CODE TITLE 9 §§ 9-1501 <i>et seq.</i>
Rhode Island	R.I. GEN. LAWS § 28-14-4(c)
South Carolina	None as of January 31, 2013
South Dakota	None as of January 31, 2013
Tennessee	TENN. CODE §§ 50-1-104, 50-1-601 <i>et seq.</i>
Texas	None as of January 31, 2013
Utah	None as of January 31, 2013
Vermont	None as of January 31, 2013
Virginia	16 VA. ADMIN. CODE § 5-60-10
Washington	None as of January 31, 2013
West Virginia	None as of January 31, 2013

STATE	STATE LAW ANALOG
Wisconsin	Wis. STAT. §§ 109.07 <i>et seq.</i> Wis. ADMIN. CODE DWD §§ 279.001 <i>et seq.</i>
Wyoming	None as of January 31, 2013

SECTION 12.3 VALID WAIVERS IN A RIF

The ADEA, as amended by the OWBPA, imposes additional requirements on employers in connection with a RIF, a plant or office closing, or in connection with an early retirement program.²⁴⁸¹ An employee over 40 years of age who accepts a monetary severance package may keep the money and file an ADEA lawsuit if the signed release does not meet specific statutory requirements.²⁴⁸²

The minimum requirements for a valid release of claims for an employee covered by the ADEA are as follows:²⁴⁸³

- release must be in writing and understandable;
- release must refer to the rights or claims arising under the ADEA;
- release cannot waive rights or claims arising after the release is signed;
- employee must receive consideration in addition to anything of value to which the individual is already entitled;
- employee must be advised in writing of the right to consult an attorney prior to signing the release;
- employee must be given at least 21 days to consider the agreement before signing, although the employee may waive this period and sign earlier. If the waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual must be given at least 45 days to consider the agreement;
- release must include a seven-day revocation period after signing the release (the seven-day period cannot be waived);
- release cannot waive an employee's right to file a charge or complaint with the EEOC, including a challenge to the validity of the waiver agreement (although the employee may waive any right to monetary relief); and
- release cannot waive the employee's right to participate in an EEOC investigation or proceeding.

For group termination programs (as with most RIFs) the minimum requirements for a valid waiver of ADEA claims, set forth above, still apply, except that the employee must be given 45 days to consider the agreement before signing, rather than only 21 days.²⁴⁸⁴ In addition, the employer must provide in writing, in an understandable manner, the following information to all affected employees:²⁴⁸⁵

- a description or statement of the class, unit, or group of individuals covered by the program – that is, the applicable “decisional unit”;

²⁴⁸¹ 29 U.S.C. § 626(f); 29 C.F.R. § 1625.22.

²⁴⁸² *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422 (1998) (holding that the release did not comply with requirements of the Older Workers Benefit Protection Act (“OWBPA”).

²⁴⁸³ 29 U.S.C. §§ 626(f)(1)-(2).

²⁴⁸⁴ 29 U.S.C. § 626(f)(1)(F)(ii).

²⁴⁸⁵ 29 U.S.C. § 626(f)(1)(H).

- any “eligibility factors” for such program;
- any time limits for such program;
- the job titles and ages of all individuals eligible or selected for the program; and
- the job titles and ages of all individuals not eligible or selected for the program.²⁴⁸⁶

Employers typically provide the above information in disclosures attached as an exhibit or attachment to each affected employee’s release or separation agreement. If the RIF or other group termination program includes voluntary and involuntary terminations, employers must differentiate between the two types of terminations if voluntary and involuntary terminations are grouped in the same disclosures.²⁴⁸⁷ If the RIF takes place in successive increments, or on a rolling basis, the information disclosed to affected employees must include information about employees terminated at earlier stages of the RIF. However, when later terminations occur, employers need not send updated information to employees who were terminated at an earlier stage of the RIF.²⁴⁸⁸

The OWBPA requires employers to inform affected employees of the class, unit, or group of individuals covered by a group termination program. Regulations issued by the EEOC explain that employers should determine the appropriate class, unit, or group of employees by identifying the applicable “decisional unit” – that is, the portion of the employer’s organizational structure from which the employer chose the persons who would be terminated.²⁴⁸⁹ Accurately defining the decisional unit is a fact-intensive inquiry that employers must undertake on a case-by-case basis depending on their organizational structure and decision-making process.²⁴⁹⁰ Employers should undertake this analysis carefully, for failure to accurately define the decisional unit renders the release invalid under the OWBPA, meaning the employer will not have obtained a valid release of employees’ ADEA claims.²⁴⁹¹ Depending on the facts surrounding a particular RIF, the appropriate decisional unit may be a single facility; several facilities; a division, department, or job family; a geographic region; or all employees reporting to a particular position (*e.g.*, “all employees reporting to the Vice President of Sales”).²⁴⁹² The Regulations explain that higher level review of termination decisions – for example, by upper management or Human Resources – generally will not change the size of the decisional unit unless the higher-level review alters the scope of the decisional unit.²⁴⁹³

The OWBPA also requires employers to inform affected employees of the “eligibility factors” for the group termination program. The term “eligibility factors” is undefined in the OWBPA or Regulations. In the past, most employers interpreted “eligibility factors” to refer to the factors determining an employee’s eligibility for severance benefits. However, a recent case from the District of Minnesota held that “eligibility factors” refers to the factors used to select employees for termination.²⁴⁹⁴ Thus, while employers are not required to disclose the particular reasons an individual employee was selected for job elimination, they should, particularly in Minnesota, provide a general list of the criteria by which employees were selected for termination.

²⁴⁸⁶ Where employees with the same job title are classified in different job grades or subcategories, the information must be broken down by grade level or other subcategory. 29 C.F.R. § 1625.22(f)(4)(iii).

²⁴⁸⁷ 29 C.F.R. § 1625.22(f)(4)(iv).

²⁴⁸⁸ 29 C.F.R. § 1625.22(f)(4)(vi).

²⁴⁸⁹ 29 C.F.R. § 1625.22(f)(3)(i)(A)-(B).

²⁴⁹⁰ 29 C.F.R. § 1625.22(f)(3)(ii)(A).

²⁴⁹¹ *Krucowski v. Weyerhaeuser*, 446 F.3d 1090 (10th Cir. 2006); *Pagliolo v. Guidant Corp.*, 483 F. Supp. 2d 847 (D. Minn. 2007).

²⁴⁹² 29 C.F.R. § 1625.22(f)(3)(iii)-(v).

²⁴⁹³ 29 C.F.R. § 1625.22(f)(3)(vi).

²⁴⁹⁴ *Pagliolo v. Guidant Corp.*, 483 F. Supp. 2d 847 (D. Minn. 2007); *Mass. v. Bull HN Info. Sys., Inc.*, 143 F. Supp. 2d 134 (D. Mass. 2001).

Waivers for Minnesota-based employees also must comply with the Minnesota Human Rights Act (“MHRA”). An employee must be informed in writing, typically within the release or separation agreement, that he or she has the right to rescind any waiver releasing MHRA claims within 15 days of signing the waiver.²⁴⁹⁵

SECTION 12.4 SEVERANCE PLANS

Severance pay arrangements may be an integral part of many employee benefit programs. These programs seek to provide a measure of employee security in the event of work slow-downs, plant closings, RIFs, and other interruptions of employment, as well as to compensate the employee for the loss of service. Severance benefits are granted when the employment relationship between the employee and employer is completely severed. Severance pay is not required under Washington law unless agreed upon by contract. Severance pay policies are normally covered by ERISA; however, the mere provision of a single lump-sum payment, whether formulated voluntarily by an employer or mandated by statute, may be exempt from ERISA’s coverage.²⁴⁹⁶ Utah law does not require employers to provide employees with severance pay.

Most arrangements that provide for severance benefits to terminated employees are considered ERISA employee benefit plans regardless of employer intent. Therefore, employers must comply with ERISA’s modest reporting requirements.

In addition, the regulations under Section 409A of the IRC indicate that both voluntary and involuntary severance pay arrangements are subject to the restrictions under Section 409A unless an exception applies. Although there are many exceptions, the risk is that an executive or an employee will be subject to a twenty percent penalty tax on the severance payment if applicable 409A requirements are not met. In addition, if Section 409A applies, severance payments to executives at publicly-traded companies must be delayed by at least six months from the executive’s separation from service to avoid the twenty percent penalty.²⁴⁹⁷

(a) ERISA’s Scope of Coverage Relating to Severance Plans

ERISA applies to any employee benefit plan established or maintained by an employer engaged in commerce, or in any industry or activity affecting commerce, or by an employee organization or organizations representing employees engaged in commerce, or in an industry or activity affecting commerce.²⁴⁹⁸ The term “employee benefit plan” includes employee welfare plans and employee pension plans.²⁴⁹⁹ Depending on the structure of the plan, the severance policy may be considered a welfare plan, a pension plan, or both if it is found to be a plan requiring an ongoing administrative scheme and employer discretion.

In the seminal case of *Donovan v. Dillingham*, the Eleventh Circuit established a four-prong test to determine whether an ERISA severance plan exists.²⁵⁰⁰ According to the court in *Dillingham*, a plan exists if a reasonable person can ascertain: (1) the intended benefits; (2) the intended beneficiaries; (3) the source of financing; and (4) the procedures for receiving benefits.²⁵⁰¹ In most cases, an arrangement made by an employer providing severance benefits will meet this four-point test.

The Supreme Court later addressed the issue of whether a state statute requiring employers to provide a one-time severance payment to employees in the event of a plant closing is preempted by either ERISA or the NLRA.²⁵⁰² In *Fort Halifax Packing Co. v. Coyne*, the Court held that the statute was not preempted by

²⁴⁹⁵ Minn. Stat. § 363A.31, subd. 2.

²⁴⁹⁶ More information about employee benefits can be found in Chapter VII.

²⁴⁹⁷ I.R.C. § 409A.

²⁴⁹⁸ 29 U.S.C. § 1003(a). Additional information about ERISA can be found in Chapter VII.

²⁴⁹⁹ *Id.*

²⁵⁰⁰ 688 F.2d 1367, 1373 (11th Cir. 1982) (*en banc*).

²⁵⁰¹ *Id.*

ERISA because the statute did not establish or require an employer to maintain an employee benefit plan.²⁵⁰³ The Court stated that Congress' intention behind ERISA's broad pre-emption provisions was to establish a uniform set of administrative procedures and a single set of regulations for employers to follow and rely upon. This concern for uniformity is only infringed upon when the provision of benefits requires an ongoing administrative program. The crucial indicator in *Fort Halifax Packing Co.* was that the statute did not require the employer to establish such an administrative program to provide the statutory severance benefits. Consequently, ERISA does not apply to a one-time severance payment, such as one dictated by a state plant-closing law, triggered by an external event and requiring no administration or administrative interpretation to carry out the plan.²⁵⁰⁴

Although there is no widely accepted test to determine whether a severance arrangement requires an administrative scheme, thus bringing the plan under the purview of ERISA, many courts have relied on the following factors to find ERISA preemption:

- benefits are paid out in a manner other than a single lump sum payment;
- employer has discretion in deciding whether an employee is eligible for benefits under the policy;
- employer exercises discretion in operating the severance policy; and
- employer is required to process benefit claims, monitor former employees to ensure compliance with a non-compete agreement, provide continued medical coverage under the policy, or otherwise continue a post-termination relationship with the former employee.

It is difficult to predict whether a severance policy is covered by ERISA. Therefore, an employer should assume that ERISA applies to any severance arrangement that is ongoing and predictable, or that requires employer discretion and analysis of individual circumstances. Benefit arrangements that involve more than a single, lump sum payment from the employer's general assets upon termination, without the need for an employer to analyze each employee's particular situation, is likely to be covered by ERISA.²⁵⁰⁵

(b) Termination and Modification of Severance Benefits

Employers have broad discretion in designing and administering ERISA severance plans. Severance plans may be entirely discretionary if the employer provides severance benefits only to designated employees in a form and amount determined by the employer at the time of termination. Alternatively, the employer may commit in advance to a severance formula where, for example, the terminated employee receives one week of pay for each year of employment.

When a severance plan is treated as a welfare benefit, severance benefits are unaccrued and non-vested, and an employer generally does not violate ERISA by altering or eliminating a severance pay policy. Therefore, a release of claims against the employer in exchange for a severance package generally provides valid consideration for the exchange.²⁵⁰⁶ However, modification or elimination of a severance benefit may be impermissible when a predecessor employer's severance pay plan contained a provision that prevented an acquirer from diminishing benefits under the plan.²⁵⁰⁷

Generally, an employer may unilaterally amend or eliminate a severance plan without violating ERISA's fiduciary standards. In *Joanon v. Coca-Cola Co.*, the Coca-Cola Company amended its severance pay policy to exclude employees who were offered comparable employment by a buyer of a business unit.²⁵⁰⁸ After

²⁵⁰² *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 3 (1987).

²⁵⁰³ *Id.* at 8.

²⁵⁰⁴ *Id.*

²⁵⁰⁵ The Department of Labor makes no distinction between funded and unfunded severance pay arrangements in applying ERISA's welfare provisions to these arrangements. 29 C.F.R. § 2510.3-1(a)(3).

²⁵⁰⁶ *Joe v. First Bank, Inc.*, 202 F.3d 1067 (8th Cir. 2000).

²⁵⁰⁷ *Snodgrass v. Simpson Timber Co.*, 955 F.2d 48 (9th Cir. 1992).

amending the policy, the company sold a business unit. Employees who were excluded from severance benefits sued, arguing that the company had wrongfully amended its policy to exclude them from coverage. The Ninth Circuit held that “[w]hile employers who choose to provide a severance plan assume certain fiduciary duties in *administering* it, they remain free to unilaterally *amend* or *eliminate* such plans without considering the employees’ interests.”²⁵⁰⁹ In addition, failure to observe ERISA’s reporting and disclosure requirements will not invalidate a plan amendment if the failure is not prejudicial. However, if an employer fails to disclose an amended severance pay arrangement, a substantive award of benefits under the pre-amended plan is appropriate if the employer acted in bad faith, actively concealed the plan, or otherwise prejudiced its employees by inducing their reliance on an inaccurate plan summary.²⁵¹⁰

(c) Requirements of ERISA Compliance Relating to Severance Plans

ERISA compliance for a severance plan requires that the employer satisfy written plan, reporting and disclosure requirements. In some cases, the severance plan may be drafted so that it limits benefit participation to terminated employees who actually receive severance benefits, making reporting and disclosure under ERISA easier. Finally, severance benefits may be paid from the employer’s general assets rather than from a trust.

- **Written Plan Requirement.** The employee benefit plan must be established and maintained pursuant to a written plan document. The written plan must contain certain plan provisions. For example, the written plan must authorize one or more named fiduciaries to operate the plan, and set forth the plan amendment procedure and the claims procedure.
- **Summary Plan Description Requirement.** A written summary of the employee benefit plan must be distributed to the plan participants. The summary must be written in easy to understand language and must contain information regarding eligibility, benefits, and a participant’s rights under ERISA. If the summary plan description is updated or materially modified, the participant must be notified of the change.
- **Annual Report Requirement.** An annual report must be filed with the Department of Labor. Unfunded plans with fewer than 100 participants at the beginning of the year that pay benefits out of the employer’s general assets are exempt from this requirement.

(d) Severance and Section 409A

The Internal Revenue Service (“IRS”) has historically had a difficult time distinguishing severance pay arrangements from deferred compensation. This distinction has become a more urgent matter with the recent enactment of Section 409A, which places a number of restrictions on deferred compensation and imposes a twenty percent penalty on deferred compensation that fails to comply with the requirements.²⁵¹¹

In 2007, the Treasury Department and the IRS postponed, until January 1, 2009, the effective date of the final regulations under IRC § 409A published on April 10, 2007 (the “Final 409A Regulations”).²⁵¹² Although there are a number of exceptions under Section 409A, an employer should consult with a benefits attorney regarding the scope of impact of Section 409A on its plans.

Section 409A defines “deferred compensation” as including certain bonus payments, severance payments, and retention awards, in addition to traditional non-qualified deferred compensation and equity awards. In addition, Section 409A applies to employees, directors, and independent contractors.

²⁵⁰⁸ 26 F.3d 96 (9th Cir. 1994).

²⁵⁰⁹ *Id.* at 98.

²⁵¹⁰ *Panaras v. Liquid Carbonic Indus., Corp.*, 74 F.3d 786 (7th Cir. 1996).

²⁵¹¹ 26 U.S.C. § 409A.

²⁵¹² *See* IRS Notice 2007-86.

Deferred compensation is generally compensation to which an individual has a legally binding right in one taxable year that is payable in a later taxable year.²⁵¹³ The regulations provide a number of exceptions to Section 409A, including the short-term deferral exception (likely to be the most significant exception). In a nutshell, the exceptions are:

- short-term deferral exception; generally, amounts paid within two and one-half months after the end of the year in which the payable amount is no longer subject to a substantial risk of forfeiture;
- involuntary arrangements that are collectively bargained;
- involuntary arrangements to the extent that they pay no more than the lesser of two times pay or \$500,000 (adjusted), and pay the entire amount no later than December 31 of the second calendar year after the year of termination of employment; and
- involuntary or voluntary arrangements that reimburse certain business expenses, reasonable outplacement and moving expenses, and medical expenses, all as incurred no later than December 31 of the second calendar year after the year of termination.

If Section 409A applies, severance payments may be structured to comply with Section 409A. Certain executives of publicly-traded companies, however, may not receive payment based on termination of employment until at least six months after such termination.²⁵¹⁴

In general, if deferred compensation is not subject to a substantial risk of forfeiture and does not fit under one of the exceptions under Section 409A, then the deferred compensation must comply with restrictions under Section 409A to avoid immediate inclusion in income and the twenty percent penalty tax. Section 409A imposes restrictions on when an employee may elect to defer compensation. Generally, an employee must make such an election in the year before the employee earns (that is, provides services for) the compensation.

In addition, Section 409A poses a challenge with respect to severance pay arrangements that attempt to make up for amounts from either equity or deferred compensation plans that an executive forfeits upon termination because they are not vested. Often an employer wishes to compensate the employee for this amount to avoid a dispute. The regulations provide that Section 409A applies to compensation substituted to replace deferred compensation under another plan. Such compensation is considered to be paid or deferred under the other plan and this may cause the other plan to fail to satisfy Section 409A.²⁵¹⁵

Section 409A penalties potentially apply to payment of deferred compensation in the context of the following six events: (1) separation from service (termination); (2) disability; (3) death; (4) a specified date; (5) a change in ownership; or (6) an unforeseeable emergency.²⁵¹⁶ In general, payment may not be accelerated. In addition, Section 409A requires reporting of deferred compensation and imposes restrictions on funding deferred compensation.

Deferred compensation agreements and plans subject to Section 409A (including employment, severance, and change-in-control agreements) must be amended to comply with Section 409A. Because the twenty percent penalty is imposed on the executive, director, employee or independent contractor who is due the deferred compensation, employers should discuss Section 409A with those in affected categories, and recommend they contact a benefits attorney and review their agreements and plans in light of Section 409A.

²⁵¹³ Treas. Reg. § 1.409A-1(b)(1).

²⁵¹⁴ I.R.C. § 409A(a)(2)(B)(i).

²⁵¹⁵ See Treas. Reg. §§ 1.409A-1(b)(9), 1.409A-1(m).

²⁵¹⁶ 26 U.S.C. § 409A(a)(2)(A); Treas. Reg. § 1.409A-3(a).

SECTION 12.5 PARTIAL TAX-QUALIFIED RETIREMENT PLAN TERMINATION

The IRC provides that when an employer terminates or partially terminates a tax-qualified retirement plan, then the unvested participants who are affected must be fully vested. In general, when an employer reduces the number of participants in a tax-qualified retirement plan by twenty percent or more, there is a partial termination.²⁵¹⁷ Generally, if an employer has a plan to reduce its workforce that covers one or more years, then the conservative approach is to count all employees terminated in connection with the reduction. If there is a RIF that approaches the twenty percent threshold, then the employer should consult with a benefits attorney regarding its impact on the employer's tax-qualified retirement plan.

SECTION 12.6 RIF TIMELINE

90 days before RIF:

- Evaluate company policies
- Create a layoff plan
- Institute a hiring freeze
- Determine union bargaining issues: decision v. effects
- Review collective bargaining agreements for severance, bumping, and seniority issues
- Compliance with the WARN Act
 - Covered employer?
 - Notice-triggering event?
 - Who is entitled to notice?
- Review retirement benefit plans (*i.e.*, 401(k) plans) to determine if RIF will trigger a "partial plan termination" requiring vesting of unvested contributions
- Review potential tax implications of IRC Section 409A on deferred executive compensation

90-60 days before RIF:

- Establish criteria and methodology
- Thoughtfully select and train RIF decision makers
- Train decision makers on selection guidelines and equal employment considerations
- Document selection decision
- Conduct adverse impact analysis
- Prepare WARN notices
- Determine stay incentives
- Prepare external communication/public relations plan

60 days before RIF:

- Revisit WARN Act requirements including when notice must be given and to whom is notice sent
- Implement public relations plan
- Implement stay incentive agreements
- Begin effects bargaining with union

²⁵¹⁷ See I.R.C. § 411(d)(3)(A); Treas. Reg. § 1.411(d)-2; Rev. Rul. 2007-43.

30 days before RIF:

- Release agreements
- OWBPA
- Severance pay plans
- Develop plan for mechanics of notification
- Develop plan for trade secrets, network access

RIF day:

- Implement notification plan
- Provide letter regarding severance benefits, continued obligations regarding trade secrets, confidentiality, and covenants not to compete

Day after RIF:

- Implement internal and external communications plan
- All-employee meeting regarding new vision, post-reduction workloads
- Individual meetings with managers

1-30 days after RIF:

- Human resources manage by walking around
- Re-recruiting

30-60 days after RIF:

- Employee poll regarding employee relations issues after RIF
- Audit receipt of severance and release agreements

CHAPTER XIII

TERMINATION OF EMPLOYEES

SECTION 13.1 DECISION TO TERMINATE

It is not uncommon for employers to invest considerable time, energy, and resources into deciding whether or not to terminate an employee, and then to implement that decision with little thought. Not only do employers need to exert significant efforts into making legally defensible termination decisions, they also need to handle terminations in ways that minimize the potential for future litigation.

(a) Review by Independent Party

The Washington State Supreme Court has emphasized the importance of careful risk assessment before implementing a termination decision. In *Ellis v. City of Seattle*, an employee was terminated for insubordination when he refused to disable the public address component of the sports arena's fire alarm system.²⁵¹⁸ The court held that such a termination gave rise to a public policy wrongful discharge claim because of public safety concerns and the possibility of imminent harm. According to the court's decision, even employees who have willfully refused to follow the directions of their supervisor may be engaging in activity protected by public policy.²⁵¹⁹

An employee almost never should be terminated without some review and consideration of the decision. In most instances, terminations should be reviewed in detail by a person who is aware of the potential legal implications of the proposed termination. The reviewer should use a checklist that helps identify problem areas. Because termination decisions often involve very subtle judgments, the reviewer should be able to focus objectively on all of the relevant considerations, including employee evaluations and discipline.²⁵²⁰ In addition, employers should consider the following issues in evaluating the decision to terminate an employee.

(i) Ensure Compliance with Company Policy

- Were all the applicable discipline and terminations policies and procedures followed properly?²⁵²¹
- Was the employee informed of the problem and given an opportunity to respond to the concerns and/or correct the problem? If the employee was given a specified period of time in which to improve, was that time period reasonable and has it elapsed?

(ii) Ensure Discharge is Consistent with Company Practice

- If the termination is disciplinary in nature, is termination the appropriate, commensurate response to the employee misconduct or would some lesser discipline be appropriate?

²⁵¹⁸ 142 Wn.2d 450 (2001).

²⁵¹⁹ *Id.*; see Chapter X for additional information on employee tort claims.

²⁵²⁰ See Chapter II for additional information on employee performance evaluations.

²⁵²¹ A company should ensure that its discipline and termination policies and procedures comply with the law. For example, in August 2011 the NLRB released its "Report of the Acting General Counsel Concerning Social Media Cases," stating that employees have a right to "protected concerted activity" when using social media. A protected concerted activity occurs when employees act together in matters related to the *terms and conditions* of their employment. This can include a group activity or the activity of a single employee if the employee is acting on behalf of a group or preparing for group action (this provision does *not* apply to actions which are limited solely to one employee's concerns). As a result, companies should make certain that their discipline and termination policies do not adversely affect employees who engage in protected concerted activity using social media, and that their other discipline and termination policies are, likewise, in compliance with the law.

- Are there other employees who have exhibited the same or similar problems? If so, how have they been treated? How would you treat your favorite employee if he or she engaged in the same conduct?
- What is the employee's side of the story? Has the employee been given an opportunity to present his or her side and is there a plausible explanation for the problem?
- Has the employee raised any issue or complaint recently that could create the basis for a retaliation or "whistleblower" claim? For instance, has the employee recently raised an issue or claim regarding workers' benefits, safety issues, discrimination or harassment, union activity, or any other unlawful activity in the workplace?
- Is the employee in a statutorily protected category on account of race, gender, religion, creed, national origin, age, disability, sexual orientation, marital status, receipt of public assistance, etc.?
- What is the employee's length of service? Long-term service often creates sympathy, legitimately or not, on the part of the court or jury in any subsequent dispute.
- What is the history of the supervisor seeking the termination? Has he or she terminated any employees before? What were the circumstances in those other terminations? For example, if the supervisor has terminated many employees before, all of them over the age of 40, and the employee to be terminated is over the age of 40, this may raise a red flag.
- If the employee to be terminated has had other supervisors in the recent past, what do those supervisors say about the employee?

(iii) Review Supporting Documents

- Are the grounds for the termination well supported and documented?
- What do the employee's past performance evaluations indicate with respect to "good" or "bad" performance?
- Has the employee received "merit" salary increases, awards, commendations, or any other indication of above-average performance?
- Are protected classes referenced in performance documentation, either explicitly or implicitly?

(b) Consider Alternatives

When considering the implications of a termination decision, employers are advised to review other possible options that may be appropriate and could reduce the risk of litigation. These options include transfer opportunities to other positions and/or locations,²⁵²² early retirement options (with or without additional benefits or inducements), outplacement assistance or severance pay. In considering these alternatives, the employer also should carefully consider obtaining a release of claims from the employee. If the employee is being offered some benefit to which he or she otherwise would not be entitled, such as special severance pay, then the employer generally should seek a release in return, not because the employer did anything wrong or there is any basis for a claim, but to avoid the costs of future, frivolous litigation.²⁵²³ In some cases, it may be preferable to offer the employee an opportunity to resign with the understanding that if the employee does not elect to resign, the employee will be terminated.²⁵²⁴

²⁵²² Although an employer should consider transfer opportunities to other positions before terminating an employee, when it comes to employees who become disabled or injured while employed, the Ninth Circuit Court of Appeals ruled that under California law an employer is only required to consider whether the injured employee can perform the tasks of the job they were hired to perform or if the employee can be placed in another position. If the employer finds that the employee cannot perform his original job functions and the employer has no other suitable position for the employee, the employer need not retain the injured employee. *See Carando v. Lucent Technologies, Inc.*, 642 F.3d 728 (9th Cir. 2011). *But see Cuiellette v. City of Los Angeles*, 194 Cal. App. 4th 757 (2011) (must accommodate into light duty role).

²⁵²³ *See also* Chapter XII (regarding layoffs and reductions in force).

(c) Identify the Decision-Maker

Everyone involved in the process should understand at the outset who made the termination decision. This will ensure that the decision later can be effectively defended, if necessary. It also will avoid the awkward situation where everyone tries to pass the buck and avoid accountability for the decision.

SECTION 13.2 TERMINATION PROCESS

(a) Preparing the Termination Package

Review termination benefits and procedures in advance so they can be discussed concisely and accurately with the employee, including:

(i) Severance Pay

There is no legal requirement under Washington, Minnesota, California, or Utah law that employers provide severance pay to an employee upon termination of employment.²⁵²⁵

(ii) Medical and Life Insurance

Benefit continuation and conversion options are available under COBRA.²⁵²⁶

(iii) Pension and Profit-Sharing

Pension and profit-sharing, including vesting and options to withdraw contributions, should be considered.

(iv) Wages Due

Washington law provides that, when an employee is fired, laid off or voluntarily quits, final wages are due on the regularly established payday after termination.²⁵²⁷ Paid vacation, holiday and sick leave are considered voluntary benefits. If the employer promises workers such benefits, the employee must be paid all compensation due. Under no circumstances should earned wages be withheld as leverage in seeking a resignation.²⁵²⁸ Not only is this illegal, it also may void any settlement agreement procured on this basis.

California law provides that if an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately.²⁵²⁹ “All wages” include any earned, but unused vacation pay.²⁵³⁰ There is no requirement under California law that an employer pay accrued sick leave upon termination.

Minnesota law provides that, in most instances, unpaid wages and commissions become due immediately upon termination.²⁵³¹ Wages should be paid within 24 hours of the termination.²⁵³² If wages are not paid

²⁵²⁴ *Molsness v. City of Walla Walla*, 84 Wn. App. 393, 398 (1996) (a resignation is still voluntary when an employee tenders her resignation to avoid termination for cause).

²⁵²⁵ For additional severance information, refer to the severance discussion later in this chapter; *see* Chapter X: Contract and Tort Claims, and Chapter XII: Reductions in Force, Layoffs, Plant Closings, and Severance.

²⁵²⁶ *See* Chapter VII for additional COBRA information.

²⁵²⁷ RCW 49.48.010 (payment of wages due to employee ceasing work at end of pay period); RCW 49.48.160 (payment of earned commissions upon termination of contract between principal and sales agent). For more information on wage and hour laws, *see* Chapter V.

²⁵²⁸ RCW 49.52.050-.070 (imposing double damages for willful wage withholding).

²⁵²⁹ Cal. Lab. Code § 201.

²⁵³⁰ Cal. Lab. Code § 227.3; *see also* *Suastez v. Plastic Dress-Up Co.*, 31 Cal. 3d 774 (1982).

²⁵³¹ Minn. Stat. § 181.13 (wages and commissions actually earned are due immediately upon demand of discharged employee); *see also* Minn. Stat. § 181.14 (due next regular payday for resigning employee); Minn. Stat. § 181.145 (timing of prompt payment of commissions to commissioned salespeople).

within 24 hours, the employer can be required to pay the employee two times the employee's average daily earnings for each day until wages are paid.²⁵³³ Under no circumstances should earned wages be withheld as leverage in seeking a resignation. Not only is this illegal, but it also may void any settlement agreement procured on this basis.

Minnesota law prohibits deductions from pay for any debts to the employer, unless the employee, *after* the debt has arisen, voluntarily authorizes the employer in writing to make the deduction.²⁵³⁴

Depending on the employer's vacation policy, the employee may be entitled to compensation for earned, unused vacation.²⁵³⁵ The Minnesota Supreme Court has held that while vacation and PTO are "wages" under Minnesota Statute Section 181.13(a), the statute does not itself grant a right to vacation, PTO, or PTO payout. Rather, the employee's rights to these "wages" are governed wholly by the contract with the employer. Essentially, the court clarified that Section 181.13(a) is a timing statute and does not create a right to unpaid vacation wages upon termination unless provided by the contract between the parties. The contract determines what "wages" an employer must pay to a discharged employee, whereas the statute mandates when an employer must pay those wages.²⁵³⁶

It is particularly important to note that the court based its decision on the assumption that the employee handbook, which contained the PTO policy, was an enforceable contract. In light of this, it is important to clarify that a PTO policy is a contract. Otherwise, a court may find that the handbook also disclaims provisions that an employee is not entitled to PTO-payout "wages" even if terminated for misconduct. While employers may still include a description of vacation and PTO payout policies in employee handbooks, those policies also should be set forth in a separate document made available to employees that can clearly be viewed as a contract. Employers should be similarly careful with other policies such as commission plans and benefits.

Utah law provides that when an employer separates an employee from the payroll, the employees' unpaid wages become due immediately.²⁵³⁷ The employer must pay the employee within 24 hours of the time of separation.²⁵³⁸ If an employer fails to pay unpaid wages within 24 hours, an employee may make a written demand for payment and is entitled to up to 60 days of pay at the same wages from the date of demand.²⁵³⁹

If an employee does not have a written contract for a definite employment and resigns, the employee's unpaid wages become due at the next regular payday.²⁵⁴⁰

(v) Waiver/Release

Any waiver or release of age discrimination claims must comply with the Older Workers Benefits Protection Act ("OWBPA").²⁵⁴¹ An employee's release of Age Discrimination in Employment Act ("ADEA") claims is not valid and enforceable unless it strictly complies with the statutory requirements. This is true even if an employee who signs a release accepts and keeps a monetary severance package.²⁵⁴²

²⁵³² Minn. Stat. §§ 181.11, 181.13.

²⁵³³ *Id.*

²⁵³⁴ Minn. Stat. § 181.79.

²⁵³⁵ *Brown v. Tonka Corp.*, 519 N.W.2d 474 (Minn. Ct. App. 1994).

²⁵³⁶ *Lee v. Fresenius Med. Care, Inc.*, 741 N.W.2d 117 (Minn. 2007).

²⁵³⁷ Utah Code Ann. § 34-28-5(1)(a).

²⁵³⁸ *Id.*

²⁵³⁹ Utah Code Ann. § 34-28-5(1).

²⁵⁴⁰ Utah Code Ann. § 34-28-5(2).

²⁵⁴¹ 29 U.S.C. § 626(f). It must also comply with state law. *See, e.g.*, Minn. Stat. § 363A.31.

²⁵⁴² *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422-23 (1998) (court held release did not comply with requirements and therefore cannot bar an ADEA claim).

Among the requirements imposed by the OWBPA are the following:²⁵⁴³

- the release must be in writing and be understandable;
- the employee must receive additional consideration in addition to any benefits to which the employee would otherwise be entitled upon termination of employment;
- the release must refer to the ADEA;
- the release cannot waive rights or claims arising after the release is signed;
- the release cannot waive an employee's right to file a charge or complaint with the Equal Employment Opportunity Commission ("EEOC") or any other government agency or limit an employee's right to participate in such an investigation or proceeding;
- the employee must be advised in writing of the right to consult an attorney prior to signing the release;
- the employee must be given at least 21 days to consider the agreement before signing it, or 45 days if part of a group layoff, although the employee may waive this period and sign earlier or the employer may revoke the offered agreement prior to its acceptance;²⁵⁴⁴ and
- the release must include a seven-day revocation period after signing the release. The seven-day period cannot be waived.²⁵⁴⁵

In response to the U.S. Supreme Court's decision in *Oubre v. Entergy Operations, Inc.*,²⁵⁴⁶ the EEOC issued regulations that call into question an employer's ability to obtain a full covenant not to sue – that is, an agreement that the employee will not bring a lawsuit against the employer. The Regulations state that the entire release, as it relates to ADEA claims, will be invalid if the release requires an employee who breaches the covenant not to sue by filing a lawsuit to return any monetary consideration, to pay attorneys' fees, and/or forfeit additional payments under the release.²⁵⁴⁷ Employers may try to comply with the Regulations by excluding ADEA claims from any covenant not to sue. However, recent case law indicates that such efforts may confuse employees who likely do not understand the legal distinction between a release of claims and covenant not to sue and, as a result, may render the release invalid because it was not written in an understandable manner, as required by the OWBPA.²⁵⁴⁸ Employers are cautioned that employees may have nothing to lose by signing the release, accepting the employer's money, and then challenging the legal sufficiency of the signed release in court. However, a court may elect to offset the employee's damages by any amount paid in severance.

²⁵⁴³ 29 U.S.C. § 626(f); 29 C.F.R. § 1625.22 (EEOC regulations, waivers of rights and claims under the ADEA). The OWBPA imposes additional informational requirements and a 45-day consideration period for group or class layoffs pursuant to an "exit incentive program." See Chapter XII for more details on these requirements. EEOC regulations provide that such a "program" must be offered to two or more employees and typically involves a standardized formula or package of benefits that is generally not subject to negotiation between the parties. 29 C.F.R. § 1625.22(f)(1)(iii)(B). Whether a termination program triggers the additional requirements is determined on a case-by-case basis. See also Chapter IX for more information on employment discrimination.

²⁵⁴⁴ *Ellison v. Premier Salons Int'l, Inc.*, 164 F.3d 1111, 1115 (8th Cir. 1999).

²⁵⁴⁵ Enforcement Guidance on Non-Waivable Employee Rights Under EEOC Enforced Statutes, EEOC Notice No. 915.002 (Apr. 10, 1997). For a complete discussion of group layoffs, including releases, see Chapter XII: Reductions in Force, Layoffs, Plant Closings, and Severance, in particular, Section 12.3.

In addition, waivers or releases of claims under the MHRA that have not been filed with the Department of Human Rights or other administrative body or judicial body must include a 15-day revocation period after signing the release, which 15-day revocation period may run concurrently with the 7-day revocation period. Minn. Stat. § 363A.31, subd. 2. A waiver or release given in settlement of a claim filed with the Department of Human Rights or other administrative body or judicial body is valid and final upon execution. *Id.*

²⁵⁴⁶ 522 U.S. 422 (1998).

²⁵⁴⁷ 29 C.F.R. § 1625.23.

²⁵⁴⁸ *Syverson, et al. v. IBM Corp.*, 461 F.3d 1147 (9th Cir. 2006), *superseded on other grounds*, 472 F.3d 1072 (9th Cir. 2007); *Thomforde v. IBM Corp.*, 406 F.3d 500 (8th Cir. 2005). *But see Parsons v. Pioneer Seed*, 447 F.3d 1102 (8th Cir. 2006).

(b) Other Preparations

Other steps may need to be taken prior to the termination meeting. For example, if there was a risk of violence or a security risk, additional precautions may be necessary. It may be advisable to take steps, such as changing computer access codes, to preclude the employee from access to sensitive files. Preparations should be made to collect keys, access cards, company property, and to cancel any company credit cards.

In some circumstances, it may be appropriate to escort the employee off the premises immediately after the termination. In Minnesota, the mere act of escorting the employee out of the facility is not considered defamatory, even if other persons can observe it being done.²⁵⁴⁹ To reduce any risk of defamation, if it is the standard practice for an employer to escort terminated employees out of the building, it should ensure that all such employees are discreetly escorted off the premises, preferably after the conclusion of the workday.

(c) Control the Process

Make certain that the termination is not tainted by an allegation that it was maliciously motivated. Generally, communication of the reasons for termination and other related information to the employee and to other employees on a need-to-know basis is confidential. Confidential privilege may be lost if the employee can show that the employer acted with malice or if persons without a need-to-know were given information. Staff in the personnel department and others who review or have access to information concerning termination issues should not discuss these issues with others inside or outside the company.²⁵⁵⁰

(d) The Termination Meeting

(i) Timing and Setting

The termination meeting should take place in a confidential setting, such as an office or conference room with a closed door. Arrangements should be made to avoid interruptions, such as telephone calls. It is often advisable to conduct such a meeting at the very beginning or end of a day or shift, when there are fewer people around. The employer also should be mindful of the timing of the meeting in relation to other events. For example, it would not be advisable to terminate the employee on the day before a holiday; such an apparently callous action may cast the employer in a very unfavorable light in the eyes of a fact finder should subsequent legal action ensue.

(ii) Attendees

Ordinarily, the individual principally responsible for the decision to terminate should be the one to inform the employee of that decision. This person should prepare a written outline of the issues to address and stick to that outline in the meeting. It is a good practice to check off each item on the outline after it has been covered as evidence that each was indeed discussed. One other person, if possible someone from the human resource department, should be present to respond to benefits questions and independently verify what transpires. The entire interview should be summarized in writing as soon as possible after the meeting, with both employer representatives signing off on the summary.

Employees in unionized companies may have a right to request the presence of a co-worker to attend an investigating interview which the employee reasonably believes could result in a disciplinary action.²⁵⁵¹ Therefore, if the employee makes such a request, the underlying circumstances of the particular termination should be analyzed to ensure compliance with the National Labor Relations Act (“NLRA”).

²⁵⁴⁹ *Bolton v. Dep't of Human Servs.*, 540 N.W.2d 523 (Minn. 1995).

²⁵⁵⁰ For a complete discussion of the tort of defamation in the employment context, see Chapter X.

²⁵⁵¹ *IBM Corp.*, 341 NLRB No. 148, 2004 WL 1335742 (June 9, 2004).

(iii) Tone of the Meeting

The meeting should be conducted with honesty, candor, and sensitivity, and be forward-looking, yet decisive. The meeting also should be brief and to the point. This is not the time to argue about the reasons or justifications for the termination.

(iv) Reasons for Termination

There are competing issues at stake as to the question of what an employee should be told in a termination meeting about the reasons for the termination. As a practical matter, and for the fundamental fairness of the process, it is difficult to terminate an employee if the employee is not informed of the reasons for the termination. Conversely, stating the reasons for the termination may lead to an argument about those reasons, which is best avoided in the termination meeting. In addition, telling the employee the reasons for the termination may give rise to a claim for defamation, which though generally privileged and defensible, nevertheless may entail substantial litigation costs. Providing a statement of the reasons for the termination also can be problematic if the statement is not absolutely complete and accurate. It would be difficult for an employer to modify or supplement its stated reasons later without risking that the fact finder would view the employer's reasons as pre-textual.

In some circumstances it may be better that the employer not state the reasons for the termination in the termination meeting itself. In the context of performance-based terminations, it is likely that the employee has been apprised of his or her problem(s) under the employer's progressive discipline system and, therefore, should already be well aware of the reasons for the termination. The employer then can make some general statement to the effect that "you are aware of the reasons for this action based on our prior discussions," or, even more generally, "the situation simply is not working out, and the company has made the decision to terminate your employment."

In other circumstances, it will be necessary or appropriate to state the reasons for the termination in the meeting with the employee. In such a case, it is important that the reasons are stated truthfully, concisely, and briefly. Again, it will be difficult for the employer to later supplement or modify the reasons given. If the employer intends to state only the "primary" reasons for the termination in the meeting, it is critical that the employee be advised that he or she can request a written statement of *all* the reasons. It is good practice to inform the employee in the meeting of the right to a written statement of the reasons for the termination and to provide a form to request such a statement.²⁵⁵²

Whenever or in whatever context the reasons are stated for the employee's termination, always be certain the statement is all-inclusive and accurate. Avoid the temptation to "soften" the impact with less critical reasons such as "not enough work available" or "reorganization" if such reasons are not accurate.

(e) Post-Termination

(i) Written Notice of Termination Reasons

Under Washington and Minnesota law, an involuntarily terminated employee may demand to be informed in writing of the reasons for the termination.²⁵⁵³ In Washington, if a written demand is made, the employer must respond within 10 working days with a signed written statement, setting forth the reasons for such discharge and the effective date thereof. In Minnesota, if the employee makes a written demand within 15 working days of termination, the employer must respond within 10 working days with a written statement of the truthful reasons for the discharge. An objective, factual statement of reasons is always the best course to follow.

²⁵⁵² Minn. Stat. § 181.933. When an employee makes such a request, it is especially important that the reasons given in the employer's response mirror the truthful, concise, and complete explanations given in the termination meeting with the employee.

²⁵⁵³ WAC 296-126-050(3); Minn. Stat. § 181.933, subd. 1.

Minnesota law also affords some protection to employers because the employer's written statement may not be the basis of any claim for libel, slander, or defamation.²⁵⁵⁴ Employers must post a summary of this law in a conspicuous location in the workplace.²⁵⁵⁵

(ii) Follow-up Meetings

A brief follow-up meeting may be necessary to resolve further issues, such as return of company property, termination benefits, and other residual issues, in a less tense setting. If subsequent meetings devolve into a debate over the termination, end the meeting.

(iii) Confidentiality

The employee may wish to keep the termination confidential to aid in a job search, while the employer may need to notify those with a need to know of the fact that the individual is no longer with the company. It is advisable to establish a practice with respect to the way in which departures (involuntary and voluntary) are announced (*e.g.*, "Effective on _____, [employee] is no longer with the company. Should you have questions, please direct them to _____.") to minimize the risk of defamation claims. Depending on the circumstances, it may be desirable to try to reach agreement on the wording of an appropriate statement with the departing employee. The agreement should be documented to avoid misunderstanding and to establish consent if the employee later claims the announcement was defamatory.

(iv) Employee References

As part of every termination process the employer should inform the employee of the employer's general policy with respect to references. Employers are cautioned against providing more than basic information. The employer may provide a form to the employee to authorize further release of information and to waive any claim arising therefrom.²⁵⁵⁶

(v) Severance

Employers in Washington, Minnesota, California, and Utah have no legal obligation to provide severance pay unless they have promised to do so in a labor contract or other employment agreement.²⁵⁵⁷ If the employee does have a contractual right to receive severance pay, it will not serve as consideration for a release of claims. Payments made purely as severance pay are taxable as wages and are subject to withholding.

ERISA applies to severance arrangements that provide benefits under a plan, fund or program.²⁵⁵⁸ There is not a generally accepted test to determine whether an arrangement requires an ongoing administrative scheme.²⁵⁵⁹ Courts tend to disregard whether an employer has complied with ERISA²⁵⁶⁰ and regularly find that arrangements under informal agreements, policies or guidelines are an ERISA plan.²⁵⁶¹

Recent tax law changes have significantly impacted severance arrangements and whether or not an arrangement constitutes deferred compensation, particularly for certain officers ("key employees") of

²⁵⁵⁴ Minn. Stat. § 181.933, subd. 2.

²⁵⁵⁵ Minn. Stat. § 181.934.

²⁵⁵⁶ *See Richland Sch. Dist. v. Mabton Sch. Dist.*, 111 Wn. App. 377 (2002) (former employer did not owe school custodian's new employer a duty to include the dismissed charges of child molestation and reprimands in custodian's letters of recommendation).

²⁵⁵⁷ For a discussion of claims arising for breach of a contractual agreement to pay severance, *see* Chapter X: Contract and Tort Claims, and Chapter XII: Reductions in Force, Layoffs, Plant Closings, and Severance.

²⁵⁵⁸ 29 U.S.C.A. §§ 1002(1)-(2).

²⁵⁵⁹ *See Crews v. Gen. Am. Life. Ins. Co.*, 274 F.3d 502, 506 (8th Cir. 2001) (providing a list of factors). *See also Fort Halifax v. Coyne*, 482 U.S. 1, 12 (1987); *Emmenegger v. Bull Moose Tube Co.*, 197 F.3d 929, 935 (8th Cir. 1999).

²⁵⁶⁰ *See Petersen v. E.F. Johnson Co.*, 366 F.3d 676, 679 (8th Cir. 2004).

²⁵⁶¹ *See Reedstrom v. NOVA Chem. Inc.*, 96 F. App'x 331 (6th Cir. 2004); *Emmenegger*, 197 F.3d at 934.

publicly-traded companies. In general, if severance pay constitutes deferred compensation, and if an employee may elect the form or time of severance pay, or if a key employee of a publicly-traded company receives severance pay earlier than six months after the date of the employee's termination, then the severance pay may be subject to a twenty percent penalty tax.²⁵⁶² Because the changes are relatively recent, this continues to be a developing area of law.²⁵⁶³

(vi) Outplacement Assistance

Outplacement assistance may be a very valuable part of a severance package for several reasons:

- it may help in securing a termination agreement, including a release of claims;
- even without a release of claims, assistance to the terminated employee in securing quality employment in a short period of time may be an excellent hedge against subsequent litigation; and
- it has a positive effect upon the company's reputation in the labor market and in the general community, which, in turn, may have a positive impact upon future hiring.

In some instances, it is helpful to have a representative of the outplacement firm meet with the employee soon after the termination meeting. This frequently helps the employee cope with the impact of the termination and expedites the employee's transition to a job search.

²⁵⁶² See 26 U.S.C.A. § 409A; I.R.S. Notice 2008-113.

²⁵⁶³ See Chapter VII for additional information on executive compensation legislation and 26 U.S.C.A. § 409A.

CHAPTER XIV

ALTERNATIVE DISPUTE RESOLUTION

Alternative Dispute Resolution (“ADR”) involves methods of resolving disputes outside of the courtroom. The high costs associated with taking a dispute all the way through trial make ADR an increasingly common method of civil case disposition. In 1998, Congress enacted the Alternative Dispute Resolution Act, which directs federal courts to implement ADR programs and gives individual courts a great deal of flexibility in accomplishing that goal.²⁵⁶⁴ State and federal courts in Washington have also adopted rules expressly providing for mediation. Utah also has numerous mediation programs.

In 1994, the Minnesota Supreme Court adopted Rule 114 of the General Rules of Practice requiring parties in almost all lawsuits—including all employment lawsuits—to engage in one or more of nine sanctioned ADR methods to enhance the likelihood of settlement. In addition, Minnesota has enacted the Minnesota Civil Mediation Act to facilitate the voluntary settlement of controversies with a mediator.²⁵⁶⁵ The Minnesota federal court has promulgated Local Rule 16.5, Alternative Dispute Resolution, which mandates a “mediated settlement conference” before a Magistrate Judge to be set within 45 days of trial in each civil case.

SECTION 14.1 MEDIATION

Mediation is by far the most popular ADR method for employment lawsuits that have already commenced. Mediation is a more flexible process and requires less preparation time and expense than the other ADR methods. Employment claims can be difficult to settle because they often involve strong emotions on both sides. Settlement can be impossible unless one or both parties has the opportunity to “tell their side of the story” to a neutral party. In these situations, the mediator can perform the useful role of a sympathetic listener.

A good mediator is able to discuss intelligently with both parties the strengths and weaknesses of their respective cases. Accordingly, parties should always select a mediator with significant experience in the relevant area of law.

SECTION 14.2 EMPLOYER-COMPELLED ARBITRATION

Employers with unionized work forces frequently engage in arbitration because it has been the customary method of resolving disputes arising under a collective bargaining agreement. Most collective bargaining agreements require “good cause” to discipline or discharge an employee, and require employment disputes to be resolved by arbitration.

Historically, arbitration was an infrequent substitute for litigation in a non-union work setting because the aggrieved plaintiff-employee would be unwilling to waive his or her right to have a jury decide the case. However, in the 1991 case of *Gilmer v. Interstate/Johnson Lane Corporation*,²⁵⁶⁶ the U.S. Supreme Court held that a non-union employee was required to arbitrate his federal age discrimination claim against his employer based on an agreement in the employee’s job application to arbitrate disputes. In the aftermath

²⁵⁶⁴ 9 U.S.C. § 1.

²⁵⁶⁵ Minn. Stat. §§ 572.31-572.41.

²⁵⁶⁶ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

of *Gilmer*, many employers have included similar provisions in contracts with employees, requiring employees to agree to arbitrate all employment disputes as a condition of employment.

The enforceability of employer-mandated arbitration is a developing area of law, and the decisions handed down by various federal appeals courts have been inconsistent. Nevertheless, the trend since *Gilmer* has been to enforce arbitration agreements, even when the underlying cause of action involves a statutory discrimination claim.²⁵⁶⁷

Section 1 of the Federal Arbitration Act²⁵⁶⁸ (“FAA”) excludes certain employees from its coverage. While the FAA’s exclusion of “other class of workers engaged in foreign or interstate commerce,” appears to cover nearly all employment contracts, the U.S. Supreme Court has held that this provision only excludes employment contracts involving transportation workers.²⁵⁶⁹ Accordingly, except for those employment agreements covering transportation workers, employment agreements signed by most employees will not be excluded from the FAA.

Similarly, in *Tjart v. Smith Barney*,²⁵⁷⁰ the Court of Appeals of Washington held that the FAA applies to employees’ state law-based employment discrimination claims.

Compulsory arbitration is an option available to all employers.²⁵⁷¹ Before an employer seeks to compel some or all of its employees to arbitrate their employment claims, the employer must first consider whether arbitration is in its best interest. The following are potential advantages of arbitration:

- the overall expense of an arbitration proceeding is usually much less than litigating the same dispute in court;
- arbitrators are generally believed to be more restrained than jurors in awarding damages, especially speculative and punitive damages;
- the parties may keep the arbitration proceeding confidential and closed to the outside world; and
- there is no legal precedent created by arbitration decisions, thus a previous unfavorable decision does not bind an employer’s conduct.

On the other hand, arbitration has potential disadvantages:

- the rules of evidence are relaxed, meaning that an award can be based on evidence that may not be admissible in a court;
- there is no meaningful right to appellate review of an arbitration decision. Lack of appellate review can be especially disadvantageous in a case with complex legal issues;
- there is no equivalent of summary judgment in arbitration to obtain a pretrial dismissal of claims; and
- by compelling arbitration of employment disputes, the employer essentially gives the arbitration panel the power to determine whether the firing was justified, a process that

²⁵⁶⁷ *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011); *EEOC v. Luce*, 303 F.3d 994 (9th Cir. 2002) (Title VII, ADA, ADEA, and EPA); *Seus v. John Nuveen & Co., Inc.*, 146 F.3d 175 (3d Cir. 1998) (Title VII and ADEA); *Koveleskie v. SBC Capital Mkts., Inc.*, 167 F.3d 361 (7th Cir. 1999) (Title VII and EPA); *McWilliams v. Logicon, Inc.*, 143 F.3d 573 (10th Cir. 1998) (ADA); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832 (8th Cir. 1997) (Title VII); *Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698 (11th Cir. 1992); *Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229 (5th Cir. 1991).

²⁵⁶⁸ 9 U.S.C. §§ 1 *et seq.*

²⁵⁶⁹ *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).

²⁵⁷⁰ *Tjart v. Smith Barney*, 107 Wn. App. 885 (2001). The vast majority of cases addressing the enforceability of compulsory arbitration of employment disputes involve securities industry employers due to the arbitration provision formerly contained in the securities industry job application. Pursuant to an amendment to the rules of the National Association of Securities Dealers (“NASD”), effective January 1, 1999, the NASD no longer requires mandatory arbitration of statutory discrimination claims, although other employment-related claims can still be mandatorily arbitrated.

²⁵⁷¹ *PaineWebber, Inc. v. Agron*, 49 F.3d 347, 352 (8th Cir. 1995).

necessarily alters the employment relationship from at-will to a “discernible cause” standard.²⁵⁷²

An employer wishing to pursue a policy of compulsory arbitration must either enter into signed arbitration agreements with each employee one at a time, or issue a written policy of arbitration and distribute it in a policy manual or employment handbook. The trend appears to be that the enforceability of a mandatory arbitration agreement will depend on whether the agreement encompasses the specific claim at issue and whether the agreement contains adequate procedures and remedies. Thus, the written arbitration agreement or policy should, at a minimum:

- include an acknowledgment to be signed by the employee;
- describe the value given by the employer in exchange for the agreement (consideration);
- describe the types of disputes subject to arbitration, including statutory references;
- describe the arbitration procedures, including a fair procedure for selecting the arbitrator and taking evidence, and the right to legal representation;
- address whether class-based claims are permitted;²⁵⁷³
- provide for the employer to pay the arbitrator’s fees;
- include a specific waiver of the right to a jury and/or bench trial;
- provide for the same remedies available in court, including attorneys’ fees,²⁵⁷⁴ and
- allow employees to join together to pursue employment-related legal claims.²⁵⁷⁵

SECTION 14.3 STATUTORY AUTHORITY FOR ARBITRATION

The FAA was enacted to “reverse the long standing judicial hostility” toward arbitration agreements that American courts had inferred from English law and to place arbitration agreements “on the same footing as other contracts.”²⁵⁷⁶

Section 2 of the FAA provides in relevant part that a:

written provision in . . . a contract . . . to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.²⁵⁷⁷

Section 1 of the FAA, provides the following exclusion:

nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.²⁵⁷⁸

²⁵⁷² *Id.*

²⁵⁷³ *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011) (no class claim where agreement is silent); *Reyes v. Liberman Broad., Inc.*, 146 Cal. Rptr. 3d 616 (Cal. Ct. App. 2012) (same); *Kinecta Alt. Fin. Solutions Inc. v. Superior Court*, 205 Cal. App. 4th 506 (2012) (no class arbitration).

²⁵⁷⁴ *Johnson v. Hubbard Broad., Inc.*, 940 F. Supp. 1447 (D. Minn. 1996); RCW 49.48.030 (provides that an employee who is successful in recovering judgment for wages or salary owed in a grievance arbitration shall have reasonable attorneys’ fees assessed against the employer); *but see, Mayers v. Volt Mgmt.*, 203 Cal. App. 4th 1194 (2012) (fee-shifting provision unconscionable and invalidated arbitration provision).

²⁵⁷⁵ *D.R. Horton, Inc. and Michael Cuda*, 357 N.L.R.B. No. 184, 2012 WL 36274 (Jan. 3, 2012).

²⁵⁷⁶ 9 U.S.C. §§ 1 *et seq.*

²⁵⁷⁷ 9 U.S.C. § 2.

The Washington Arbitration Act²⁵⁷⁹ provides that: “[a]n agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of the contract.”

California’s Arbitration Act²⁵⁸⁰ provides that: “a written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract.”

The Minnesota Uniform Arbitration Act validates the use of arbitration agreements between employers and employees and sets forth certain requirements and procedures for arbitration. In addition to statutory authority, employers should be aware of the Equal Employment Opportunity Commission’s (“EEOC”) policy statement and the American Arbitration Association’s (“AAA”) rules on the issue of the arbitration of employment disputes.²⁵⁸¹

The Utah Uniform Arbitration Act provides that “[a]n agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract.”²⁵⁸² It also provides that the court shall decide whether an agreement to arbitrate exists.²⁵⁸³

SECTION 14.4 CASE LAW – COURT INTERPRETATION OF CONTROLLING STATUTES

In the 1991 landmark decision, *Gilmer v. Interstate/Johnson Lane Corp.*,²⁵⁸⁴ the U.S. Supreme Court held that a private agreement by an employee to arbitrate all claims against his employer would be enforced under the FAA with respect to statutory discrimination and common law claims. In the context of a complaint brought under the Age Discrimination in Employment Act (“ADEA”), the Court held that an arbitration clause in an employee’s securities registration application to the New York Stock Exchange required the employee to arbitrate. The Court held that there was no absolute right to a judicial forum for an ADEA claim, and that there was nothing in the legislative purpose or framework of the ADEA that would prohibit arbitration. The Court noted that, to the contrary, the ADEA appeared to look with favor on alternative dispute resolution methods.²⁵⁸⁵ The *Gilmer* court stated that the ADEA’s purposes were served as long as the employee could effectively present his or her case in the arbitral forum, particularly where arbitration would not undermine the EEOC’s independent authority to investigate claims.²⁵⁸⁶

²⁵⁷⁸ 9 U.S.C. § 1.

²⁵⁷⁹ RCW 7.04A *et seq.*

²⁵⁸⁰ Cal. Code Civ. Pro. §§ 1280 *et seq.*

²⁵⁸¹ Minn. Stat. §§ 572B.06-572B.30; EEOC, Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment (July 10, 1997), at <http://www.eeoc.gov/policy/docs/mandarb.html>; American Arbitration Association, National Rules for the Resolution of Employment Disputes (including Mediation and Arbitration rules) (July 1, 2006, as amended Nov. 1, 2009).

²⁵⁸² Utah Code Ann. § 78B-11-107.

²⁵⁸³ *Id.*

²⁵⁸⁴ 500 U.S. 20 (1991).

²⁵⁸⁵ *See also* Civil Rights Act of 1991, Pub. L. No. 102-166, § 118 (1991) (amendments encourage the use of ADR, “including . . . arbitration . . . to resolve disputes arising under the acts or provisions of Federal law amended by this title”).

²⁵⁸⁶ Since *Gilmer*, state and federal courts have frequently required arbitration of claims arising under Title VII, the ADEA, the Equal Pay Act, ERISA, the ADA, the FLSA, and other federal laws and state statutes. *See Saari v. Smith, Barney, Harris, Upham & Co.*, 968 F.2d 877 (9th Cir. 1992) (Polygraph Protection Act, 29 U.S.C. § 2001, claim subject to arbitration); *Mago v. Shearson Lehman, Hutton, Inc.*, 956 F.2d 932 (9th Cir. 1992) (Title VII); *Nghiem v. NEC Elec., Inc.*, 25 F.3d 1437 (9th Cir. 1994) (Title VII); *Golenia v. Bob Baker Toyota*, 915 F. Supp. 201 (S.D. Cal. 1996) (ADA); *Sacks v. Richardson Greenshield Sec., Inc.*, 781 F. Supp. 1475 (E.D. Cal. 1991) (California Fair Employment and Housing Act).

The *Gilmer* court's interpretation of the ADEA applies in the collective-bargaining context. In *14 Penn Plaza v. Pyett*, the U.S. Supreme Court held that a provision in a collective-bargaining agreement that clearly and unmistakably requires union members to arbitrate ADEA claims is enforceable as a matter of federal law.²⁵⁸⁷ The Court pointed out that nothing in the ADEA suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative.²⁵⁸⁸ The Court also rejected the argument that enforcing such arbitration provisions represents an impermissible prospective waiver of statutory rights. As the Court stated, "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute, it only submits to their resolution in an arbitral, rather than a judicial forum."²⁵⁸⁹

The Court in *14 Penn Plaza* also clarified the holding of *Alexander v. Gardner-Denver*.²⁵⁹⁰ In that case, the U.S. Supreme Court held that arbitral decision resolving Title VII disputes issued pursuant to a mandatory arbitration provision in the collective bargaining agreement did not preclude a subsequent trial *de novo* on that claim, based in part on the reasoning that by submitting his or her grievance to arbitration, an employee seeks to vindicate his contractual right under a collective-bargaining agreement, while a lawsuit under Title VII asserts independent statutory rights accorded by Congress.²⁵⁹¹ Relying on *Alexander v. Gardner-Denver*, a number of lower courts held that a collective bargaining agreement could not waive an employee's rights to a judicial forum for causes of action created by Congress. The Court in *14 Penn Plaza* explained that the holding of *Gardner-Denver* should never have been construed this broadly.²⁵⁹² According to the Court, arbitration was without preclusive effect in *Gardner-Denver* because the collective bargaining agreement at issue in that case did not explicitly reference statutory claims. Because the arbitrator in that case was not authorized to resolve statutory claims, the employee's arbitration of his grievance did not preclude a subsequent judicial proceeding.²⁵⁹³ The Court in *14 Penn Plaza* made clear that the *Gardner-Denver* line of cases do not control where the collective bargaining agreement's arbitration provision expressly covers both statutory and contractual discrimination claims. Following *14 Penn Plaza*, where a collective-bargaining agreement expressly requires statutory claims to be decided by arbitration, an arbitral decision as to a statutory claim will be given its appropriate preclusive effect.²⁵⁹⁴

In *KPMG LLP v. Cocchi*,²⁵⁹⁵ the U.S. Supreme Court held that where a company has an arbitration requirement, the FAA requires that if there is a dispute which presents multiple claims – some arbitrable and some not – the arbitrable claims must be sent to arbitration, even if it will lead to piecemeal litigation. Further strengthening the enforceability of arbitration agreements in 2012 the U.S. Supreme Court overruled a state supreme court declaring arbitration clauses as void and unenforceable as against the state's public policy. The Court held that it is for the arbitrator to decide whether the agreements' covenants not to compete are valid as a matter of applicable state law, and that under the Supremacy Clause, the state courts must abide by the FAA.²⁵⁹⁶

The trend toward judicial acceptance of compulsory arbitration agreements has not been without detractors.²⁵⁹⁷ In 2001, the Supreme Court overruled the Ninth Circuit ruling against compulsory arbitration agreements, holding that all employment agreements involving commerce, other than those excepted under the FAA, are within the FAA's regulatory power.²⁵⁹⁸ Following this decision, the Ninth

²⁵⁸⁷ 556 U.S. 247 (2009).

²⁵⁸⁸ *Id.* at 259.

²⁵⁸⁹ *Id.* at 264 (internal quotations omitted).

²⁵⁹⁰ 415 U.S. 36 (1974).

²⁵⁹¹ *Id.* at 49.

²⁵⁹² 566 U.S. at 260.

²⁵⁹³ *Id.* at 263.

²⁵⁹⁴ *Id.* at 263-64.

²⁵⁹⁵ 132 S. Ct. 23 (2011).

²⁵⁹⁶ *Nitro-Lijt Technologies v. Howard*, 133 S. Ct. 500 (2012).

Circuit ruled, in *EEOC v. Luce, Forward, Hamilton & Scripps*,²⁵⁹⁹ that Title VII does not preclude the enforcement of arbitration agreements entered into as a condition of employment. In 2012, the Supreme Court issued a ruling that when an Act is silent on whether claims under the Act can proceed in an arbitrable forum, the FAA requires the arbitration agreement to be enforced according to its terms.²⁶⁰⁰

SECTION 14.5 ENFORCEABILITY OF A PARTICULAR ARBITRATION AGREEMENT

The FAA applies to all agreements, except in the very rare cases in which it can be established to a high degree of certainty that no interstate commerce is involved (*e.g.*, a local dentist's office in a rural area).²⁶⁰¹ The U.S. Supreme Court has extended the FAA's reach to the limits of Congress's power under the Commerce Clause. The FAA is binding on federal and state courts, and arbitration must be compelled if the parties have so agreed.²⁶⁰²

In 2010, the U.S. Supreme Court held that a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so.²⁶⁰³ In *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, numerous charter shipping companies were sued by customers in separate actions alleging antitrust claims based on an alleged price-fixing conspiracy. After consolidation of the claims, the customers demanded class arbitration even though the arbitration provision applicable to the dispute was silent on the issue. The Court reasoned that because class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator. Consequently, under the FAA, there must be a contractual basis for concluding that parties agreed to submit to class arbitration.

The FAA exempts only one class of transaction. Section 1 of the FAA expressly provides that the FAA does not apply to "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."²⁶⁰⁴ It has been argued that the words "or any other class of workers engaged in foreign or interstate commerce" should be read broadly to exclude from the FAA non-transportation employment agreements which involve interstate commerce. In *Circuit City*, however, the Supreme Court held that the words "any other class of workers engaged in . . . commerce" give effect only to the terms "seamen" and "railroad employees."²⁶⁰⁵ Thus, the exception contained in Section 1 is much narrower than has been argued.

²⁵⁹⁷ See *Circuit City Stores, Inc. v. Mantor*, 335 F.3d 1101 (9th Cir. 2003) (ruling an arbitration agreement to be unenforceable under California state law when an employee is not given a meaningful opportunity to opt out or modify the agreement); *Craft v. Campbell Soup Co.*, 177 F.3d 1083 (9th Cir. 1998) (holding that the FAA does not apply to labor or employment contracts); *accord Nelson v. Cyprus Bagdad Copper Corp.*, 119 F.3d 756 (9th Cir. 1997); *Renteria v. Prudential Ins. Co. of Am.*, 113 F.3d 1104, 1107 (9th Cir. 1997) (holding that plaintiffs did not knowingly agree to submit sexual harassment disputes to arbitration); *Prudential Ins. Co. of Am. v. Lai*, 42 F.3d 1299, 1305 (9th Cir. 1994) (same); *Zullo v. Superior Court of Santa Clara Cnty.*, 197 Cal. App. 4th 477 (2011) (holding a compelled arbitration clause to be invalid where employees had no opportunity to negotiate, the clause failed to give adequate notice of the arbitration rules that will apply, the employer was allowed the full range of remedies and forums for resolution of claims it might have against petitioner while limiting petitioner to binding arbitration of his or her claims, and the clause imposed a strict time limit within which petitioner must respond to any arbitration-related communication without imposing similar requirements on the company).

²⁵⁹⁸ *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).

²⁵⁹⁹ 345 F.3d 742 (9th Cir. 2003) (*en banc*), *overruling Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182 (9th Cir. 1998).

²⁶⁰⁰ *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012).

²⁶⁰¹ 9 U.S.C. § 2. See *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265 (1995) (holding that FAA's "involving" commerce is virtually the same as "affecting").

²⁶⁰² FAA, 9 U.S.C. §§ 3-4 (courts must stay action pending arbitration and enforce arbitration agreements).

²⁶⁰³ 559 U.S. 662, *on remand to* 624 F.3d 157 (2nd Cir. 2010); see also, *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011).

²⁶⁰⁴ FAA, 9 U.S.C. § 1 (emphasis added).

²⁶⁰⁵ *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).

This is in accord with the majority of circuit courts (D.C., First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth and Tenth) which have previously held that Section 1 of the FAA exempts only employment contracts of workers actually engaged in the movement of goods in interstate commerce.²⁶⁰⁶

(a) Washington Law

Washington courts entertain lawsuits over whether parties are bound by a specific agreement to arbitrate under the FAA.²⁶⁰⁷ One Washington court held that an employer moving to compel arbitration under the FAA must make a threshold showing that a written agreement to arbitrate exists and that the contract at issue involves interstate commerce.²⁶⁰⁸ An agreement to arbitrate need not be perfectly mutual in order to be enforceable.²⁶⁰⁹ For example, arbitration agreements are enforceable even where the employer reserves the right to use the courts to enforce its non-completion and confidentiality rights, but the employee must arbitrate the bulk of her employment related disputes.²⁶¹⁰

In two cases, the Washington Supreme Court limited the enforceability of certain provisions in arbitration agreements. In both *Adler v. Fred Lind Manor* and *Zuver v. Airtouch Commc'ns*, employees sought to avoid arbitrating their disputes with employers, even though they had signed arbitration agreements.²⁶¹¹ In both cases the employees successfully argued that certain terms of the arbitration agreements were unfair to employees and therefore unenforceable. Importantly, the court “severed” the unenforceable provisions and left the underlying arbitration agreements intact. In each case, the court analyzed whether provisions of the arbitration agreements were substantively or procedurally “unconscionable.” That is, whether the terms of the contract or the relative negotiating power were too one-sided. Washington and California similarly define unconscionability in the arbitration context.²⁶¹² Notably, the provisions the court struck down took away rights employees have in the court system.

Employers that use arbitration agreements should review them for one-sided terms that may be struck down.²⁶¹³ Although a trial court may vacate an arbitration award, Washington trial courts do not have the authority to revise arbitration awards.²⁶¹⁴ Also, employers should ensure that arbitration agreements are

²⁶⁰⁶ *McWilliams v. Logicon, Inc.*, 143 F.3d 573, 575-76 (10th Cir. 1998); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832 (8th Cir. 1997); *Great Western Mortgage Corp. v. Peacock*, 110 F.3d 222, 227 (3d Cir. 1997); *Miller v. Public Storage*, 121 F.3d at 217-18; *O’Neil v. Hilton Head Hosp.*, 115 F.3d at 274; *Pryner v. Tractor Supply Co.*, 109 F.3d 354 (7th Cir. 1997); *Cole*, 105 F.3d 1465; *Rojas*, 87 F.3d 745; *Matthens*, 72 F.3d 50; *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592 (6th Cir. 1995); *Miller Brewing Co. v. Brewery Workers Local Union No. 9*, 739 F.2d 1159 (7th Cir. 1984) (limited to employees in transportation industries); *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1069 (2d Cir. 1972) (applies only to those “actively involved in the transportation industry”); *Dickstein v. duPont*, 443 F.2d 783, 785 (1st Cir. 1971) (limited to employees involved in or closely related to the actual movement of goods); *Rudolph v. Alamo Rent A Car*, 952 F. Supp. 311 (E.D. Va. 1997); *Durkin v. CIGNA Prop. & Cas. Corp.*, 942 F. Supp. 481 (D. Kan. 1996); *Golenia*, 915 F. Supp. 201; *Connors v. Amisub*, No. 96-6188, 1996 WL 406677 (S.D. Fla. Feb. 2, 1996); *Kropfelder v. Snap-On Tools Corp.*, 859 F. Supp. 952 (D. Md. 1994); *Cranford v. West Jersey Health Sep.*, 847 F. Supp. 1232 (D.N.J. 1994). *But see Pryner*, 109 F.3d 354; *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305 (6th Cir. 1991) (*dicta*).

²⁶⁰⁷ Note that Washington’s revised Washington Uniform Arbitration Act, RCW 7.04A, does not apply to arbitration agreements between employers or employees.

²⁶⁰⁸ *Walters v. A.A.A. Waterproofing, Inc.*, 120 Wn. App. 354 (2004) (holding that ample evidence of interstate commerce exists to enforce arbitration agreement in employment contract where employee contracted to “actively participate in expansion of business in the Northwestern United States . . .”).

²⁶⁰⁹ *Id.* at 360.

²⁶¹⁰ *Id.*

²⁶¹¹ *Adler v. Fred Lind Manor*, 153 Wn.2d 331 (2004) (holding that a provision that “employee needed to seek arbitration no later than 180 days after the event that first gave rise to the dispute” unfairly limited the employee’s rights and was therefore unenforceable based on Washington law affording employees three years to sue for discrimination) and *Zuver v. Airtouch Commc'ns, Inc.*, 153 Wn.2d 293 (2004) (Washington Supreme Court refused to enforce arbitration provision that “all arbitration proceedings, including settlements and awards, under the agreement will be confidential” because it “hampers an employee’s ability to prove a pattern of discrimination or to take advantage of findings in past arbitrations”).

²⁶¹² There are circumstances where an entire arbitration agreement will be held unenforceable. *See, e.g., Al-Safin v. Circuit City Stores, Inc.*, 394 F.3d 1254 (9th Cir. 2005) (holding Circuit City’s entire arbitration agreement unenforceable under Washington law because it was “permeated with unconscionable provisions”). Among the unconscionable provisions in *Al-Safin* was a modification clause that permitted the employer to amend each year and provided that employee disputes were governed by the rules in effect at the time the employee filed for arbitration. Even if the provision were not unconscionable, an employee could not be held to modifications of an arbitration agreement made after the employee’s termination.

clearly written, and are presented to the employee in such a manner that the employee cannot claim he or she was coerced into signing. For example, courts disfavor giving employees little time to consider the agreement, telling employees that they will be terminated if they do not sign the agreement, or burying the agreement to arbitrate “in a maze of fine print.” Optimally, the arbitration agreement should be attached to the employment offer letter with an explanation that signing it is a requirement. Similarly, the offer letter should also inform the potential employee of other requirements, such as non-competition agreements, confidentiality agreements, employee handbooks, etc.

In 2002, the U.S. Supreme Court issued a unanimous decision regarding the ability of an arbitrator to determine whether a suit is eligible for arbitration.²⁶¹⁵ According to the Court in *Howsam*, the question as to whether parties have submitted a specific issue to arbitration is a “question of arbitrability,” which is ordinarily an issue for the Court, unless the parties have clearly agreed otherwise.²⁶¹⁶ However, procedural questions arising from the dispute or defenses to arbitrability, such as waiver or delay, are issues for the arbitrator.²⁶¹⁷ Although this case focused on an arbitration rule of the National Association of Securities Dealers, it is expected to have an impact on employment law arbitration cases.²⁶¹⁸

In addition to the FAA, state laws may be relied upon to compel arbitration.²⁶¹⁹ Washington courts support the FAA’s application to state statutory discrimination claims.²⁶²⁰

(b) California Law

California courts will generally enforce agreements to arbitrate statutory discrimination claims under the California Fair Employment and Housing Act (“FEHA”), so long as the agreements adhere to certain procedural safeguards: (1) damages otherwise recoverable in court, including punitive damages and attorneys’ fees are not limited; (2) a neutral arbitrator issues a written decision; (3) adequate discovery is permitted; (4) the employee is not required to pay unreasonable costs, or costs connected with the arbitration, that he would not have to pay were the action filed in court; and (5) the arbitration obligation is mutual, *i.e.*, both the employee and employer are subject to arbitration as an alternative means of resolution.²⁶²¹ If any of these procedural requirements are not met, California courts may deem the agreement unconscionable and unenforceable, at least as to arbitration of FEHA claims.

For example, in *Davis v. O’Melveny & Myers*,²⁶²² the Ninth Circuit held that an arbitration plan covering all employees was unenforceable under California law both procedurally and substantively. It was procedurally unconscionable because it was a condition of the employee’s employment presented on a

²⁶¹³ *Rodriguez v. Windermere Real Estate/Wall Street, Inc.*, 142 Wn. App. 833 (2008) (holding arbitration agreement was inherently unfair and unenforceable where the employer wrote the arbitration agreement, designed the arbitration procedures, and selected the arbitrators who consisted of current employees within the employer’s franchise family).

²⁶¹⁴ *See Int’l Union of Operating Eng. v. Port of Seattle*, 164 Wn. App. 307 (2011); *Dep’t of Transp. v. Marine Employee’s Comm’n*, 167 Wn. App. 827 (2012) (arbitrator exceeded authority by granting attorneys’ fees).

²⁶¹⁵ *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002).

²⁶¹⁶ *See also Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772 (2010) (arbitrator properly addressed challenge to validity of arbitration agreement when a provision in the agreement expressly delegates such authority to the arbitrator).

²⁶¹⁷ Also of note is a recent decision by the Washington Supreme Court holding that where an entire contract containing an arbitration clause is in question, the question of whether a contract containing a valid agreement to arbitrate is enforceable goes to the arbitrator. *Townsend v. Quadrant Corp.*, No. 84422-4, 2012 WL 19736 (Wash. Jan. 5, 2012).

²⁶¹⁸ *Howsam*, 537 U.S. 79.

²⁶¹⁹ RCW 7.06 (mandatory arbitration for state court cases where damages alleged are less than \$50,000), and Western District of Washington Court Rule 39.1 (federal district court may compel mediation).

²⁶²⁰ *Tjart v. Smith Barney, Inc.*, 107 Wn. App. 885 (2001) (despite plaintiff’s argument that arbitration agreement was unenforceable, unconscionable and in violation of public policy, the court upheld the arbitration agreement and mandated arbitration of the employee’s state discrimination claims).

²⁶²¹ *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83 (2000); *Mayers v. Volt Mgmt.*, 203 Cal. App. 4th 1194 (2012) (mutual attorneys’ fees provision invalidated the agreement); *Wisdom v. Accent Care, Inc.*, 202 Cal. App. 4th 591 (2012) (adhesion contract); *Peleq v. Neiman Marcus Group*, 204 Cal. App. 4th 1425 (2012) (modification clause).

²⁶²² *Davis v. O’Melveny & Myers*, 485 F.3d 1066 (9th Cir. 2007).

“take it or leave it” basis with no opportunity to negotiate. It was substantively unconscionable because of provisions (1) requiring the employee to provide notice and demand for mediation within one year; (2) prohibiting the employee from discussing her claims with any party not involved directly with the proceedings; (3) allowing the law firm, but not the employee, to go to court to seek injunctive or equitable relief regarding certain claims; and (4) prohibiting the employee from filing any administrative claims with the Labor Department or the California labor commissioner. These provisions could not be severed without “gutting” the agreement.

An arbitration agreement was held unconscionable on similar grounds in *Murphy v. Check ‘n Go of Cal. Inc.*²⁶²³ In *Murphy*, the court held that the arbitration agreement was unconscionable because it was imposed as a condition of employment and without an opportunity to negotiate its terms. Additionally, the provisions waiving class actions and requiring an arbitrator to decide unconscionability issues were one-sided.²⁶²⁴

An arbitration agreement was held unconscionable because it shortened to 30 days an employee’s statutory time limit to bring a claim.²⁶²⁵

The question of whether the parties’ arbitration agreement is unconscionable as a whole is for the arbitrator to decide.²⁶²⁶

The employer must decide whether or not to enforce arbitration early in the case, because extensive discovery can waive the agreement.²⁶²⁷

(c) Minnesota Law

Importantly for Minnesota employers, the Minnesota Supreme Court has held that discrimination claims under the Minnesota Human Rights Act (“MHRA”) can also be subject to mandatory arbitration. Whether an MHRA claim is subject to mandatory arbitration, however, may depend on whether the arbitration agreement is governed by the FAA or the Minnesota Uniform Arbitration Act (determined by whether the

²⁶²³ *Murphy v. Check ‘N Go of Cal. Inc.*, 156 Cal. App. 4th 138 (2007). See also *Gentry v. Super. Ct. of L.A. Cnty.*, 42 Cal. 4th 443 (2007) (holding employment arbitration agreements that prohibit class-wide relief are unenforceable if class arbitration would be a significantly more effective way of vindicating employees’ rights than individual arbitration); but see *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011); *Iskanian v. CIS Transp.*, 206 Cal. App. 4th 949 (2012) (holding *Gentry* overruled by *Concepcion*); *Gelom v. Central Pac. Mortgage Corp.*, 560 F. Supp. 2d 972 (E.D. Cal. 2008) (holding an arbitration agreement procedurally unconscionable because the contracts were non-negotiable and did not give employees a meaningful opportunity to alter the terms of the contract. The arbitration agreement was further held substantively unconscionable because: (1) it did not provide employees with remedies equivalent to those provided by a court; and (2) it required employees to pay one-half of the arbitrator’s expenses, even if the employees were successful on their claims); *Pronovost v. Aurora Loan Servs.*, No. D049196, 2008 WL 142583 (Cal. Ct. App. Jan. 16, 2008) (arbitration provision was unconscionable because it was essentially hidden in a routine employment application after the substantive terms of the contract had been negotiated, and it lacked mutuality, requiring one party, not both, to arbitrate); *Ontiveros v. DHL Express (USA) Inc.*, 164 Cal. App. 4th 494 (2008) (arbitration agreement unconscionable because of improper fee requirement and overly-restrictive discovery limits); *Metters v. Ralphs Grocery Co.*, 161 Cal. App. 4th 696 (2008) (request to compel arbitration denied where agreement was confusing and did not alert employee that he was agreeing to binding arbitration); *Ramirez-Baker v. Beazer Homes, Inc.*, 636 F. Supp. 2d 1008 (E.D. Cal. 2008) (although arbitration provision, contained in application for employment, was procedurally unconscionable contract of adhesion, the employer’s alternative dispute resolution program was not so permeated with substantive unconscionability as to render the arbitration agreement unenforceable. The sole substantively unconscionable provision allowing the employer to unilaterally modify or terminate terms of the agreement was severable); *Trivedi v. Curexo Tech. Corp.*, 189 Cal. App. 4th 387 (2010) (arbitration provision of employment agreement was procedurally unconscionable when prepared by employer, was mandatory part of employment agreement and employee was not given copy of applicable arbitration rules that would apply to future disputes. Additionally, the arbitration provision was found substantively unconscionable because it: (1) allowed for prevailing party to be awarded attorney fees and costs in contravention of FEHA that allows prevailing defendant to recover attorney’s fees only when plaintiff’s action is frivolous, unreasonable, without foundation, or brought in bad faith; and (2) allowed parties access to the courts only for injunctive relief, as court found that it is more likely that employer, rather than employee, would seek injunctive relief).

²⁶²⁴ But see, *Reyes v. Liberman Broad., Inc.*, 146 Cal. Rptr. 3d 616 (Cal. Ct. App. 2012) and *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011).

²⁶²⁵ *Flores v. Prime Time Prods., Inc.*, No. D052205, 2008 WL 4616801 (Cal. Ct. App. Oct. 20, 2008).

²⁶²⁶ *Rent-A-Center W., Inc. v. Jackson*, 130 S. Ct. 2772 (2010); but see, *Ajamian v. Cantor CO2e LP*, 203 Cal. App. 4th 771 (2012) (court determines).

employer is engaged in interstate commerce).²⁶²⁸ However, the Minnesota Department of Human Rights (“MDHR”) requires mediation for every discrimination charge filed within the MDHR, though individuals may still choose to file a discrimination suit in court before filing a charge with the MDHR.

(d) Utah Law

Arbitration agreements are favored in Utah.²⁶²⁹ The Utah legislature promotes alternative dispute resolution, including arbitration, because they “reduce the need for judicial resources and the time and expense of the parties.”²⁶³⁰ But a party cannot be required to arbitrate if he has not agreed to submit to arbitration.²⁶³¹ Also, arbitration may not be invoked by one who is not a party to the agreement and does not otherwise have the right to compel arbitration.²⁶³²

To be enforceable, arbitration agreements must be written.²⁶³³ Whether such agreements are enforceable is a question of law.²⁶³⁴ Utah law provides that arbitration is a matter of contract, and that “arbitration contracts are to be enforced according to their terms, and arbitration proceedings shall be conducted in the manner to which the parties have agreed.”²⁶³⁵ Still, Utah courts have been hesitant to require arbitration in some employment disputes.²⁶³⁶

Utah courts apply equitable contract principles to arbitration agreements.²⁶³⁷ Specifically, Utah courts have applied the principle of part performance to enforce an oral arbitration agreement,²⁶³⁸ and the equitable doctrine of unconscionability to bar the enforcement of an arbitration agreement.²⁶³⁹

SECTION 14.6 LAWS PROVIDING FOR ARBITRATION OF EMPLOYMENT DISPUTES

(a) Washington Law

(i) Washington State’s Permissive Arbitration Statute

Washington’s permissive arbitration statute provides that parties may agree to submit to arbitration “in conformity with the provisions of” that law.²⁶⁴⁰ That law is expressly *not applicable* to employment

²⁶²⁷ *Compare, Partridge v. Hot Wings, Inc.*, No. A130266, 2012 WL 470458 (Cal. Ct. App. Feb. 14, 2012) (invalidated) with *Reyes, supra* (upheld).

²⁶²⁸ 9 U.S.C. §§ 1 *et seq.*; Minn. Stat. §§ 572.08-572.041; *Correll v. Distinctive Dental Servs., Inc.*, 607 N.W.2d 440 (Minn. 2000) (finding no mandatory arbitration if agreement is not subject to FAA).

²⁶²⁹ *Sosa v. Paulos*, 924 P.2d 357, 359 (Utah 1996).

²⁶³⁰ Utah Code Ann. § 78B-31b-3(2); *Buckner v. Kennard*, 99 P.3d 842, 847 (Utah 2004).

²⁶³¹ *Cade v. Zion First Nat’l Bank*, 956 P.2d 1073, 1076-77 (Utah App. 1998).

²⁶³² *Id.*

²⁶³³ *Jenkins v. Percival*, 962 P.2d 796, 800 (Utah 1998).

²⁶³⁴ *Id.*

²⁶³⁵ *Buckner v. Kennard*, 99 P.3d 842, 848 (Utah 2004).

²⁶³⁶ *Salt Lake City v. Int’l Ass’n of Firefighters*, 563 P.2d 786, 787-89 (Utah 1977) (holding unconstitutional statute that required disputes between firemen and municipal corporations regarding wages, hours, and other conditions of employment to be submitted to arbitration).

²⁶³⁷ *ACS UT, Inc. v. Wolf Mountain Resorts, L.C.*, 245 P.3d 184, 192 (Utah 2010).

²⁶³⁸ *Jenkins v. Percival*, 962 P.2d 796, 801 (Utah 1998).

²⁶³⁹ *Sosa v. Paulos*, 924 P.2d 357, 361-65 (Utah 1996).

²⁶⁴⁰ RCW 7.04A *et seq.*

agreements.²⁶⁴¹ However, employment arbitration agreements are enforceable under Washington law to the extent they are enforceable under general contract principles.

Recent decisions of the Washington Appellate Courts indicate that the public policy favoring enforcement of employee arbitration agreements only goes so far when weighed against other public policies regarding employee rights. Divisions I and II of the Court of Appeals have ruled that on claims brought to vindicate the public interest, such as allegations of wrongful discharge or retaliation in violation of public policy, employees need not satisfy contractual arbitration agreements prior to filing suit.²⁶⁴² In *Young*, the court also held that the employee was not required to arbitrate his claims arising from the Washington Minimum Wage Act (“WMWA”), even though the employee had knowingly and voluntarily entered into an employment agreement mandating arbitration of disputes.²⁶⁴³ However, the court later distinguished *Young*, noting that the case involved workplace health and safety issues and was not subject to the FAA, but rather was decided on state law alone.²⁶⁴⁴ Thus, courts ruling on the enforceability of arbitration agreements subject to the FAA may weigh the public policy considerations differently.

(ii) Washington State’s Mandatory Arbitration Statute

Washington’s mandatory arbitration statute provides for mandatory arbitration of civil lawsuits in state court where the amount of damages alleged is less than \$50,000.²⁶⁴⁵ This statute includes arbitration of employment disputes. The statute provides for appeal from the arbitrator’s decision, in which case, the arbitrator’s decision would not have any binding effect.

(iii) U.S.D.C. Western District of Washington Local Court Rule 39.1

U.S.D.C. Western District of Washington Local Court Rule 39.1 permits the court to designate a civil action for mediation. Parties in federal court may also agree to submit to voluntary arbitration.

(b) California Law

Title 9 of the California Civil Procedure Code governs civil arbitration, including arbitration of employment agreements.²⁶⁴⁶ Under California law “[a] written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract.”²⁶⁴⁷

(c) Minnesota Law

The following are ADR methods under Minnesota Rule 114:

Mediation: Mediation is a process in which a neutral third party facilitates communication between the parties to promote a settlement. The mediator may not impose his or her own settlement, but often will meet privately during the mediation with each party to encourage flexibility. Mediation is really nothing more than an assisted settlement negotiation session.

Arbitration: Arbitration involves a contested hearing in which each side presents its case and evidence to an arbitrator, who then renders a decision and specific award.

²⁶⁴¹ RCW 7.04A.030(4).

²⁶⁴² *Young v. Ferrelgas*, 106 Wn. App. 524 (2001); *Smith v. Bates Tech. Coll.*, 139 Wn.2d 793 (2000).

²⁶⁴³ *Young*, 106 Wn. App. at 531-32.

²⁶⁴⁴ *Tjart v. Smith Barney*, 107 Wn. App. 885 (2001).

²⁶⁴⁵ RCW 7.06 *et seq.*

²⁶⁴⁶ Cal. Civ. Proc. Code §§ 1280 *et seq.*

²⁶⁴⁷ *Id.* § 1281.

Arbitration may be either binding or non-binding depending on the agreement of the parties. Arbitration generally involves a proceeding that is less formal and more expedited than courtroom litigation.

Mediation - Arbitration (Med-Arb): This is a hybrid of mediation and arbitration in which the parties initially mediate their dispute, but if they reach an impasse, then they arbitrate the deadlocked issues.

Consensual Special Magistrate: This is a court-annexed form of ADR in which a dispute is presented to an impartial third party in the same manner as a civil lawsuit is presented to a judge. The process results in a binding decision and includes the right of appeal.

Early Neutral Evaluation: Attorneys present the core of the dispute to a neutral evaluator in the presence of the parties after the case is filed but before discovery is conducted. The neutral then provides a candid assessment of the case. If settlement does not result, the neutral narrows the dispute and suggests guidelines for managing discovery.

Mini-Trial: The parties and their counsel present their positions, either before a selected representative of each party, a neutral third party, or both to define the issues and develop a basis for realistic settlement negotiations. The neutral may issue an advisory opinion regarding the merits. The advisory opinion is not binding unless the parties expressly agree otherwise.

Moderated Settlement Conference: The parties and their counsel present their positions before a panel of neutrals that subsequently issues a non-binding advisory opinion regarding liability, damages, or both.

Neutral Fact Finding: An agreed-upon neutral investigates and analyzes a dispute (frequently involving complex or technical issues) and issues findings and a non-binding report or recommendation.

Summary Jury Trial: The parties and their counsel present a summary of their positions before a panel of jurors, who then issue a non-binding advisory opinion regarding liability, damages or both.

(d) Utah Law

In Utah, “[a]rbitration is a matter of contract.”²⁶⁴⁸ The parties to the arbitration agreement determine the scope and questions to be resolved during arbitration proceedings.²⁶⁴⁹ The arbitrator must not exceed the scope in the parties’ written agreement.²⁶⁵⁰

Although there is a strong presumption against waiver of the right to arbitrate, a party who has agreed to an arbitration clause can waive its right to arbitrate.²⁶⁵¹ A party to an arbitration agreement waives its right to arbitrate if it: (1) substantially participated in the underlying litigation to a point inconsistent with the intent to arbitrate, and (2) this participation resulted in prejudice to the opposing party.²⁶⁵²

²⁶⁴⁸ *Buckner v. Kennard*, 99 P.3d 842, 848 (Utah 2004).

²⁶⁴⁹ *Id.*

²⁶⁵⁰ *Id.*

²⁶⁵¹ *Cedar Surgery Ctr., LLC v. Bonelli*, 96 P.3d 911, 914 (Utah 2004).

²⁶⁵² *Id.*

SECTION 14.7

EEOC'S POSITION ON MANDATORY
ARBITRATION OF DISCRIMINATION
CLAIMS

Despite the endorsement of arbitration of statutory claims by the Supreme Court and other lower courts, the EEOC has taken the position that mandatory arbitration agreements imposed as a condition of employment are unenforceable.²⁶⁵³ In *River Oaks*, the district court enjoined the use of the employer's ADR policy, which the court held was "misleading and against the principles of Title VII."²⁶⁵⁴ The ADR policy at issue required the employees to pay half the cost of arbitration, and there was no provision for the disclosure of the backgrounds of the arbitrators.²⁶⁵⁵

The EEOC's objections to a mandatory arbitration process were described in an amicus brief filed by the EEOC:

Arbitration (1) is not governed by the statutory requirements and standards of Title VII; (2) is conducted by arbitrators given no training and possessing no expertise in employment law; (3) routinely does not permit plaintiffs to receive punitive damages and attorneys' fees to which they would otherwise be entitled under the statute; and (4) forces them to pay exorbitant "forum fees" in the tens of thousands of dollars, greatly discouraging aggrieved employees from seeking relief.²⁶⁵⁶

The EEOC also views unilaterally imposed "agreements" not to be knowing or voluntary, and disapproves of arbitration agreements precluding an employee from filing a charge with the EEOC, assisting the EEOC in its investigation, or requiring an employee to consent to arbitration as a pre-condition to investigation into his or her claims.²⁶⁵⁷ However, these objections may have less merit where the arbitration agreement provides certain protections for the employee.

Another strategy utilized by the EEOC was to argue that an arbitration agreement, which included Title VII claims, required as a condition of employment, constituted unlawful retaliation against an employee who refused to sign.²⁶⁵⁸ The Ninth Circuit Court rejected this argument, holding that an employer may require employees to arbitrate Title VII claims as a condition of employment.²⁶⁵⁹

Finally, the EEOC argues that an employees' valid agreement to arbitrate individual discrimination claims does not bar the EEOC from pursuing claims, as a named plaintiff, based upon alleged incidents of discrimination against the employee.²⁶⁶⁰ This argument has been accepted by the Supreme Court.²⁶⁶¹

²⁶⁵³ See, e.g., *Cosgrove v. Shearson-Lehman Bros.*, 105 F.3d 659 (6th Cir. 1997); *EEOC v. River Oaks Imaging & Diagnostic*, No. 95-755, 1995 WL 264003 (S.D. Tex. Apr. 19, 1995); *Johnson v. Hubbard Broad., Inc.*, 940 F. Supp. 1447 (D. Minn. 1996) (amicus brief filed by EEOC claimed that enforcement of arbitration provision would severely diminish employee's statutory rights).

²⁶⁵⁴ *River Oaks*, 1995 WL 264003.

²⁶⁵⁵ *Id.*

²⁶⁵⁶ *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182 (9th Cir. 1998), *overruled by EEOC v. Luce*, 345 F.3d 742 (9th Cir. 2003) (*en banc*).

²⁶⁵⁷ See EEOC Policy Statement: Mandatory Arbitration of Employment Discrimination Disputes as a Condition of Employment, EEOC Notice No. 915.002 (July 10, 1997), available at <http://www.eeoc.gov/policy/docs/mandarb.html>. *But see U.S. v. N.Y. Transit Auth.*, 97 F.3d 672 (2d Cir. 1996) (rejecting EEOC's position that employer policy cutting off internal investigation once EEOC charge is filed is unlawful retaliation under Title VII).

²⁶⁵⁸ *EEOC v. Luce*, 345 F.3d 742 (9th Cir. 2003) (*en banc*).

²⁶⁵⁹ *Id.*

²⁶⁶⁰ *EEOC v. Ralphs Grocery Co.*, No. 07 C 5110 (N.D. Ill. May 22, 2008) (holding it is critical that employees know that even when their employer maintains a mandatory arbitration policy, they retain the right to file discrimination charges and to participate in any investigation or lawsuit arising out of them. Claims of employment discrimination can be arbitrated under governing law, but that law also protects the rights of employees to communicate with the EEOC and state and local civil rights agencies, and the EEOC will not hesitate to take legal action to challenge overly broad arbitration agreements).

In *EEOC v. Waffle House*, the U.S. Supreme Court adopted the EEOC's position that an arbitration agreement between an employer and employee did not bar the EEOC from pursuing victim-specific judicial relief in an ADA action, such as back pay, reinstatement, and damages.²⁶⁶² The Court reasoned that because federal statutes unambiguously authorize the EEOC to bring such a suit in Title VII and ADA actions, the existence of an arbitration agreement between private parties does not limit the EEOC's authority.

The EEOC has also been vigorously lobbying Congress to pass legislation banning employer policies that require pre-dispute agreements to arbitrate discrimination claims in their entirety.²⁶⁶³ Thus far, their lobbying efforts have been unsuccessful. However, despite Supreme Court decisions such as *Gilmer* and *Circuit City*, it appears likely that the EEOC will continue to lobby for legislation, given its vigorous opposition to mandatory arbitration.

SECTION 14.8 NLRB POSITION ON MANDATORY ARBITRATION CLAUSES

The National Labor Relations Board ("NLRB") has also expressed some concerns about mandatory arbitration agreements. In one case, the Board took the position that an employer committed an unfair labor practice by requiring employees and applicants for employment to sign an agreement forcing them to submit their employment claims to binding arbitration before seeking redress in any other forum, and by terminating an employee who refused to sign the agreement.²⁶⁶⁴

The provision in question stated that, by signing the agreement, the employee agreed that any employment dispute would be submitted to arbitration before a neutral third party, pursuant to the AAA procedures. The NLRB authorized the issuance of a complaint against the employer after the company terminated an employee who refused to sign the agreement. The Board contended that the provision violated the National Labor Relations Act ("NLRA") because it required the employee, as a condition of employment, to forfeit his statutory right to file an unfair labor practice charge with the NLRB. The employer settled the case with the NLRB by agreeing to reinstate the employee with back pay, and by posting notices in its stores that it would no longer require employees to proceed to arbitration before filing a complaint with the NLRB.

The NLRB General Counsel Report, explaining the Board's position in the *Bentley's Luggage* case, suggests that the NLRB will find an unfair labor practice if the mandatory arbitration agreement inhibits the employee's ability to file charges with the Board.²⁶⁶⁵ The Board has "regularly concluded that an employer violates the Act when it insists that an employee waive his statutory right to file Board charges."²⁶⁶⁶

SECTION 14.9 REQUIREMENTS FOR A VALID ARBITRATION POLICY

(a) Written Agreement

Generally an agreement to arbitrate a dispute must be reduced to writing to be enforceable.²⁶⁶⁷

²⁶⁶¹ See *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002).

²⁶⁶² *Id.*

²⁶⁶³ See *Civil Rights Procedures Protection Act of 1999*, S. 121, 106th Cong. (2000); *Civil Rights Procedures Protection Act of 1999*, H.R. 872, 106th Cong. (2000).

²⁶⁶⁴ *Bentley's Luggage Corp.*, NLRB General Counsel Case No. 12-CA-16658 (August 21, 1995).

²⁶⁶⁵ See *NLRB General Counsel Report, January to September 1995*, Daily Lab. Rep. (BNA) No. 36, D-25 (Feb. 23, 1996).

²⁶⁶⁶ *Id.*

²⁶⁶⁷ See FAA, 9 U.S.C. § 2; RCW 7.04.A; Utah Code Ann. § 78B-11-107(1) (agreement must be contained "in a record").

It may not be legally necessary for the writing to be signed by the parties, or even for the employee to know the contents and meaning of an arbitration provision.²⁶⁶⁸ However, the employee's signature on the agreement will be helpful in enforcement proceedings to establish that the employee knowingly and voluntarily agreed to arbitrate. Whenever possible, the written agreement should be signed by the employee and should be separate from any employee handbook.²⁶⁶⁹

(b) Agreement Based on Consideration

An employee's agreement to arbitrate should be based upon some value given by the employer in exchange (consideration), such as an offer of continued or future employment, a promotion, stock options, pay raise, etc. Some courts have held that the employer's reciprocal promise to arbitrate is sufficient consideration to bind the employee.²⁶⁷⁰ Some courts, however, have expressed reluctance as to whether the employer can condition agreement on continued employment because it seems overly coercive (*i.e.*, sign or lose your job).²⁶⁷¹

(c) Description of Types of Claims/Disputes Covered by the Agreement

The arbitration agreement should specifically describe the types of claims that are covered by the agreement.²⁶⁷² In particular, the agreement should specify whether employment discrimination claims or other statutory claims are covered under the agreement.²⁶⁷³

(d) Description of Claims Not Covered by the Agreement

Employers can limit the scope of arbitration in various ways by excluding certain types of claims from coverage. For example, it is generally necessary and advisable to exclude workers' and unemployment compensation and ERISA claims from the agreement. Employers may also want to exclude trade secrets and non-competition claims for which immediate injunctive relief is often sought.²⁶⁷⁴ At least one Washington appellate court has approved of this practice. *Id.* Some courts, however, have concluded that excluding certain claims from coverage may undermine the enforceability of the agreement.²⁶⁷⁵

²⁶⁶⁸ See, e.g., *Feinberg v. Bear, Stearns & Co., Inc.*, No. 90-5250, 1991 WL 79309 (S.D.N.Y. May 3, 1991). *But see Prudential Ins. Co. of Am. v. Lai*, 42 F.3d 1299 (9th Cir. 1994).

²⁶⁶⁹ *Nelson v. Cyprus Bagdad Copper Corp.*, 119 F.3d 756 (9th Cir. 1997).

²⁶⁷⁰ See, e.g., *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272 (4th Cir. 1997); *Hull v. Norcom, Inc.*, 750 F.2d 1547, 1550 (11th Cir. 1985).

²⁶⁷¹ See, e.g., *Shankle v. B-G Maint. Mgmt. of Colo., Inc.*, 163 F.3d 1230 (10th Cir. 1999).

²⁶⁷² See *Morgan v. Smith Barney, Harris Upham & Co.*, 729 F.2d 1163, 1165 (8th Cir. 1983) (duty to arbitrate is a contractual obligation; only those disputes which party has agreed to arbitrate may be resolved); see also *United Steelworkers of Am. v. Rohm and Haas Co.*, 522 F.3d 324 (3d Cir. 2008) (the disability benefits at issue were not created by or incorporated into a collective bargaining agreement, and as such did not obligate the employer to arbitrate); *but see Panepucci v. Honigman Miller Schwartz & Cohn LLP*, 281 F. App'x 481 (6th Cir. 2008) (where the arbitration clause is broad, only an express provision excluding a specific dispute from consideration by arbitrators); *United Steel, Paper and Forestry, Rubber, Manuf., Energy, Allied Indus. & Serv. Workers Int'l Union v. TriMas Corp.*, 531 F.3d 531 (7th Cir. 2008) (one does not remove issues from arbitration simply by changing the scope of the underlying agreement, and a dispute covered by the plain language of the arbitration agreement and by nothing else should be submitted to arbitration).

²⁶⁷³ See, e.g., *Prudential Ins. Co. of Am. v. Lai*, 42 F.3d 1299, 1305 (holding that employees were not bound by an agreement to arbitrate Title VII claims because they did not "knowingly" agree to waive their statutory right to a judicial forum).

²⁶⁷⁴ *Walters v. A.A.A. Waterproofing, Inc.*, 120 Wn. App. 354 (2004).

²⁶⁷⁵ See *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83 (2000); *Ferguson v. Countrywide Credit Indus., Inc.*, 298 F.3d 778 (9th Cir. 2002) (supporting the analysis in *Armendariz* of arbitration agreements under California law); *Stirlen v. Supercuts, Inc.*, 51 Cal. App. 4th 1519 (1997) (the California court refused to enforce a compulsory arbitration clause of an employment contract on the grounds that it was unconscionable, in part because it required the employee to use arbitration for all of his claims but permitted the employer to use the courts for certain equitable claims); *Hull v. Norcom, Inc.*, 750 F.2d 1547 (11th Cir. 1985) (Eleventh Circuit held arbitration clause invalid and unenforceable under New York law where the employer reserved the option to raise any and all disputes that it may have against the employee in a court of law rather than through arbitration). *But cf. Seymour v. Gloria Jean's Coffee Bean Franchising Corp.*, 732 F. Supp. 988, 995 (D. Minn. 1990) (arbitration clause upheld where defendant did not reserve unto itself the right to litigate all potential claims it might have against the plaintiffs).

In light of the NLRB's position on the enforceability of mandatory arbitration agreements, the employer should also consider a specific exemption for unfair labor practice complaints and claims brought under the NLRA.²⁶⁷⁶ Moreover, the agreement should not preclude employees from filing charges or cooperating with the EEOC, and should not be a pre-condition to an employer's internal investigation of employee claims.

(e) Arbitration Procedures, Including Selection of Arbitrator

The arbitration procedures should be outlined in detail in the agreement and should provide for one or more neutral and qualified arbitrators. The neutral arbitrator should be required to disclose any potential or actual conflicts of interest. The arbitrator must also be a disinterested party and, therefore, should not be an employee of the employer.²⁶⁷⁷

The agreement should detail the manner in which the arbitrator will be selected. One method of selecting an impartial arbitrator is for parties to alternate striking names from a list provided by the AAA or Judicial Arbitration & Mediation Services, Inc.

The scope of the arbitrator's authority should be detailed in the agreement. The arbitrator should be bound to comply with the rules or procedures provided by the designated agency, any statutes or regulations, and any agreements between the parties. Other matters that may be addressed include the scope of the arbitrator's authority regarding pre-hearing disputes, discovery, subpoenas, motions, recording of the proceeding, evidentiary matters, arbitrability, and post-hearing submissions. However, considerable care should be exercised in imposing limitations on discovery and other procedural areas, because too many restrictions could lead to the conclusion that the process is so one-sided as to be fundamentally unfair. The result could be judicial refusal to compel arbitration.

(f) Written Arbitration Award

The arbitrator should be required to render a written decision, either by the agreement or the rules governing the arbitrator.²⁶⁷⁸ The AAA rules provide that the arbitration award shall be in writing and shall provide the written reasons for the award. The written decision, particularly in discrimination claims, should contain detailed conclusions of law and findings of fact.²⁶⁷⁹

(g) Remedies

The agreement should specify that the arbitrator may award all types of remedies that would be available in court.²⁶⁸⁰ If the agreement is intended to cover all statutory claims, the agreement should not preclude the employee from obtaining Title VII remedies.²⁶⁸¹

²⁶⁷⁶ See *Bentley's Luggage Corp.*, NLRB General Counsel Case No. 12-CA-16658 (Aug. 21, 1995) (Board took position that the employer's mandatory arbitration agreement violated the NLRA because Board interpreted it as requiring an employee to forfeit his statutory right to file an unfair labor practice charge with the Board as a condition of employment).

²⁶⁷⁷ See *Ramirez-De-Arellano v. Am. Airlines, Inc.*, 133 F.3d 89, 91 (1st Cir. 1997); *Rodriguez v. Windermere Real Estate/Wall St. Inc.*, 142 Wn. App. 833 (2008) (a parent franchisor cannot select arbitrators from employees of other franchisees because arbitrators who have a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing and substantial relationship with a party may not serve as neutral arbitrators).

²⁶⁷⁸ *Gilmer*, 500 U.S. at 31-32; *Cole*, 105 F.3d at 1482.

²⁶⁷⁹ See *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 204 (2d Cir. 1998).

²⁶⁸⁰ See *Cole*, 105 F.3d at 1482 (arbitration arrangement provided for all the types of relief that would otherwise be available in court); *Graham Oil Co. v. ARCO Prods. Co.*, 43 F.3d 1244, 1246-48 (9th Cir. 1994) (arbitration clause that purported to waive remedies provided by federal statute and to shorten statute of limitations was unenforceable).

²⁶⁸¹ See *Alcaraz v. Avnet, Inc.*, 933 F. Supp. 1025, 1028 (D.N.M. 1996) (no agreement to arbitrate employer's discrimination claims exists where written arbitration agreement provided that arbitrator was authorized to award damages for breach of contract only and had no authority to make an award of other damages); *Gilmer*, 500 U.S. at 32 (in holding that ADEA claim can be subjected to compulsory arbitration, Supreme Court noted that NYSE rules do not restrict the types of relief an arbitrator may award).

(h) Binding Effect of Arbitration Award

The arbitration agreement should expressly provide that the arbitration results are final and binding on the parties, subject to the rights of each party to judicial review, except that they shall have no collateral estoppel/*res judicata* effect beyond the parties to the arbitration itself. The agreement should also provide that all awards are enforceable in a court of competent jurisdiction.

(i) Employee Acknowledgment

The arbitration agreement should include a conspicuous acknowledgment that the employee has read and understands the agreement's terms, has entered into the agreement voluntarily, and has had the opportunity to consult with independent legal counsel.²⁶⁸² Again, this acknowledgment should cover the arbitration agreement *only* – an acknowledgment of receipt of an employee handbook containing an arbitration clause may not suffice.²⁶⁸³

(j) Agreement Not to Maintain a Lawsuit or Have a Trial by Jury

The agreement should clearly and prominently state that the employee is agreeing not to maintain a lawsuit, and to subject any dispute to a neutral arbitrator rather than a jury.²⁶⁸⁴ This language will help to establish that the waiver was knowing and voluntary. An employer brought into court should refrain from requesting summary judgment as an alternative to requesting an order for arbitration, as courts have ruled that moving for summary judgment constitutes a waiver of the arbitration agreement.²⁶⁸⁵

(k) Notice of Claims

The arbitration agreement should require written notice of a claim and the factual basis for the claim as part of the arbitration process, and identify the person to whom such notice should be given.

(l) Representation By Counsel

The right to counsel is not required under the FAA, but it is advantageous to allow both parties this right. Not only will the presence of counsel contribute to the efficiency of the proceeding, it will also add to the overall fairness of the process.²⁶⁸⁶ Thus, the participation of counsel should be addressed in the arbitration agreement.

(m) Discovery

The arbitration agreement may limit the parties' right to discovery.²⁶⁸⁷ For example, the agreement could limit each party to three depositions and one expert deposition. However, a prohibition on all discoveries could undermine the enforceability of the agreement.²⁶⁸⁸

²⁶⁸² *Prudential*, 42 F.3d 1299; *Morgan*, 729 F.2d 1163.

²⁶⁸³ See *Ramirez-De-Arellano*, 133 F.3d at 90; *Nelson*, 119 F.3d at 761; see also *Turner v. U-Haul Co. of Fla.*, 905, No. 08-118, 2008 WL 709107 (M.D. Fla. Mar. 14, 2008) (holding that an e-mail asking employees to sign onto a website and accept an arbitration agreement did not bind employees who continued employment with the company but did not accept the agreement); see also *Campbell v. Gen. Dynamics Gov't Sys. Corp.*, 321 F. Supp. 2d 142 (D. Mass. 2004) (holding that an e-mail notification of a dispute resolution policy was not binding on employees because the e-mail did not state that it changed employees' legal rights or that employees would become bound by the policy); *Mazera v. Varsity Ford Servs. LLC*, No. 07-12970, 2008 WL 283698 (E.D. Mich. Feb. 1, 2008) (a worker who received a handbook requiring a multi-step dispute resolution procedure was required to arbitrate his claims because he signed an acknowledgement form that referred to the dispute procedure), *judgment affirmed in part, reversed in part on other grounds*, 565 F.3d 997 (6th Cir. 2009).

²⁶⁸⁴ *Davenport v. Richfood Inc.*, No. 07-595, 2008 WL 2439877 (E.D. Va. June 13, 2008) (an employee was not required to arbitrate his race discrimination claims under a collective bargaining agreement because the agreement did not clearly and unmistakably waive his right to sue in federal court).

²⁶⁸⁵ *Khan v. Parsons Global Servs. Ltd.*, 521 F.3d 421 (D.C. Cir. 2008).

²⁶⁸⁶ See *Cole*, 105 F.3d at 1483 n.11 (suggests that employee must have right to independent representation).

²⁶⁸⁷ *Dotson v. Amgen, Inc.*, 181 Cal. App. 4th 975 (2010) (arbitration limiting discovery and allowing additional discovery provision "upon a showing of need" not unconscionable).

(n) Arbitration Fees and Costs

The payment of arbitration fees and costs should be provided for in the arbitration agreement. These are commonly shared by the parties, although in many cases the employer pays a disproportionate amount or pays the entire amount.²⁶⁸⁹ The parties can also empower the arbitrator to decide which party should pay. There is, however, strong legal authority suggesting that requiring the employee to pay all or part of the arbitrator's fees may render the arbitration agreement unenforceable.²⁶⁹⁰ It follows from this reasoning that if the arbitration agreement requires arbitration at a particular location, it should also state that the employer will pay for transportation of the employee, his or her attorney, and/or witnesses to that location.

(o) Judicial Review

The right of either party to bring an action to compel arbitration and to enforce an arbitration award should be described in the agreement. Judicial review of arbitration decisions is limited under the FAA to situations where: (1) the award was procured by corruption, fraud, or undue means; (2) there was evident partiality by the arbitrator or misconduct prejudicing the rights of any party; or (3) the arbitrator exceeded the authority granted by the arbitration agreement.²⁶⁹¹

Federal courts and some state courts, including Washington, have held that an arbitration decision arising out of a collective bargaining agreement can be vacated if it violates public policy.²⁶⁹² In order to vacate an arbitrator's decision as contrary to public policy, the public policy must be explicit, well defined and dominant.²⁶⁹³

(p) Choice of Law Provision

A provision specifying that a certain state's laws will govern any disputes is helpful to avoid later questions as to the applicable substantive law.

(q) Employment At-Will

The agreement should reiterate the employee's at-will status and state that nothing in the agreement constitutes an employment contract.

²⁶⁸⁸ See *Cole*, 105 F.3d at 1482 (agreement enforced where AAA rules provided for more than minimal discovery); *Gilmer*, 500 U.S. at 31 (court suggests that lack of right to discovery may constitute a procedural defect in arbitration agreement); *Ramirez-De-Arellano*, 133 F.3d at 91 (same); *Ontiveros v. DHL Express (USA) Inc.*, 164 Cal. App. 4th 494 (2008) (limits placed on discovery in the arbitration procedure supported the finding that the arbitration agreement was unconscionable).

²⁶⁸⁹ Effective November 1, 2002, the AAA amended its rules for arbitration of non-union employment disputes. The filing fee payable by an employee subject to an employer-promulgated arbitration program is now capped at \$125. A summary of the rule changes can be found at http://www.lawmemo.com/arb/res/aaa-employment_rev.htm; *Ontiveros v. DHL Express (USA) Inc.*, 164 Cal. App. 4th 494 (2008) (holding that an arbitration process could not require an employee to bear any type of expense that would not be required if the employee brought the same claim in court).

²⁶⁹⁰ See *Cole*, 105 F.3d at 1482; see also *River Oaks Imaging & Diagnostic*, No. 95-755, 1995 WL 264003, *1 (S.D. Tex. April 19, 1995) (granting injunction against implementation of arbitration policy that required employees to pay costs and fees of arbitration); *Walters v. A.A.A. Waterproofing, Inc.*, 151 Wn. App. 316 (2009) (provision in the arbitration agreement, providing that prevailing party shall be entitled to all costs and expenses of arbitration, including reasonable legal fees, was unconscionable and therefore unenforceable).

²⁶⁹¹ See FAA, 9 U.S.C. § 10; *Cole*, 105 F.3d at 1487 (assumptions regarding arbitration of statutory claims are valid only if judicial review is sufficiently rigorous to ensure that arbitrators have properly interpreted and applied statutory law); *Mich. Sugar Co. v. Bakery, Confectionery, Tobacco Workers & Grain Millers Int'l Union*, 278 F. App'x. 623 (6th Cir. 2008) (review of arbitration awards is supposed to be "very limited"); but see *Halligan*, 148 F.3d at 203-04 (refusing to affirm arbitrators' decision based on court's determination that arbitrators ignored the law or the evidence or both).

²⁶⁹² See *E. Associated Coal Corp. v. United Mine Workers of Am., Dist. 17*, 531 U.S. 57 (2000) (holding that public policy did not prohibit an arbitration award reinstating a truck driver who tested positive for marijuana twice); *Kitsap County Deputy Sheriff's Guild v. Kitsap County*, 167 Wn.2d 428 (2009) (adopting public policy exception as a basis for vacating a grievance arbitration award).

²⁶⁹³ *Kitsap County*, 167 Wn.2d at 428.

(r) Provisions that Should be Used with Caution

(i) Statute of Limitations

The parties should not agree to a shorter statute of limitations than the law provides because it may render the entire agreement unenforceable. In *Johnson v. Hubbard Broadcasting*, the district court observed that an arbitration provision requiring the filing of a demand within 180 days after the dispute had arisen might improperly diminish the statute of limitations available under federal and state law, but postponed a final determination of the issue until the matter was addressed by the arbitrator.²⁶⁹⁴ Accordingly, the arbitration agreement should provide a specific period by which written notice should be given, but allow that all applicable statutes of limitation will govern in the event there is a conflict between the notice period and limitation period. Washington employers should be careful to specify in their agreements that applicable statutes of limitations will apply in the arbitration proceedings. In 2010, the Washington Supreme Court held that state statutes of limitations do not apply to claims brought in arbitration unless there is specific contractual language to the contrary.²⁶⁹⁵

(ii) Exclusion of Employer Claims for Injunctive Relief

Many employers exclude claims by the employer for injunctive and other equitable relief, including claims for unfair competition and the use or disclosure of trade secrets or confidential information. However, there is a risk that this exemption may make the agreement unenforceable.²⁶⁹⁶

SECTION 14.10 PROS AND CONS OF MANDATORY ARBITRATION POLICIES

Employers do not always benefit from arbitration and should carefully weigh the pros and cons before committing to an agreement that may benefit the employee in a later context.²⁶⁹⁷

(a) Pros

Generally, arbitration fosters less costly and contentious pre-hearing discovery, particularly if some constraints on allowable discovery are imposed in the arbitration agreement. However, this benefit will be reduced in those arbitrations in which the arbitrator allows discovery to be as broad as, or broader than, that allowed by a judge, or in which the arbitration is likely to last longer than a few days. To the extent constraints are imposed upon discovery, arbitration generally favors employers because employers generally have more of the “facts,” receive broader and more burdensome discovery requests, and have employees who must miss work to respond to discovery and deposition requests.

Another advantage is that parties may select their arbitrator, rather than simply being assigned a judge or jury, and therefore have some say in who will decide their dispute. However, selecting the best arbitrator is not always an easy task; it is often difficult to find published decisions of arbitrators or to find out much about their previous rulings to help predict an arbitrator’s reaction in a given case.

²⁶⁹⁴ *Johnson v. Hubbard Broad., Inc.*, 940 F. Supp. 1447, 1460 (D. Minn. 1996). See also *Graham Oil Co.*, 43 F.3d at 1246-48 (arbitration clause that purported to shorten statute of limitations was unenforceable).

²⁶⁹⁵ *Broom v. Morgan Stanley DW Inc.*, 169 Wn.2d 231 (2010).

²⁶⁹⁶ See *Stirlen v. Supercuts, Inc.*, 51 Cal. App. 4th 1519 (1997) (the California court refused to enforce a compulsory arbitration clause of an employment contract on the grounds that it was unconscionable, in part because it required the employee to use arbitration for all of his claims but permitted the employer to use the courts for certain equitable claims); *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83 (2000) (same); *Ferguson v. Countrywide Credit Indus.*, 298 F.3d 778 (9th Cir. 2002) (supporting the analysis in *Armendariz* of arbitration agreements under California law).

²⁶⁹⁷ *United Steelworkers of Am. v. Ret. Income Plan for Hourly-Rated Employees of ASARCO*, 512 F.3d 55 (9th Cir. 2008) (court allowed union suit on behalf of laid-off employees to force employer and its Retirement Income Plan to arbitrate denial of pension benefits; court applied presumption of arbitrability, despite fact that parties seeking arbitration were retired and no longer “employees”).

In arbitration, employers are not faced with potential “run-away” or “employee-friendly” juries. Both parties have improved chances that the case will be decided on its merits, rather than on unduly prejudicial or inflammatory evidence.

Finally, arbitration is more informal and may provide greater privacy to the parties. Privacy may be particularly important to employees and employers alike where the allegations or evidence are considered sensitive. However, it seems that more and more parties are publicizing arbitration demands and victories with the same regularity as they publicize court complaints and verdicts. Moreover, parties are free to share with the media the daily testimony or the arbitration hearing.

(b) Cons

The major disadvantage to arbitration is that arbitration awards are virtually non-appealable. As a result, the parties are essentially “stuck” with errors of law or clearly erroneous factual findings.²⁶⁹⁸ As the use of arbitration becomes more frequent, and as more attorneys become arbitrators and mediators, parties should benefit from “triers of fact” who are both impartial and well versed in employment law, which reduces the likelihood of such errors.²⁶⁹⁹ If novel claims or defenses are to be advanced, arbitration may be ill advised, particularly where the equities favor the other side. Further, arbitrators are more likely to render “equitable,” rather than “legally correct,” decisions. They may also be more likely to “split the baby.” For example, an arbitrator may compromise strong cases for employers by ordering reinstatement without back pay. This results in a bad precedent for the employer, as well as the reinstatement of a disgruntled employee, perhaps to a critical position within the company.

In addition, crucial discovery may be barred in arbitration. The current trend, however, seems to be toward more liberal discovery. The downside to this trend is that arbitration may come to mirror litigation in terms of pre-trial and trial practice. Moreover, arbitrators, because they are generally paid by the hour, have a strong financial disincentive to streamline proceedings and reduce the length of hearings. As a result, there will often be no reduced expense, and there will be no meaningful appeal rights.

Moreover, because evidentiary rules are more relaxed in arbitration, undesirable and otherwise inadmissible evidence may be admitted. Further, as set forth above, arbitrators are less receptive to technical and procedural defenses (*e.g.*, statutes of limitations) and rarely dismiss claims on motions to dismiss or for summary judgment. Unlike judges, arbitrators have little incentive to clear their dockets. Thus, almost all cases are likely to be tried “on their merits.” Arbitrators are also less likely to exercise control over attorney misbehavior than are judges, potentially increasing expense through uncontrolled behavior.

Judges are more likely to begin and end a case on consecutive days, which reduces the “start-up” costs associated with a few trial days every other month, a process more likely to be utilized in a lengthy arbitration. Moreover, the parties must incur the added expense of the arbitrator’s hourly fees, which are not incurred in a judicial proceeding.

Finally, arbitrators are less likely to dispose of cases on summary judgment, so parties’ may be required to try cases which would not survive summary judgment in court. Furthermore, some experts assert that the easy access, inexpensiveness, and privacy of the arbitral forum may actually increase employees’ willingness to sue, and therefore increase the number of claims against the employer. There is no hard evidence yet to support this assertion.

²⁶⁹⁸ *But see Pearson Dental Supplies, Inc. v. Super. Court*, 48 Cal. 4th 665 (2010) (holding that when an employee subject to a mandatory employment-arbitration agreement is unable to obtain a hearing on the merits of his FEHA claims, or claims based on other unwaivable statutory rights because of an arbitration award based on legal error, the trial court does not err in vacating the arbitration award).

²⁶⁹⁹ *But see Halligan*, 148 F.3d at 204 (vacating arbitration award due to the arbitrator’s “manifest disregard of the law”); *Cole*, 105 F.3d 1465 (suggesting that judicial review of arbitral awards on Title VII or other employee-protective statutes must be broader to ensure effectuation of public law of these statutes).

Before determining whether an arbitration agreement would be appropriate or desirable, an employer must carefully examine itself, its workforce, and its legal situation. The decision to use an arbitration agreement should not be made lightly because the agreement will affect the legal rights of both employer and employee. Prior to implementing an arbitration policy, the employer must contemplate the effect such a provision might have on employee morale, recruitment, retention, labor relations, customer relations, and on the employer's overall legal situation.

SECTION 14.11 FACTORS TO CONSIDER WHEN DECIDING WHETHER TO ARBITRATE A SPECIFIC CASE

Generally employers should consider the following factors when deciding whether to arbitrate a specific case.

Factors Favoring Arbitration for Employers:

- Cases in which there is a realistic potential of high public exposure due to highly inflammatory allegations.
- Cases in which summary judgment seems improbable or unlikely based on the facts.
- Cases in which the judicial assignment is poor or “pro-employee.”
- Cases involving senior management who will have to be available to testify on the court's schedule in a public forum.
- Cases in which employees may have been treated very unfairly, but not unlawfully (*i.e.*, not discriminated against).
- Cases involving highly complex or technical facts, which may be beyond the comprehension of most jurors.

Factors Favoring Judicial Forum for Employers:

- Cases in which summary judgment is likely to be granted in favor of the employer.
- Cases in which the assigned judge is likely to limit discovery on irrelevant matters or to exclude certain marginally relevant or inflammatory matters from the trial.
- Cases in which the hearing or trial is likely to be very lengthy.
- Cases that are bench trials, rather than jury trials, particularly where the assigned judge is conservative or otherwise “pro-employer.”

Factors Disfavoring Arbitration for Either Side:

- Cases involving significant legal issues in which an appeal is likely (*e.g.*, some evolving issues in disability cases).
- Cases in which substantial discovery is needed.
- Cases that would require more than one arbitrator on the panel, which might reduce the speed with which the matter can be resolved on the merits.
- Cases in which substantial control over the opposing attorney may be required.
- Cases in which one party prefers a very prompt resolution of the dispute, while the other party may wish to delay proceedings.

CONCLUSION

We are hopeful that you find the information set forth in this text informative and useful, providing sound practical and legal guidance. However, the field of labor and employment law is fluid and dynamic. Statutory provisions are revised with regularity. New legislation is introduced periodically that alters the employment law landscape. Judicial decisions are rendered routinely, sometimes offering dramatic expansions of pre-existing analyses or introducing entirely new legal theories (whether based on statute or common law). On other occasions, these decisions simply offer subtle and nuanced modifications of well-established legal principles.

For all of these reasons, it is critical that you not rely upon this text as the definitive word on the statutes and decisions discussed above. Rather, we hope this Employment Law Guide provides you a basic understanding of the issues presented and a useful starting point for your own analysis. As just noted, however, the text is only a starting point. Seek guidance from in-house and outside counsel on the myriad employment issues you confront. Of course, if we can provide you any assistance on any of these issues, we would greatly appreciate the opportunity to partner with you.

DORSEY & WHITNEY LLP

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INTERNET RESOURCES LINKS
FOR LABOR & EMPLOYMENT LAW ATTORNEYS
AND THE HSR PROFESSIONAL

NAME OF ORGANIZATION

WEBSITE ADDRESS & LINK

FEDERAL LABOR WEBSITES

US Dept. of Labor	http://www.dol.gov/index.htm
Equal Employment Opportunity Commission	http://www.eeoc.gov/
National Labor Relations Board	http://www.nlr.gov/
Occupational Safety & Health Administration	http://www.osha.gov/
Immigration and Naturalization Services	http://www.uscis.gov/portal/site/uscis
US Dept. of State–Visa Services	http://travel.state.gov/visa/visa_1750.html
Americans with Disabilities Act–Information and Technical Assistance	http://www.ada.gov
US Code, Title 29, Labor	http://www.law.cornell.edu/uscode/html/uscode29/usc_sup_01_29.html
US Code, Chapter 5.71, Labor-Management Relations	http://www.law.cornell.edu/uscode/html/uscode05/usc_sup_01_5_10_III_20_F_30_71.html

WASHINGTON STATE LABOR WEBSITES

Revised Code of Washington, Title 49, Labor Regulations	http://www.apps.leg.wa.gov/rcw/default.aspx?Cite=49
Washington Dept. of Labor and Industries	http://www.lni.wa.gov/
Washington Industrial Safety & Health Act Services	http://www.lni.wa.gov/Safety/Rules/default.htm
Washington Employment Security	http://www.esd.wa.gov
Washington State Human Rights Commission	http://www.hum.wa.gov/

CALIFORNIA STATE LABOR WEBSITES

California Department of Industrial Relations	http://www.dir.ca.gov
California Employment Development Department	http://www.edd.ca.gov

MINNESOTA STATE LABOR WEBSITES

Minnesota Department of Employment and Economic Development	http://www.positivelyminnesota.com
Minnesota Department of Labor & Industry	http://www.dli.mn.gov

HUMAN RESOURCES WEBSITES

National Human Resources Association	http://www.humanresources.org/
Society for Human Resource Management	http://www.shrm.org/