CLE SEMINAR EVALUATION FORM

Name (Optional): _____ Date: October 27, 2011

Name of Course: Basic Labor and Employment 2011(1297R TVM)

City: Tampa Facility: Tampa Airport Marriott

Please evaluate the speaker presentation for this Florida Bar CLE program based on the following scale: **5=excellent; 4=good; 3=fair/average; 2=poor; 1=unacceptable**. If you rate a presentation 2 or 1, please explain why, in the comment section, so that we may further improve our programs.

Speaker	Speaker Rating	Course material	Comments
Scott Atwood	___	___	_____
Brian Koji	___	___	_____
Mark Cheskin	___	___	_____
Robert Kilbride	___	___	_____
Chelsie Flynn	___	___	_____
Robert C. Leitner	___	___	_____

General Speaker Comments: _____

_____

_____

General Seminar Comments: _____

_____

_____

_____

Course material Comments: _____

_____

Please evaluate the facility based on the following scale: **5=excellent; 4=good; 3=fair/average; 2=poor; 1=unacceptable**. If you use a rate of 2 or 1, please explain why, in the comment section, so that we may further improve our programs.

___ Convenience
___ Aesthetics (comfort, cleanliness, etc.)
___ Amenities (restaurants, restrooms, parking, etc.)

Facility Comments: _____

_____

Where did you learn of this seminar?

☐ Bar *News* Ad ☐ Brochure ☐ FLABAR Website ☐ Section Website ☐ Other

Please identify any topic that you wish to see as the subject of future or expanded Florida Bar seminars:

_____

_____

Common Questions About CLER

1. **What is CLER?**
   CLER, or Continuing Legal Education Requirement, was adopted by the Supreme Court of Florida in 1988 and requires all members of The Florida Bar to continue their legal education.

2. **What is the requirement?**
   Over a 3 year period, each member must complete 30 hours, 5 of which are in the area of ethics, professionalism, substance abuse, or mental illness awareness.

3. **Where may I find information on CLER?**
   Rule 6-10 of the Rules Regulating The Florida Bar sets out the requirement. All the rules may be found at www.floridabar.org to Rules Updates to Rules Regulating The Florida Bar.

4. **Who administers the CLER program?**
   Day-to-day administration is the responsibility of the Legal Specialization and Education Department of The Florida Bar. The program is directly supervised by the Board of Legal Specialization and Education (BLSE) and all policy decisions must ultimately be approved by the Board of Governors.

5. **How often and by when do I need to report compliance?**
   Members are required to report CLE hours earned every three years. Each member is assigned a three year reporting cycle. You may find your reporting date either by going to www.floridabar.org to Member Profile to CLE Status Inquiry or the mailing label of The Florida Bar News.

6. **Will I receive notice advising me that my reporting period is upcoming?**
   Three months prior to the end of your reporting cycle, you will receive either:
   1) a CLER Reporting Affidavit, if you still lack hours; or,
   2) a CLER Notice of Compliance, if you have completed your hours.

7. **What do I do with the Affidavit?**
   You are to update and correct the form, complete any hours you lack, and sign and return the affidavit by your reporting date. Complete instructions appear on the reverse side of the form.

8. **What do I do with the Notice of Compliance?**
   If the information is correct, you need not respond. This document is your confirmation that you have completed the requirement for your current reporting cycle.

9. **What happens if I am late returning my Affidavit or do not complete the required hours?**
   You run the risk of being deemed a delinquent member which prohibits you from engaging in the practice of Florida law.

10. **Will I receive any other information about my reporting cycle?**
    Approximately 45 days prior to the end of your reporting cycle, if you have not yet completed your hours.

11. Are there any exemptions from CLER?

Rule 6-10.3(c) lists all valid exemptions. They are:

1) Active military service
2) Undue hardship (upon approval by the BLSE)
3) Nonresident membership (see rule for details)
4) Full-time federal judiciary
5) Justices of the Supreme Court of Florida and judges of district, circuit and county courts
6) Inactive members of The Florida Bar

12. Other than attending approved CLE courses, how may I earn credit hours?

Credit may be earned by:

1) Lecturing at an approved CLE program
2) Serving as a workshop leader or panel member
3) Writing and publishing in a professional publication or journal
4) Teaching (graduate law or law school courses)
5) University attendance (graduate law or law school courses)

13. How do I submit various activities for credit evaluation?

Applications for credit may be found either on our website, www.floridabar.org, or in the directory issue of The Florida Bar Journal following the listing of Board Certified Lawyers.

14. How are attendance hours posted on my CLER record?

If you registered for a seminar through The Florida Bar Registrations Department, the credit will be posted to your record automatically. If the course is sponsored by a Florida Bar Section or another organization, you can post your credits online.

15. How long does it take for hours to be posted to my CLER record?

When you post your CLE credit online, your record will be automatically updated and you will be able to see your current CLE hours and reporting period.

16. How may I find information on programs sponsored by The Florida Bar?

You may wish to visit our website, www.floridabar.org, or refer to The Florida Bar News. You may also call CLE Registrations at 850/561-5831.

17. If I accumulate more than 30 hours, may I use the excess for my next reporting cycle?

Excess hours may not be carried forward. The standing policies of the BLSE, as approved by the Supreme Court of Florida specifically state in 6.03(b):

... CLER credit may not be counted for more than one reporting period
and may not be carried forward to subsequent reporting periods.

18. Will out-of-state CLE hours count toward CLER?

Courses approved by other state bars are generally acceptable for use toward satisfying CLER.

19. If I have questions, whom do I call?

You may call the Legal Specialization and Education Department of The Florida Bar at 850/561-5842.

While online checking your CLER, don't forget to check your Basic Skills Course Requirement status.

The Florida Bar Continuing Legal Education Committee and the
Young Lawyers Division

Basic Labor and Employment 2011

COURSE CLASSIFICATION: BASIC LEVEL

October 27, 2011

Tampa Airport Marriott
4200 George J. Bean Parkway, Tampa, FL 33607

Course No. 1297R

THE FLORIDA BAR

PREFACE

The course materials in this booklet were prepared for use by the registrants attending our Continuing Legal Education course during the lectures and later in their offices.

The Florida Bar is indebted to the members of the Steering Committee, the lecturers and authors for their donations of time and talent, but does not have an official view of their work products.

CLER CREDIT

(Maximum 7.5 hours)

General ..... 7.5 hours Ethics..... 0.0 hours

Seminar credit may be applied to satisfy both CLER and Board Certification requirements in the amounts specified above, not to exceed the maximum credit. Refer to Chapter 6, Rules Regulating The Florida Bar, see the CLE link at www.floridabar.org for more information about the CLER and Certification Requirements.

Prior to your CLER reporting date (located on the mailing label of your Florida Bar *News*) you will be sent a Reporting Affidavit (must be returned by your CLER reporting date) or a Notice of Compliance which confirms your completion of the requirement according to Bar records (does not need to be returned). You are encouraged to maintain records of your CLE hours.

CLE CREDIT IS NOT AWARDED FOR THE PURCHASE OF THE COURSE BOOK ONLY.

CLE COMMITTEE MISSION STATEMENT

The mission of the Continuing Legal Education Committee is to assist the members of The Florida Bar in their continuing legal education and to facilitate the production and delivery of quality CLE programs and publications for the benefit of Bar members in coordination with the Sections, Committees and Staff of The Florida Bar and others who participate in the CLE process.

COURSE CLASSIFICATION

The Steering Committee for this course has determined its content to be BASIC.

YOUNG LAWYERS DIVISION

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CLE COMMITTEE

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For a complete list of Member Services visit our web site at www.floridabar.org.

LECTURE PROGRAM

8:30 a.m. – 8:55 a.m.	**Registration**
8:55 a.m. – 9:00 a.m.	**Introduction and Welcome**
9:00 a.m. – 10:00 a.m.	**Title VII/FCRA Overview - Introduction to Anti-Discrimination and Anti-Harassment Laws** *Scott Atwood, Fort Myers*
10:00a.m. – 11:00a.m.	**Retaliation** *Brian Koji, Tampa*
11:00a.m. – 11:15a.m.	**Break**
11:15a.m.–12:15p.m.	**FLSA** *Mark Cheskin, Miami*
12:15 p.m. – 1:15p.m.	**Lunch (on your own)**
1:15 p.m. – 2:30 p.m.	**FMLA and ADA** *Robert Kilbride, Stuart*
2:30 p.m. – 2:45 p.m.	**Break**
2:45 p.m. – 3:45 p.m.	**Traditional Labor Law** *Chelsie Flynn, Orlando*
3:45 p.m. – 4:45 p.m.	**Overview of Florida Employment Laws** *Robert C. Leitner, Miami*

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Overview of Florida Employment Laws
Robert C. Leitner, Miami

AUTHORS/LECTURERS

SCOTT E. ATWOOD heads the labor and employment practice at Stout | Atwood LLC, with offices in Fort Myers and Atlanta. He received his undergraduate degree in history, with honors, from Dartmouth College in 1990, and holds an M.A in history from the College of William & Mary. Scott graduated from the University of Florida College of Law, with honors, in 1995, where he served as the Editor-in-Chief of the Florida Journal of International Law and was a recipient of the President's Award for outstanding contributions to the University of Florida. He currently serves on the law school's alumni council. Scott is admitted to the Georgia and Florida Bars. Scott regularly counsels both private and public clients on various labor and employment matters, including investigations of internal employee complaints; complaints filed with the EEOC, DOL and NLRB; discrimination claims; wage and hour matters; and restrictive covenants agreements. He has litigated employment issues nationwide, and has been involved in a number of large cases for various entities, including Fulton County, Georgia; Hooters of America; Applebee's; Florida Power; Florida Power & Light; auto parts manufacturer Collins & Aikman; MCI; and numerous public housing authorities. On multiple occasions, Scott has been named a Super Lawyers Rising Star in labor and employment law by the publishers of Atlanta Magazine. He currently serves on the Executive Council of the Florida Bar's Labor & Employment Section, where he is the co-chair of the EEOC/FCHR sub-committee. Among other speaking engagements, he has previously lectured at the Florida Bar's Basic Labor CLE and has twice been a featured speaker at the prestigious Georgia and Atlanta Bars' Annual Joint Labor & Employment Seminar. In addition to lecturing, Scott is an active writer and has been a contributing editor for the BNA treatises How Arbitration Works and Discipline and Discharge in Arbitration. Scott is a past President of the Florida Bar's Young Lawyers Division, and has served on the Florida Bar's Board of Governors' Executive Committee. While a Board of Governors member, he served on the Board's Disciplinary Review Committee, which conducts the final review of all statewide disciplinary findings before the Bar issues a recommendation to the Supreme Court. He has also served on the Supreme Court's Committee on Professionalism.

MARK CHESKIN is a litigation partner in the Miami office of Hogan Lovells US LLP, where he heads up the Firm's Labor & Employment Law Practice in Florida. In his 24 year career, Mark successfully has taken many significant cases to jury verdict in a wide range of complex commercial and employment matters. For example, within one six month period, Mark obtained successful jury verdicts in two different, month long class action jury trials, where tens of thousands of plaintiffs sought over $70 million. Mark consistently has been named as a top lawyer in the Best Lawyers of America, the South Florida Legal Guide, Florida Trend Magazine, Chambers USA, and Corporate Counsel's Super Lawyers. He also has received the Daily Business Review's designation as South Florida's Most Effective Lawyer in the pro bono category for his representation of a plaintiff in obtaining a $2.5 million jury verdict in an employment discrimination case against Homeland Security.

CHELSIE FLYNN concentrates her practice on litigating employment cases in state and federal courts and advising employers on various employment issues, including federal and state anti-discrimination statutes, the Fair Labor Standards Act and the Family and Medical Leave Act. She regularly conducts management training on developments in various employment and labor laws. Prior to joining Ford & Harrison LLP, Chelsie served as an associate at an Orlando law firm where she represented private and public employers in litigation and administrative actions under Title VII, the Florida Civil Rights Act, the Americans with Disabilities Act and the Public Employees Relations Act. She also worked with clients regarding employment policies,

employee privacy and discipline, public records and general legal/regulatory compliance. Chelsie has served on the Florida Bar Young Lawyers Division Board of Governors since 2007. She also served as President of the Orange County Bar Association's Young Lawyers' Section from 2008-2009. She is a 2002 graduate of Stetson University College of Law and a 1999 graduate of the University of Florida with a B.S. in Journalism.

ROBERT L. KILBRIDE is a partner at the law firm of Fox, Wackeen and Dungey in Stuart Florida where he concentrates on labor and employment law and business litigation. He was admitted to the Florida Bar in 1983. Bob is board certified by the Florida Bar in Labor and Employment Law. He is also a member of the U.S. District Court, Southern District of Florida, Trial Bar (1985) and the U.S. District Court, Middle District of Florida (1986). He was an Assistant City Attorney for the City of Stuart. Previously, he was V.P. and Associate General Counsel for The Wackenhut Corporation and a former state prosecutor. Bob is a member of the Florida Bar, Labor and Employment Law and the City, County and Local Government sections. He is a former member of the Board of Directors and was Secretary of The National Association of Security Companies (NASCO). Currently, Bob is a Code Enforcement Magistrate for Martin County Florida. He also serves as Board counsel for the Port S. Lucie, Civil Service Appeals Board and the Town of Sewall's Point, Code Enforcement and Zoning Adjustment boards. Bob is "AV" Rated by Martindale Hubbell and graduated from Florida State University (B.S., Business, 1980) and the Florida State University, College of Law (J.D., 1983). He is a certified as a circuit civil mediator and serves currently on several local boards including the Arts Council of Martin County and the American Red Cross

BRIAN W. KOJI is a shareholder of the firm Allen, Norton & Blue, P.A. He earned his bachelor's degree in Economics from the University of Central Florida in 1994 and his J.D. degree from Duke University School of Law in 1997. He was admitted to The Florida Bar in 1997, the Eleventh Circuit Court of Appeals, and United States District Courts for the Middle, Southern and Northern Districts of Florida in 1998 and the United States Supreme Court in 2008. He is Board Certified by The Florida Bar as a specialist in the area of Labor and Employment Law.

ROBERT C. LEITNER is a senior associate in the Miami office of K&L Gates LLP. He practices in the areas of labor and employment law (employer side) and general commercial litigation. He has handled a full range of employment matters, including discrimination claims and restrictive covenants litigation and wage and hour litigation. He graduated *summa cum laude* from Tulane University in 1999 with a B.A. in Asian studies and history and *summa cum laude* from the University of Miami School of Law in 2004. He also has an M.A. in Latin American studies from the University of Texas at Austin.

Title VII/FCRA Overview - Introduction to Anti-Discrimination and Anti-Harassment Laws

By

Scott Atwood, Fort Myers

STOUT ATWOOD LLC

BRIEF OVERVIEW OF FEDERAL AND FLORIDA DISCRIMINATION LAWS

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I. THE CIVIL RIGHTS ACT OF 1964 ("TITLE VII")

A. The Act.

The Civil Rights Act of 1964 is commonly referred to as Title VII. The Act prohibits discrimination in employment on the basis of **race, color, religion, sex, pregnancy, or national origin**. Employment refers to hiring, firing, compensation, and other terms, conditions and privileges of employment. Discrimination may be demonstrated both by intentional acts by the employer and by employment practices that have a discriminatory effect.

Employees protected under the Act include applicants and, in some instances, former employees. Certain narrow categories of individuals are excluded from the definition of employee; e.g., elected officials, etc.

Title VII applies to both public and private employers with 15 or more employees. The Act authorizes a cause of action against the employing entity; there is generally no individual liability (e.g., against supervisors, department heads, elected officials, etc.) under Title VII.

Title VII does not purport to constitute an employee's exclusive remedy for discrimination on the basis of race, color, religion, sex, pregnancy, or national origin. Thus, parallel claims can in

most instances be asserted under other statutes such as 42 U.S.C. Section 1981 or 42 U.S.C. Section 1983.

1. Pregnancy Discrimination

In 1978, Title VII was amended to include a ban on discrimination on account of pregnancy, childbirth and any medical condition related to pregnancy (including abortion). Employers may not force women to stop working when they are able to continue performing their duties. However, employers do not have to provide any special accommodations to pregnant women. Like other Title VII cases, pregnancy discrimination is proven either through direct evidence or through circumstantial evidence (establishing a prima facie case).

2. Religious Accommodation

Title VII prohibits employment discrimination based on an employee's religious beliefs. Further, an employer is required to reasonably accommodate the religious beliefs of an employee or prospective employee, unless doing so would impose an undue hardship. General examples of reasonable accommodation include reassignment or transfer, restructuring of job duties, allowing reasonable time off for religious practices, flexibility in scheduling and appearance standards, and allowing voluntary exchanges of work schedules. The Courts have given employers rather wide discretion in this area, such that accommodation cases are difficult for plaintiffs to prove.

3. National Origin

Title VII prohibits discrimination against an individual because of birthplace, ancestry, culture or linguistic characteristics common to a specific ethnic group. National origin has been broadly interpreted under Title VII cases to generally mean the country from which an applicant or employee, or his forebears, came. However, national origin does not include discrimination on the basis of citizenship.

4. BFOQ Defense

In rare cases, a bona fide occupational qualification (BFOQ) permits an employer to discriminate on the basis of sex, religion or national origin where such a factor is reasonably necessary to the normal operation of the employer's business. Race cannot be a BFOQ.

When an employer asserts a BFOQ as an affirmative defense, it is essentially admitting that the protected trait did play a substantial role in the adverse employment decision, but was a bona fide qualification that was reasonably necessary to ensure a normal operation of the particular business.

To establish a BFOQ, an employer must prove (1) a relationship between the classification and job performance; (2) the necessity of the classification for successful performance, and (3) that the job performance affected is the essence of the employer's business operation.

B. Proving Discrimination Under Title VII

To prove a case of discrimination, an individual must establish a connection between the employment condition or decision and a prohibited basis, such as race or sex. Such causal connection may be established by showing:

- Individual instances of different or disparate treatment based on prohibited criteria (referred to as "Disparate Treatment"); or

- Neutral policies or practices that have a harsh or adverse impact upon a protected class to which an employee or applicant belongs, such as women, Hispanics, or persons over 40 (referred to as "Disparate Impact").

1. Disparate Treatment

A plaintiff may establish a claim of disparate treatment through either direct or circumstantial evidence. *Schoenfeld v. Babbitt*, 168 F.3d 1257 (11th Cir. 1999).

Direct Evidence: Direct evidence may take the form of a supervisor's comments about the plaintiff's race, sex, or other protected criteria. Generally, direct evidence is "evidence" which if believed, proves the existence of a fact in issue without inference or presumption. It has also been defined as "evidence which reflects a discriminatory or retaliatory attitude correlating to the discrimination or retaliation complained of by the employee." Only the most blatant remarks, whose intent could mean nothing other than to discriminate on the basis of some impermissible factor constitute direct evidence of discrimination. If the statement suggests, but does not prove, a discriminatory motive, then it is considered circumstantial evidence. *See Akouri v. State of Florida Dept. of Transp*. 408 F.3d 1338 (11th Cir. 2002) (citations omitted).

Circumstantial Evidence: As direct evidence is rare and hard to come by, Plaintiffs in discrimination cases usually have to prove their claims by the use of circumstantial evidence. In order to do so, the plaintiff must use the burden-shifting analysis adopted by the Supreme Court in *McDonnel Douglas Corp. v. Green*, 411 U.S. 792 (1973) and *Texas Dep't of Comm. Affairs v. Burdin*, 450 U.S. 248 (1981). *See also Holifield v. Reno*, 115 F.3d 1555 (1997).

Under the burden-shifting framework, the plaintiff carries the initial burden of establishing a *prima facie* case of discrimination. If the plaintiff successfully carries this burden, a rebuttable presumption is created that the employer unlawfully discriminated against the plaintiff.

There are a variety of ways to establish a *prima facie* case of discrimination. One of the most common ways is for the plaintiff to establish that:

(1) he/she is a member of a protected class;

(2) he/she was qualified for the position;

(3) he/she suffered an adverse employment action; and

(4) the position was filled by someone outside of the protected class or the plaintiff was replaced by someone outside of the protected class or was treated less favorably than a similarly situated individual outside of the protected class.

Once the employee has established a prima facie case, the burden shifts to the employer to rebut the presumption of discrimination by producing evidence that its action was taken for some legitimate non-discriminatory reason. The burden in establishing a legitimate non-discriminatory reason for the employer's action is one of production, not persuasion. Thus, the employer may satisfy this burden by articulating a clear and reasonably specific, factual basis upon which it based its employment action.

If the employer satisfies this burden of production, the presumption of discrimination is eliminated and the plaintiff then has the opportunity to come forward with evidence that is sufficient to permit a reasonable fact finder to conclude that the reasons given by the employer for the adverse employment action were "pretextual" and were not the actual reasons for the action.

2. Disparate Impact

In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) the U.S. Supreme Court determined that Title VII prohibits not only overt and intentional discrimination but also employment practices that appear neutral but are discriminatory in operation. The Court later stated that claims of disparate impact "involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." *Hazen Paper Co., v. Biggins,* 507 U.S. 604 (1993).

To show a prima facie case of disparate impact, an employee must identify specific employment practices or selection criteria being challenged, show disparate impact by proving a pattern or practice of hiring sufficiently different from that of a pool of qualified applicants, and prove causation by presenting statistical evidence of kind and degree sufficient to show that practice in question has in fact caused exclusion of applicants because of their membership in a protected group.

C. Workplace Harassment

As discussed above, Title VII states that it is an unlawful employment practice for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individuals' race, color, religion, sex, or national origin." *42 U.S.C. § 2000e-2*.

The Supreme Court concluded in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), that sexual harassment is a form of sex discrimination prohibited by Title VII. The Supreme Court subsequently expanded this area of the law in the two landmark sexual harassment decisions of *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998). Since the *Faragher* and *Ellerth* opinions were published on the same day in 1998, numerous federal decisions in all of the Federal Circuits (including the Eleventh Circuit), have followed the principles established in those cases (replacing the former "quid pro quo analysis") and applied them not only to sexual harassment cases, but to all types of harassment. *See generally Hulsey v. Pride Restaurants, LLC*, 367 F.3d 1238 (11th Cir. 2004).

Under the current state of the law, to prove harassment in violation of Title VII, a plaintiff must show the following:

(1) that he/she belongs to a protected group;

(2) that he/she has been subjected to unwelcome harassment;

(3) that the harassment was based on a protected characteristic (sex, race, etc.)

(4) that the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and/or create a discriminatory abusive working environment; and

(5) that a basis for holding the employer liable exists.

See *Hulsey, supra*.

A plaintiff may proceed to establish the above elements by relying on one of two theories. Under the first theory, the plaintiff must prove that the harassment culminated in a "tangible employment action" against him or her. Under the second theory, known as the "hostile work environment" theory, the plaintiff must prove that he or she suffered severe or pervasive conduct that negatively altered the terms and conditions of the plaintiff's work.

1. Tangible Employment Action

A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different

responsibilities, or decision causing a significant change in health benefits. In most cases, a tangible employment action inflicts direct economic harm.

When a plaintiff proves that a tangible employment action resulted from harassing conduct, the plaintiff has established that the employment decision itself constitutes a change in the terms and conditions of employment and is thus actionable under Title VII. For example, if a supervisor terminated an employee because the employee refused to submit to the supervisor's sexual demands, the employer would be liable for sexual discrimination under Title VII.

2. Hostile Work Environment

The second way to establish sexual harassment under Title VII is to show that the harassment is sufficiently severe and pervasive to effectively result in a change in the terms and conditions of employment, even though the employee is not discharged, demoted, or reassigned. This is referred to as a "hostile environment" claim.

Stated another way, a "hostile environment" claim occurs when an employer's conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive environment. In order for the conduct to be actionable, it must be both objectively and subjectively offensive, such that a reasonable person would find it hostile and abusive, and such that the victim did in fact personally perceive it to be hostile and abusive.

In assessing whether the objective reasonableness of the employee's perception that the harassment complained of was severe and pervasive enough to alter the terms and conditions of employment, courts typically employ a totality of the circumstances approach and consider the following four factors:

(1) the frequency of the conduct;

(2) the severity of the conduct;

(3) whether the conduct was physically threatening or humiliating, or merely offensive utterances; and

(4) whether the conduct unreasonably interfered with the employee's work performance.

While courts are to consider the alleged conduct in context and cumulatively, the Supreme Court has made clear that Title VII is not a "general civility code" and that teasing, offhand comments, and isolated incidents may constitute ordinary tribulations of the workplace but are not discriminatory changes in the terms and conditions of employment. See *Faragher, supra; Oncale v. Sundowner Offshore Services, Inc*., 523 U.S. 75 (1998). Further, because a claim of harassment under Title VII is a claim of disparate treatment, in order to prevail the plaintiff must show that "similarly situated

persons not of [his/her protected class (sex, race, etc.] were treated differently and better." *Baldwin Blue Cross/Blue Shield of Alabama*, 480 F.3d 1287 (11th Cir. 2007). While case law has made clear that the determination of whether an employer's conduct rises to the level of creating a hostile work environment must be made on a case-by-case basis, the following are examples of behaviors that courts have held to be severe and pervasive.

- Unwanted sexual advances;
- Offering employment benefits in exchange for sexual favors;
- Visual conduct such as leering, making gestures, or displaying derogatory pictures, cartoons, calendars, posters or drawings;
- Verbal conduct such as derogatory comments, epithets, slurs, or jokes;
- Written communications via documents or email;
- Verbal abuse, graphic verbal comments, use of degrading words to describe an individual, suggestive or obscene letters, notes or invitations;
- Physical conduct such as touching, assault, impeding or blocking movements; or
- Retaliation for making harassment reports or threatening to report harassment.

D. Employer Liability for Workplace Harassment

The Supreme Court, in the *Faragher* and *Ellerth* cases, *supra*, held that an employer is strictly liable under Title VII for any harassment by a supervisor that results in a "tangible employment action." Thus, when a supervisor, in harassing a subordinate employee, takes a tangible employment action against the employee, then the supervisor's action becomes the act of the employer for the purpose of imposing liability under Title VII.

However, the Court also determined that where supervisory behavior constitutes a hostile work environment, but does not result in a tangible employment action, employers may avail themselves to an affirmative defense to liability or damages. The defense has two halves, one of which focuses on the employer's responsibility to prevent or correct workplace harassment, and the other of which focuses on the employee's responsibility to protect himself/herself and others from harassment by using the procedures the employer has in place to promptly report it.

As articulated by the Supreme Court, the affirmative defense consists of the following two necessary elements:

(1) that the employer exercised reasonable care to prevent and correct promptly any harassing behavior; and

(2) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

The Court further provided that while proof that an employer has promulgated an anti-harassment policy is not necessary in every instance as a matter of law, the need for such a policy may appropriately be addressed in any case when litigating the first element of the affirmative defense. Additionally, while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing any unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense. *Ellerth, supra at 766.*

In *Baldwin Blue Cross/Blue Shield of Alabama*, 480 F.3d 1287 (11th Cir. 2007), the Eleventh Circuit discussed the reasonableness of the investigation launched by the employer after it had been notified of the alleged misconduct. The Court provided that all that is required is "reasonableness in all circumstances, and the permissible circumstances include conducting the inquiry informally in a manner that will not unnecessarily disrupt the company's business, and in an effort to arrive at a reasonably fair estimate of the truth." *Id*. at 1304. Further, any remedial measures offered by the employer to correct the harassing behavior must be "reasonably likely to prevent the misconduct from recurring." *Id*. at 1305. In the event the employee fails to take advantage of any reasonable remedial measure offered by the employer, then he/she cannot avail themselves to the so-called *Faragher-Ellerth* defense. *Id. at 1306.*

The Eleventh Circuit also noted in *Baldwin* that when a plaintiff alleges that his or her employer is liable for a hostile work environment due to the harassing conduct of co-workers rather than supervisors, the employer will be held liable only if it knew or should have known of the harassing conduct but failed to take prompt remedial action. *Id. at 1302.*

E. Procedure

Title VII is enforced by the United States Equal Opportunity Commission ("EEOC"). Charges alleging violations of Title VII must generally be filed within 180 days from the date of the alleged violation. However, where a state or local deferral agency exists, the time period is extended to 300 days. Since Florida has a state agency known as the Florida Commission on Human Relations ("FCHR"), a complainant in the State of Florida may file his or her claim of discrimination within 300 days of the alleged misconduct.

After the charge has been filed, the EEOC will investigate the charge and issue a determination. The EEOC has the right to make written requests for information, conduct interviews, subpoena documents, and perform on-site visits.

Once the investigation is concluded, the EEOC will issue a determination of whether there is reasonable cause to suspect that a violation of Title VII occurred. Regardless of whether the EEOC finds cause, at the conclusion of its investigation it will issue a "Right-to-Sue" notice to the charging party. After receipt of this notice, the charging party has 90 days in which to file a civil suit against the employer.

In the event that the EEOC has not made a ruling within 180 days after the charge has been filed, the charging party may request a "Right-to-Sue" notice without a cause finding.

Charges against state or local governments are forwarded to the United States Department of Justice (DOJ) for investigation of possible enforcement action.

F. Remedies Under Title VII

Possible penalties for violation of Title VII are back pay, front pay, benefits, affirmative relief including promotions and reinstatement, reasonable attorney's fees, and compensatory and punitive damages.

Back pay restores the employee to the position he or she would have been in absent the discrimination by restoring the employee's lost wages and benefits. Plaintiffs are required to mitigate their damages and thus subsequent employment compensation may reduce or eliminate the amount of a back pay award. Further, back pay is limited to two years prior to filing the charge.

Front pay is an equitable remedy that generally compensates a victim in situations where reinstatement is impracticable or impossible. Front pay attempts to place the individual in as near as possible in the situation that he or she would have occupied if the discriminatory acts had not been committed, and usually consists of lost wages that a victim is reasonably likely to incur in the future, less any income from other employment.

Compensatory and punitive damages are recoverable where there is a claim that the alleged discrimination was intentional. The amount of compensatory and punitive damages that may be granted depends on the size of the employer:

- up to $50,000 for employers with 15-100 employees,
- up to $100,000 for employers with 101-200 employees,
- up to $200,000 for employers with 201-500 employees, and
- up to $300,000 for employers with more than 500 employees.

Punitive damages are only available if plaintiff shows that the employer acted with malice or reckless indifference (not available against public employers).

Attorney's fees are available to the plaintiff if he/she prevails or to the prevailing defendant if it can show the action was frivolous or without merit. *42. U.S.C. § 2000e-5(k).*

G. Recent Legislation: The Lilly Ledbetter Fair Pay Act

President Obama signed into law The Lilly Ledbetter Fair Pay Act on January 29, 2009. The law reverses the U.S. Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, which held that the charge-filing deadline on Title VII compensation discrimination claims begins to run on the date of the first allegedly discriminatory pay decision.

The Act amends Title VII, along with the Americans with Disabilities Act of 1990 ("ADA"), the Rehabilitation Act of 1973, and the Age Discrimination in Employment Act of 1967 ("ADEA") to provide that the charge-filing periods (300 days in most states and 180 days in states that do not have a fair employment agency) commence when: (1) a discriminatory compensation decision or other practice is adopted; (2) an individual becomes subject to the decision or practice; or (3) an individual is affected by an application of a discriminatory compensation decision or practice (including each time wages, benefits, or other compensation is paid).

Accordingly, the law for compensation discrimination claims has been changed so that the statute of limitations restarts each time an employee receives a paycheck based on a discriminatory compensation decision, even if that decision was made far back in an employee's employment history.

II. THE FLORIDA CIVIL RIGHTS ACT ("FCRA")

A. The Act

The Florida Civil Rights Act, referred to as the "FCRA," *Fla. Stat. § 760, et. seq.*, is modeled after Title VII and other federal employment discrimination laws, and thus is interpreted according to federal law interpreting the same. *Smith v. Avatar Properties, Inc.*, 714 So.2d 1103 (Fla. 5th DCA 1998).

The FCRA prohibits employment discrimination on the basis of race, color, religion, sex, national origin, age, handicap, or marital status. Section 760.10, Florida Statutes, states in part:

1. It is an unlawful employment practice for any employer:

   a. To discharge or to fail or refuse to hire any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.

b. To limit, segregate, or classify employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities, or adversely impact any individual's status as an employee, because of such individuals' race, color, religion, sex, national origin, age, handicap, or marital status.

The FCRA applies to any "employer" which employs 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year.

It has been a subject of dispute whether the FCRA prohibits pregnancy discrimination, and courts are not unanimous on this issue. Neither the FCRA nor its predecessor the Florida Human Rights Act expressly prohibits discrimination based on pregnancy. While Title VII was amended by the Pregnancy Discrimination Act of 1978, the FCRA was reenacted and renamed in 1992 and did not include such an amendment. On this logic, the United States District Court for the Middle District of Florida recently concluded that while "Florida citizens may still bring suit under Title VII unfettered by the FCRA's provisions, [the] FCRA does not provide a pregnancy-discrimination cause of action of its own." *Boone v. Total Renal Laboratories, Inc.*, 565 F.Supp 2nd 1323, 1327 (M.D. Fla. 2008).

Contrarily, in *Carsillo v. City of Lake Worth*, 995 So. 2d 1118 (Fla. 4th DCA 2008), which was decided on December 3, 2008, the Fourth DCA (specifically mentioning and discounting *Boone, supra)* held that since it was the original intent of Congress in 1964 to prohibit pregnancy discrimination, and since Florida statutes are to be construed in the same manner that federal statutes are construed, that the FCRA should be construed to prohibit discrimination based on pregnancy.

B. Procedure

Under the FCRA, a complainant must file a charge with the Florida Commission of Human ("FCHR") Relations within 365 days of the alleged violation as a condition precedent to bringing a private lawsuit. After the charge is filed, the FCHR has 180 days to investigate the charge to determine whether there is reasonable cause to believe a discriminatory practice has occurred.

The EEOC has entered into a work-sharing agreement with the FCHR to divide the workload of investigating charges of discrimination. Each agency acts as the essentially agent for the other for the purposes of receiving charges so that charges are considered to be "dual filed." Thus, if the charge is initially filed with the FCHR and is also covered by federal law, the FCHR "dual files" the charge with the EEOC to protect federal rights under Title VII, but generally retains the matter for investigation, and vice versa if the charge is initially filed with the EEOC.

Under Title VII, the EEOC's finding of cause or no cause is irrelevant to the plaintiff's ultimate right to sue. In other words, there is no prerequisite that a cause finding be made in order for the plaintiff to bring suit under Title VII.

On the other hand, findings by the FCHR generally have greater significance for causes of action under the FCRA. If the FCHR finds that there reasonable cause, then the complainant has the

option of bringing a lawsuit or requesting an administrative hearing. If the FCHR does not find cause, then the complainant's only option is an administrative hearing, which must be requested within 35 days of the finding of no cause. The complainant may then only bring suit (as to his/her FCRA claims) if the administrative law judge reverses the no cause finding initially made by the FCHR (suit must be brought within one year from the final order).

Finally, if the FCHR is unable to complete its investigation within 180 days, the plaintiff may proceed as though reasonable cause has been found.

C. Remedies under the FCRA

The remedies allowed under the FCRA are generally consistent with the remedies of Title VII, except for the fact that there is no dollar cap on compensatory damages against private employers (compensatory damages are capped against government employers at $100,000 per claim, $200,000 maximum) under the FCRA and punitive damages are capped at $100,000.00.

III. THE AGE DISCRIMINATION IN EMPLOYMENT ACT ("ADEA")

A. The Act

The ADEA prohibits discrimination on the basis of age against employees aged 40 or older. There is no maximum age. An employer is prohibited from discriminating on the basis of age with regard to hiring, discharge, compensation, or other terms of employment.

As with Title VII, employees protected under the ADEA include applicants and, in some instances, former employees. Certain narrow categories of individuals are excluded from the definition of employee; e.g., elected officials, etc.

The ADEA is applicable to employers employing 20 or more employees. It authorizes a cause of action against the employing entity; there is generally no individual liability (e.g., against supervisors, department heads, elected officials, etc.) under the ADEA.

The analysis used to determine Title VII cases is also used in ADEA litigation. However, in contrast to Title VII, the ADEA has been held to constitute the exclusive federal remedy for age discrimination in employment allegedly committed by public employers. Age discrimination is therefore not actionable under Section 1983 as a constitutional violation.

Among other acts of discrimination, the ADEA specifically includes the following:

- Statements or specifications in job notices or advertisements of age preference and limitations. An age limit may only be specified in rare circumstances where age has been proven to be a bona fide occupational qualification (BFOQ);

- Discrimination on the basis of age by apprenticeship programs, including joint labor-management apprenticeship programs; and

- Denial of benefits to older employees. An employer may reduce benefits based on age only if the cost of providing the reduced benefits to older workers is the same as the cost of providing benefits to younger workers.

B. Older Workers' Benefit Protection Act of 1990 ("OWBPA")

The OWBPA amended the ADEA to protect from discrimination all employee benefits, including such benefits provided pursuant to a bona fide employee benefit plan.

The OWBPA also amended the ADEA by setting out specific minimum standards that must be met in order for a waiver to be considered knowing and voluntary and, therefore, valid. To meet the minimum standards, an ADEA waiver must:

(1) be in writing and be clear and understandable;

(2) specifically refer to ADEA rights or claims;

(3) not waive rights or claims that may arise in the future;

(4) be in exchange for valuable consideration;

(5) advise the individual in writing to consult an attorney before signing the waiver;

(6) provide the individual with at least 21 days to consider the agreement and at least seven days to revoke the agreement after signing it.

In the event an ADEA waiver is requested by an employer in connection with an exit incentive program or other employment termination program, the minimum requirements for a valid waiver are more extensive, depending on the circumstances.

C. Remedies Under the ADEA

The ADEA allows a plaintiff to obtain a jury trial as well as attorney fees, back pay, front pay, and a supplemental award of liquidated damages equivalent to the back pay loss where the discrimination is found to be willful. Except to this extent, compensatory and punitive damages are not available under the ADEA. There are no statutory caps on the amount of monetary relief that can be awarded under the ADEA. Attorney's fees are awarded under the same standards as with Title VII cases.

IV. THE CIVIL RIGHTS ACT OF 1866, 42 U.S.C. SECTION 1981 ("SECTION 1981")

Section 1981 prohibits discrimination in employment on the basis of race, national origin, alienage, or ethnicity. Retaliation and harassment have also been held to be actionable under Section 1981. In this respect, its coverage is similar to Title VII discussed above. However, it

does not cover any category except race (race is interpreted broadly to mean identifiable classes of persons based on their ancestry or ethnic characteristics).

Section 1981 applies to all employers. As against public employers or officials, Section 1981 must be asserted pursuant to a companion statute, 42 U.S.C. Section 1983 ("Section 1983"). In contrast to private employers, no direct cause of action exists under Section 1981 against public employers.

Damages available under Section 1981 include back wages, benefits, reinstatement, and compensatory and punitive damages. A right to a jury trial is also provided.

Two key differences between Section 1981 and Title VII: (1) individual liability exists under Section 1981; and (2) damages awards under Section 1981 (including punitive damages against public officials or employees) are subject to no statutory caps.

Section 1981 claims are not filed with the EEOC or any other agency but may be filed directly into the appropriate court. Section 1981 does not contain a statute of limitations. As a general rule, actions arising under federal statutes enacted on or before December 1, 1990, that do not include a limitations provision are governed by the most appropriate or analogous state statute of limitations. *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369 (2004).

Since Section 1981 claims are actions for injuries to the rights of another, the appropriate statute of limitations is the personal injury limitations period for the state in which the claim is brought. In Florida, the statute of limitations period for a personal injury action is four years, so the applicable period of limitations for a Section 1981 claim is four years. *See Fla. Stat. § 95.11(3); New Port Largo, Inc. v. Monroe County*, 985 F.2d 1488 (11th Cir. 1993); *Cunningham v. Pinellas County Sheriff's Dep't*, 2000 U.S. Dist. LEXIS 3825 (M.D. Fla. Feb. 29, 2000).

V. The Americans with Disabilities Act ("ADA")

The ADA makes it illegal to discriminate in employment practices on the basis of disability. Disability as defined by the Act means one of three things: (1) a physical or mental impairment that substantially limits one or more of the individual's major life activities; or (2) a record of having such an impairment; or (3) being regarded as having such an impairment. Retaliation is also prohibited, and several courts have extended the ADA to disability-based harassment as well.

Title I of the ADA (which governs employment) is only applicable to employers with 15 or more employees; however, Title II (which governs public services, including employment) is applicable to all local governments, regardless of size.

There has been considerable litigation over the parameters of the term disability, and employers should recognize that the law is still in flux with regard to which impairments are ADA-covered. However, a recent amendment to the law has significantly lowered the threshold for meeting the definition of "disability."

Even if the employee is not actually disabled, the employer could be in violation of the Act if it limits the employee's job duties because of a belief that the employee is disabled within the meaning of the Act.

The ADA prohibits employers from conducting pre-employment medical examinations, from making pre-employment inquiries as to whether a person has a disability, and from making pre-employment inquiries as to the nature or severity of a person's known disability.

Like Title VII, the ADA covers all terms and conditions of employment, such as hiring, firing, promotions, transfers, benefits, work facilities and job assignments.

An employer may be required to make `reasonable accommodations' in a job for a person with a disability, so long as the person is `qualified' and the accommodation does not impose an undue hardship on the operation of the employer's business. There is considerable litigation over this aspect of the law, and the courts have emphasized that such analyses should be case specific.

Typical arguments against hiring individuals with disabilities are: higher insurance costs, higher worker's compensation costs, lower production, high turnover, and high absenteeism. These arguments and generalizations carry little weight with enforcement agencies.

Retaliation

By

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UNLAWFUL RETALIATION IN THE WORKPLACE

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I. OVERVIEW

Retaliation claims are allegations by employees that they suffered some form of adverse action in response to their voicing their opposition to the violation of one of the various laws governing the workplace. EEOC statistics show that while discrimination claims are leveling off, retaliation claims are increasing faster than other type of claim. To this end, while retaliation claims accounted for only 15.3% of all charges filed with the EEOC in the early 1990s, by 2005 retaliation claims accounted for 29.5% of all charges.[1]

Retaliation claims are not only becoming more common, they are also often the hardest to defend, with many claims requiring a trial to resolve. As a consequence, retaliation claims have become quite lucrative to employee lawyers and their clients. A 2003 survey showed that the median award for a retaliation case filed between 1996 and 2002 was $139,900. Whistleblower claims were particularly successful, accounting for 36% of the total retaliation awards and yielding an average recovery of $326,000.[2]

As can be seen by these trends, juries take retaliation claims very seriously, sometimes returning astounding verdicts for plaintiffs. Proven retaliation claims are especially dangerous because they can easily result in punitive damages against private sector employers since the very nature of retaliatory action, such as termination or demotion, is clearly intentional and often taken with malice or reckless indifference to the employee's legal rights.

Issues concerning retaliation are of critical importance because an employer can be held liable for retaliation even if it is not liable for the underlying discrimination of which the employee complains. In fact, it is not uncommon for employees to file suit alleging both discrimination and retaliation, and to lose on discrimination but win on retaliation.

II. TYPES OF RETALIATION PROHIBITED

Claims of retaliation can be made pursuant to specific statutory section prohibiting such action, as well as under statutes that have been interpreted as prohibiting retaliatory action. Some of the most common statutes prohibiting retaliation include:

1. Section 704(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a). Prohibits retaliation for the opposition to discriminatory conduct, or participation in an investigation regarding alleged discriminatory conduct, where the alleged discrimination is on the basis of race, color, religion, sex or national origin.

2. Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623(d) ("ADEA"). Prohibits retaliation for the opposition to discriminatory conduct, or participation in an investigation regarding alleged discriminatory conduct, where the alleged discrimination is on the basis of age.

3. Americans with Disabilities Act of 1990, 42 U.S.C. § 12203(a) ("ADA") and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. Prohibits retaliation for the opposition to discriminatory conduct, or participation in an investigation regarding alleged discriminatory conduct, where the alleged discrimination is on the basis of a real or perceived disability.

4. Section 15 of the Fair Labor Standards Act. 29 U.S.C. § 215(a)(3) ("FLSA"). Prohibits retaliation for the filing of a complaint or the participation in a proceeding regarding an alleged violation of wage and hour laws.

5. Section 510 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1140 ("ERISA"). Prohibits retaliation for participating in any inquiry or proceeding relating to alleged violations of ERISA.

6. Section 105 of the Family and Medical Leave Act, 29 U.S.C. § 2615 ("FMLA"). Prohibits retaliation for exercising family and medical leave rights or opposing allegedly unlawful practices regarding family and medical leave.

7. Section 2(a) of the Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. § 4311(b) ("USERRA"). Prohibits retaliation for exercising leave and other rights regarding military service obligations.

8. Section 11 of the Occupational Safety and Health Act ("OSHA"). Prohibits retaliation for filing a complaint or participating in a proceeding regarding workplace safety, including Worker Protection Standards.

9. 42 U.S.C. § 1983 ("Section 1983"). Prohibits retaliation for exercising rights protected by the Constitution or federal laws, such as protection against retaliation for public employees' exercise of free speech rights.

10. 42 U.S.C. § 1981 ("Section 1981"). Prohibits retaliation for opposing unlawful race discrimination.[3]

11. 11 U.S.C. § 525(b). Prohibits retaliation for filing a petition of bankruptcy.

12. 20 U.S.C. § 1095(a). Prohibits retaliation for employee's status as subject to wage garnishment.

13. Section 8(a)(1) – (3) of the National Labor Relations Act. Prohibits retaliation based on union activity, for attempting to form a union or encouraging union membership.

14. Sarbanes-Oxley Act, 18 U.S.C. § 1514A. Prohibits retaliation for providing information regarding alleged accounting improprieties, or participating in a proceeding related to alleged securities law violations.

15. Title IX, 20 U.S.C. §§ 1681 – 1688. Prohibits retaliation for providing information regarding alleged sex discrimination in any educational program receiving federal funds.

16. Florida Civil Rights Act, Fla. Stat. § 760.10(7) ("FCRA"). Prohibits retaliation for opposing discrimination or participating in any investigation into alleged discrimination, where the alleged discrimination is on the basis of race, color, religion, sex, national origin, age, disability or marital status.

17. Fla. Stat. § 40.271. Prohibits retaliation for engaging in jury service under a summons.

18. Florida Workers' Compensation Law, Fla. Stat. § 440.205. Prohibits retaliation for making a claim for workers' compensation benefits.

19. Florida Private Sector Whistleblowers' Act, Fla. Stat. § 448.102. Prohibits retaliation for opposing, reporting or disclosing unlawful activity of a private employer.

20. Florida Public Sector Whistleblowers' Act, Fla. Stat. § 112.3187. Prohibits retaliation for reporting certain violations of the law or reporting gross neglect of duty on the part of the public employer.

21. Florida Agricultural Worker Safety Act, Fla. Stat. § 487.2071. Prohibits retaliation for the filing of a complaint or participation in a proceeding regarding workplace safety.

22. Florida Public Employees Relations Act. Fla. Stat., Chap. 447. Prohibits retaliation based on union activity, for attempting to form a union or encouraging union membership.

23. Fla. Stat. § 92.57. Prohibits retaliation for testifying in a judicial proceeding in response to a subpoena (protects against termination only).

24. Fla. Stat. § 450.34. Prohibits retaliation by Farm Labor Contractor against employees that have filed a complaint or participated in an investigation pursuant to Florida's Farm Labor Contractor Registration.

III. ESTABLISHING CLAIMS OF RETALIATION

Anti-retaliation laws are designed to ensure that individuals who oppose unlawful discrimination or engage in other protected activity are not punished for doing so. Although there are many different types of unlawful retaliation claims, they generally share a common purpose and three essential elements. The three elements of most retaliation claims include:

1) An employee engages in protected activity, such as complaining about discrimination or an unlawful practice of the employer or participating in an investigation concerning such activity.

2) The employee experiences adverse action.

3) There is a causal connection between the protected activity and the adverse action. *See e.g., Davis v. Coca-Cola Bottling Co.,* 516 F.3d 955 (11th Cir. 2008).

A. Protected Activity

Under Title VII, an employee engages in protected activity and becomes a protected party if he or she:

(1) *Opposes* an unlawful employment practice and has a good faith belief that the act being opposed is unlawful; or

(2) *Participates* in an investigation or legal proceeding under Title VII.

42 U.S.C. § 2000e-3(a).

These clauses are referred to as the "opposition clause" and the "participation clause," respectively.

1. Protected Activity: Opposition

Most employment discrimination statutes prohibit retaliation against persons for opposing unlawful employment practices.[4] Generally, an employee must only demonstrate a

good faith, reasonable belief that the activity she is opposing violates the statute on which her claim is based.[5] Therefore, although the activity being opposed by the employee does not have to constitute actionable discrimination, it must be close enough to support an objectively reasonable belief that it does.[6]

i. Examples of Opposition

Example 1. A maintenance supervisor requested and was granted a lengthy leave of absence for brain surgery under the FMLA. When he returned to work, he was demoted and a replacement had been hired for his supervisory position. He objected to his demotion and threatened to sue. About two months later he was terminated for "stealing time" by clocking in early. Under these facts, the employee was held to have opposed a decision he reasonably believed to be in violation of the FMLA and the ADA by threatening to sue his employer over the demotion. *Cline v. Wal-Mart Stores, Inc*., 144 F.3d 294 (4th Cir. 1998).

Example 2. A female employee, Breeden, and two male employees, one of whom was her supervisor, were reviewing applications for a vacant position. In reviewing one of the applications, a report indicated that the applicant had once commented to a co-worker, "I hear making love to you is like making love to the Grand Canyon." After reading this statement, Breeden's supervisor looked at her and said, "I don't know what that means." The other male employee then said, "Well, I'll tell you later." Both men then chuckled. Breeden subsequently complained about the comment. Breeden claimed that she was then punished for such complaints. The Supreme Court found that no reasonable person could have believed that this single inappropriate comment violated Title VII and, as a result, Breeden's opposition did not rise to the level of protected activity. *Clark County School District v. Breeden*, 121 S. Ct. 1508 (2001).

ii. Manner of Opposition Must be Reasonable

Not all employee conduct calling attention to employment discrimination is protected opposition activity. Courts will balance an employer's right to run its business with the rights of the employee to express opposition to discriminatory practices.

1. Examples Where the Manner of Opposition Was Reasonable (Activity Protected)

    a. Writing letters to customers criticizing the employer's alleged discrimination.[7]

    b. Peaceful picketing

2. Examples Where the Manner of Opposition Was Unreasonable (Activity Not Protected)

a. Searching and photocopying confidential documents relating to discrimination and showing them to co-workers.[8]

b. Badgering a subordinate employee to give a witness statement in support of a charge of discrimination and pressuring her to change the statement.[9]

c. Threats of violence to life or property.

Example: Employee who engaged in insubordination and fistfight with his boss and a co-worker not subjected to unlawful retaliation. *Trotter v. BPB Am., Inc.,* Case No. 03-60929 (5th Cir. 2004).

iii. *"Did He or She Just Claim Discrimination?"*

Sometimes it may be difficult to tell if an employee is complaining about unlawful discrimination or just airing a general grievance. To be protected activity, the complaining person must explicitly or implicitly communicate to the employer a belief that its activity constituted unlawful discrimination. If the employee's protest is broad and ambiguous, a court will ask whether such a protest, under the circumstances, could have been reasonably interpreted as opposition to unlawful discrimination.

Example: Bean Counter, P.A. gives raises to all accountants at the same time of year, every year. After subtly surveying her co-workers, Betty Green complains to her boss, Tom, about her paltry raise. Betty tells Tom that she believes he has unfairly singled her out and has been more critical of her work than the other accountants. Is Betty complaining about unlawful discrimination? Would your answer change if all Tom's subordinates, other than Betty, were male?

iv. Who Must Engage in Protected Activity?

In the typical case, the person alleging retaliation is the same individual who opposed the allegedly discriminatory or unlawful conduct. This person clearly has standing to bring a retaliation case. However, other people closely related to the person exercising his or her statutory rights may do so also. Some courts have required that a relative to at least have aided the other employee,[10] while other courts have awarded "automatic standing" to close relatives, like spouses[11] and children.[12] In its January 2011 decision, the Supreme Court, in *Thompson v. North American Stainless*, declined to identify a fixed class of relationships for which third-party reprisals were unlawful.[13] The Court did hold, however, that individuals who fall within the "zone of interests" sought to be protected by the anti-retaliation provision at issue (Title VII in that case), could pursue a cause of action. The Court summarized this requirement to "enabl[e] suit by any plaintiff with an interest 'arguably sought to be protected by the statutes.'" Applying this standard, the Court in *Thompson* held that Title VII prohibited retaliation of the fiancé of a co-worker who had filed a charge of discrimination against the couple's employer.

v. Opposition Includes Speaking Out During Investigation into Co-worker's Complaint

The Supreme Court, in *Crawford v. Metropolitan Government of Nashville and Davidson County*, has held that the protection of the opposition clause extends to employees who speak out about unlawful discrimination or harassment, not on their own initiative, but also in responding to questions during an employer's internal inquiry into a co-worker's complaint.[14]

vi. Practices Opposed Need Not Have Been Engaged in by the Named Defendant

There is no requirement that the entity accused of retaliation be the same as the entity whose allegedly discriminatory practices were opposed by the complaining party. For example, a violation would be found if an employer refused to hire an applicant because it was aware that she opposed her previous employer's allegedly discriminatory practices.

vii. Opposition: Whistleblower (Private Sector)

Under Florida's private sector whistleblower statute, an employer may not take any retaliatory personnel action against an employee for (1) disclosing, or threatening to disclose, in writing an activity, policy, or practice of the employer that violates a law, rule, or regulation to any governmental agency; (2) providing information, or testifying before, a governmental entity conducting an investigation into an alleged violation of a law, rule, or regulation by the employer; or (3) objecting to, or refusing to participate in, any activity, policy, or practice of the employer that violates a law, rule, or regulation.[15]

1. Written Notice Not Usually Required - A quick reading of the private sector whistleblower statute may leave many readers with the impression that an employee is required to base a whistleblower action on a previous written complaint to his employer. This is not the case. Employees who object to, refuse to participate in unlawful activity, or provide assistance in an ongoing investigation are protected under the Act regardless of whether their opposition and participation is in writing.[16]

2. Opposing Conduct of Co-Workers Is Not Protected – A terminated university employee alleged he was retaliated against because he reported to a supervisor alleged stealing by co-employees. This was insufficient to constitute an act prohibited by the Whistle Blower Act, because it protects employees who object to an employer's unlawful acts. There was no claim that the university had participated in any unlawful act in connection with the alleged theft.[17]

3. Opposition to Executive Order, Policy or Directive Not Protected Activity – Neither a governor's executive order nor a county's order requiring mandatory evacuation of a county was a "law," "rule," or "regulation" as defined in

Whistleblower's Act, which prohibited retaliation for refusing to participate in activity of an employer in violation of a law.[18]

2. Protected Activity: Participation

Virtually all employment discrimination and other anti-retaliation statutes prohibit discrimination against persons for participating in investigations, proceedings, and hearings conducted under the statute. "Participation" generally contemplates participation in some kind of action pending with an administrative agency or a court.

i. How Formal Must the Participation Be?

1. Filing a Charge or a Lawsuit – Those who file a charge of discrimination with an administrative agency like the Equal Employment Opportunity Commission or a state agency that handles such complaints are participating in a manner that affords them protection under the employment discrimination statutes.

2. Participating in a Proceeding or Hearing – Individuals who testify in a hearing, at a deposition, or in a trial are engaging in protected activity.

3. Participating in Internal or "Informal" Investigations – In some federal jurisdictions, participating in an internal investigation prompted by another employee's filing of an EEOC charge does not constitute a type of participation protected by Title VII. Under the participation clause, only participation in an investigation by the EEOC or its designated representative, is protected activity.[19]

ii. Person Claiming Retaliation Need Not Be the Person Who Engaged in Participation

As is the case with respect to the "opposition clause," other people closely related to the person exercising his or her statutory rights may also claim protection.[20]

Example: Husband Howie and Wife Wilma are employed by Revenge, Inc. Howie files an age discrimination suit, and Revenge, Inc.'s president responds by firing Wilma before she had any involvement in proceedings connected to the case. Wilma would have standing to bring a claim of retaliation because of her spousal relationship with Howie, the participant in the suit.

iii. Participation May Include Employee Activities Directed at Someone Other than the Employer

Example: A firefighter investigated a sexual harassment claim against the head of his union. Although it was the union, not the City, that was accused of sexual harassment, the firefighter claimed that the City denied him a promotion because City officials did not like the way the firefighter handled the investigation. The trial court dismissed the firefighters claim finding that he had not engaged in

protected activity because he had been investigating an employer different than the one that allegedly retaliated against him. The appeals court reversed, and adopted the position of the EEOC in holding that Title VII bars retaliation by all *concurrent* and *future* employers.[21]

iv. Participation: Whistleblower (private sector)

Florida's private sector whistleblower statute contains a provision protecting participants. An employer may not take any retaliatory personnel action against an employee for providing information, or testifying before, a governmental entity conducting an investigation into an alleged violation of a law, rule, or regulation by the employer.[22]

v. Participation: Florida's Agricultural Worker Safety Act

Part of the Alfredo Bahena Act which went into effect on July 1, 2004, prohibits covered persons from taking retaliatory action against farm workers. Workers who claim to have been subjected to retaliatory action are permitted to file a complaint with the Department of Agriculture and Consumer Services, or they can file suit under the private whistleblower statute if the retaliatory action is predicated upon the disclosure by a worker of an illegal action, policy or practice. In such a private action, the worker is not required to show that the complaint was made under oath or in writing or that he/she notified the employer in writing of the illegal action, policy or practice.[23]

vi. Participation: Florida's "Judicial Witness Protection Program"

A rarely litigated Florida statute, Section 92.57, *Florida Statutes*, protects a person who testifies in a judicial proceeding from being dismissed from employment because of:

1. The nature of the person's testimony, or

2. The absences from employment resulting from compliance with a subpoena.

The statute does not protect a person unless he or she is actually receives a subpoena requiring his or her testimony. Additionally, the statute does not protect employees who may be retaliated against in some manner short of actual termination.

B. Adverse Action

1. *Burlington Northern* and its Repercussions

The Supreme Court adjusted the standard of adverse employment action in its holding in *Burlington Northern & Santa Fe Railway Co. v. White*.[24] In *Burlington*, White, a female employee had been working as a forklift operator. A male supervisor reassigned her to the position of a standard track laborer after male coworkers had complained that a "more senior

man" should be working her forklift position because it was a "less arduous and cleaner job." She filed two charges with the EEOC based on gender discrimination and retaliation, and she was suspended for 37-days. After an internal investigation concluded that she had not been insubordinate in her actions, she was reinstated, with back-pay. White then filed a Title VII action against Burlington. Verdicts were issued and upheld in her favor.

The Supreme Court took up the issue to clarify what the appropriate standard of an adverse employment action should be, as there was a split in the Circuits. The Supreme Court sided with the Seventh and District of Columbia Circuits, stating that the proper standard should be whether a "reasonable employee would have found the challenged action materially adverse, 'which in this context means it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.''"

Burlington Northern expanded the scope of actionable retaliation claims to include actions beyond those that affect terms, conditions, or status of employment, or those that occur only at a workplace. In this respect, the reach of anti-retaliation provisions has been held to be broader than most anti-discrimination provisions.

Many courts have limited the holding in *Burlington Northern* to cases of retaliation, or have found ways of avoiding the issue of whether the *Burlington Northern* standard applies to other types of discrimination and harassment claims by deciding cases on other grounds. So far, courts have held that the lower standard espoused by *Burlington Northern* does not apply to claims of hostile work environment,[25] race-based discrimination,[26] and disparate treatment.[27]

Third, courts have distinguished *Burlington Northern* on its facts. Courts have held that the standard after *Burlington Northern*, while objective, does depend on the particular circumstances surrounding the potentially adverse action. For example, a change or a refusal to change an employee's shift or duties does not *per se* constitute an adverse action. The new standard requires that the action be of a nature that a *reasonable* employee would find it adverse. Courts have looked at the circumstances surrounding the action in making this assessment. For instance, when an employee requested a shift change in order to avoid a conflict at work with coworkers she did not get along with and in order to spend more time with her children, the requests were repeatedly denied. In that case, the court held that, based on the specific facts of the case, a reasonable employee in the plaintiff's position would consider the action adverse.[28] To quote the court "context matters."[29]

To further expand on the contextual considerations compare the following two cases. An adverse employment action was sustained where an employee was forced to transfer to another department and was required to undergo mental and physical fitness examinations.[30] At the new department, the employee would have had different duties and responsibilities, and the new department had a negative stigma attached to it.[31] But, in a case where the employee was denied a transfer request where there was no indication that the requested position conferred any measurable benefit over the old position, no adverse action was found.[32]

2. Adverse Action -- The Obvious Ones

Major employment actions that clearly constitute ultimate employment decisions, such as those involving hiring and firing, or matters which adversely affect an employee's pay almost always constitute actionable adverse action.[33]

3. Adverse Action -- The Less Obvious Ones

i. Reassignment

Transfers that result in a substantial reduction in an employee's territory and income constitute an adverse employment action. So do transfers that fundamentally alter the nature of an employee's work, as in a change from consulting work to reference work. However, lateral transfers that are not demotions in form or in substance with only a minor affect on income do not typically constitute adverse employment actions.[34]

ii. Constructive Discharge

If an employee's working conditions become so intolerable that he or she has no reasonable choice but to resign, many courts, including the Eleventh Circuit, hold that this constitutes an adverse employment action.[35]

iii. Reduction in Duties or Responsibilities

Demotions and other significant negative changes to an employee's duties often constitute adverse employment actions. For example, one court concluded that an employer's reduction in an employee's duties constituted an adverse employment action because the employer took away major work assignments, leaving only the administrative work to the employee.[36]

4. Adverse Action -- The Questionable Ones

While the standard for assessing adverse action in the context of retaliation is broad, petty slights and trivial annoyances are not actionable, as they are not likely to deter protected activity. Whether the following particular adverse actions are actionable depend largely upon the circumstances of each case:

i. Performance Evaluations

Negative performance evaluations may rise to the level of an adverse employment action, especially if such evaluations are given close in time to a pay raise.[37]

ii. The "Cold Shoulder"

Acts of hostility by co-workers, including giving the complaining employee the infamous "cold shoulder" have been viewed as petty slights and trivial annoyances by some courts and as

actionable adverse action by others when sufficiently severe under all the facts and circumstances.[38]

5. Gone But Not Forgotten – Post-Employment Adverse Actions

Anti-retaliation provisions prohibit employers from retaliating against current *and* former employees. To this end, the Supreme Court has held that a negative job reference given in retaliation for an employee having filed an EEOC charge against it was actionable.[39]

C. Causation

1. Causation Generally

In order to establish unlawful retaliation, there must be proof that the employer took adverse action ***because*** the complaining party engaged in protected activity.

Knowledge of the protected activity is a necessary prerequisite to causation. For example, if an employee complained that her supervisor changed her schedule because of her protected activity and it was later shown that the supervisor changed her schedule two days before she complained, then she would not be able to establish causation. Nonetheless, something short of actual knowledge, such as a suspicion or belief that an employee has filed a complaint, may be sufficient to constitute knowledge on the part of the employer.[40]

If an employee's protected activity is closely followed in time by an adverse action, courts will often infer that the action was causally related to the protected activity. Close temporal proximity between the protected activity and the allegedly retaliation may be sufficient, by itself, to convince a court that a plaintiff has established *prima facie* case (or one that an employer must rebut) of retaliation.[41] On the other hand, the passage of an extended period of time between the protected activity and the adverse action usually negates any inference that a causal connection exists between the two. In some cases, a pattern of antagonism or continuing friction in between the date of the protected activity and the date of the adverse action may make up for an otherwise too lengthy time gap.[42]

However, if an employer can show that it had all but made up its mind about firing an employee prior to he or she having engaged in protected activity, then it can defeat an inference of a retaliatory motive. The Supreme Court's decision in *Clark County School District v. Breeden* held, in the context of a Title VII retaliation claim, there is no evidence of causation where an employer merely follows through on a previously contemplated adverse employment action after an employee has engaged in some protected activity. In *Breeden*, the Court stated:

> Employers need not suspend previously planned transfers upon discovering that a Title VII suit has been filed, and their proceeding along the lines previously contemplated, though not yet definitive determined, is no evidence whatever of causality.[43]

2. Sarbanes-Oxley Act: Special Considerations – 18 U.S.C. § 1514A

In the wake of Enron, Tyco and other corporate accounting scandals, the Corporate and Criminal Fraud Accountability Act of 2002, also known as the Sarbanes-Oxley Act, was created.[44] The retaliation provision of the Act, 18 U.S.C. § 1514A, can be particularly problematic as employers are held to a "heightened" burden of proof as compared to other retaliation statutes. Section 1514A protects employees of publicly traded companies from retaliatory conduct following complaints to their employers regarding potential fraud effecting shareholders and investors.

A plaintiff must prove by a preponderance of the evidence that the protected activity was a "contributing factor" as opposed to a "significant, or motivating or substantial or predominant factor" to adverse action. However, the employer may demonstrate, by clear and convincing evidence, that it would have taken the adverse action even in the absence of the protected activity. Moreover, the protected activity or complaint triggering the alleged retaliation need not be made by an employee with accounting or business expertise and merely requires that the individual have a reasonable belief of impropriety.

IV. PREVENTIVE ACTIONS TO MINIMIZE EXPOSURE TO CLAIMS

A. Update Employee Handbook or Policy Manual

- Should be distributed, signed for and dated by all employees.
- Should be periodically reviewed for compliance with law.
- Update organizational policies to include comprehensive anti-discrimination, anti-harassment and anti-retaliation policies.
- Do not fail to specifically state prohibition against harassment on the basis of religion, race, age, national origin and other protected classes (the law does not only prohibit sexual harassment).
- Include strong anti-retaliation policy with an effective complaint procedure (Employers often fail to explicitly include prohibitions against unlawful retaliation in their EEO Policies).
- Provide training regarding policies to management and subordinates.
- Post policies on bulletin board, newsletter and employer web site.
- Investigate all complaints promptly, even "informal complaints." Do not ignore complaints simply because complainant does not comply with written grievance or complaint procedures.

B. Document performance issues and misconduct as they arise

- This does not mean only on the eve of termination or other severe adverse action.
- Consistent documentation allows for easier personnel decisions: evaluations, promotions, demotions, suspensions and/or terminations.
- Have employee date and sign written disciplinary counselings or reprimands. Ensure that counseling or other disciplinary notices explicitly advise employee of his or her responsibilities and obligations to improve as well as consequences of a failure to do so. At the time the discipline or counseling is conveyed to the employee, get an affirmative commitment from him or her to improve and acknowledgement of consequences of a failure to do so.

C. Avoid Disparate Treatment Claims

- Implement formal management review and approval procedures for all discharges, demotions, transfers or other adverse employment actions before the actions are taken.
- Maintain consistency in discipline.
- Use progressive discipline when appropriate and ensure that the employer can articulate why progressive discipline was not followed in circumstances where it progressive discipline is deemed inappropriate.
- Clearly define the consequences of misconduct or substandard performance with employees.

D. Performance Appraisals

- One of the most common mistake supervisors make is to give an above average rating to a marginal performer.
- Evaluators must not use performance appraisals as “morale boosters.” Accurately and objectively evaluate individual employee job performance -- Be honest!
- Train the evaluator.
- Review evaluations before they are finalized. Compare to prior evaluations to ensure no inexplicable discrepancies.
- Have employee acknowledge and sign the evaluation.
- Numerical ratings should be accompanied by supporting statements from the evaluator.

- If employee refuses to acknowledge and sign, document refusal and report up organizational chain of command (reason for refusal should be documented).

E. Additional Measures to Avoid Retaliation Claims

- Never take disciplinary actions "on the spot" without all the facts; when in doubt and for serious incidents (as appropriate), suspend without pay pending investigation.
- Use caution in how you state the reason(s) for adverse employment actions. Be consistent in the language used to articulate the reasons for disciplinary action.
- Disciplinary conferences should be handled in private with a witness present.
- Do not unnecessarily subject the employee to embarrassment or humiliation.
- Develop good hiring practices.

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[1] Charge Statistics from the EEOC: Fiscal Year 1992 through Fiscal Year 2005.

[2] Employment Practice Liability Verdicts and Settlements, 2003 LRP Publications.

[3] Although Section 1981 does not contain a specific anti-retaliation provision, the Supreme Court has held that Section 1981's anti-discrimination provision encompasses a prohibition on retaliation. *CBOCS West, Inc. v. Humphries*, 553 U.S. 442 (2008).

[4] The anti-retaliation provision of the Fair Labor Standards Act, which applies to the Equal Pay Act, does not contain a specific "opposition" clause. However, several courts, including the Eleventh Circuit, have recognized that the statute prohibits retaliation based on opposition to allegedly unlawful practices. *See, e.g., EEOC v. White & Son Enterprises*, 881 F.2d 1006, 1011 (11th Cir. 1989).

[5] *Clark County School District v. Breeden*, 121 S.Ct. 1508 (2001).

[6] *Clover v. Total Sys. Svcs., Inc.*, 157 F.3d 824, 828-29 (11th Cir. 1998).

[7] *Sumner v. United States Postal Service*, 899 F.2d 203 (2d Cir. 19900 (practices protected by opposition clause include writing letters to customers criticizing employer's alleged discrimination).

[8] *O'Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756 (9th Cir. 1996).

[9] *Jackson v. St. Joseph State Hospital*, 840 F.2d 1387 (8th Cir.), *cert. denied*, 488 U.S. 892 (1988).

[10] *Mandia v. ARCO Chem. Co.*, 618 F.Supp. 1248, 1250 (W.D. Pa. 1985).

[11] *Wu v. Thomas*, 863 F.2d 1543, 1547 (11th Cir. 1989), *cert. denied sub nom., Wu v. Board of Trustees, Univ. of Ala.*, 511 U.S. 1033 (1994).

[12] *Clark v. R.J. Reynolds Tobacco Co.*, Civ. No. 79-7, 1982 WL 2277, at *7 (E.D. La. Feb. 2, 1982).

[13] 131 S.Ct. (Jan. 24, 2011).

[14] 555 U.S. 271 (2009).

[15] §448.102, Fla. Stat. (2000).

[16] *Golf Channel v. Jenkins,* 752 So.2d 561 (Fla. 2000).

[17] *Sussan v. Nova Southeastern University,* 723 So.2d 933 (Fla. 4th DCA 1999).

[18] *Gillyard v. Delta Health Group, Inc*., 757 So.2d 601 (Fla. 5th DCA 2000).

[19] *Clover v. Total Sys. Svcs*., 157 F.3d 824, 829 (11th Cir. 1998).

[20] *Thompson v. North American Stainless,* 131 S.Ct. (2011).

[21] *McMenemy v. Rochester,* 241 F.3d 279 (2d Cir. 2001).

[22] §448.102, Fla. Stat. (2000).

[23]Section 487.2071 (2) and (3), *Florida Statutes.*

[24] 548 U.S. 53 (2008).

[25] *Austin v. City of Montgomery*, 196 F. Appx. 747, 752 (11th Cir. 2006).

[26] *Fitzhugh v. Topetzes*, 2006 WL 2557921, *11 (N.D. Ga. 2006).

[27] *Gilmore v. Potter*, 2006 WL 3235088 *6 (E.D. Ark. 2006).

[28] *Taylor v. Roche*, 196 F. Appx. 799 (11th Cir. 2006).

[29] *Id.* at 802.

[30] *Murry v. Gonzales*, 2006 WL 2506963 *9 (M.D. Fla. 2006).

[31] *Id.*

[32] *Reis v. Universal City Dev't Partners, Ltd.*, 442 F. Supp. 2d 1238 (M.D. Fla. 2006).

[33] *Flannery v. Trans World Airlines*, 160 F.3d 425, 428 (8th Cir. 1998). Reducing an employee's pay will generally also constitute an adverse employment action. *Carney v. Amer. Univ*., 151 F.3d 1090, 1095 (D.C. Cir. 1998) (holding that withholding extra severance pay constituted an adverse employment action); *Gumbhir v. Curators of Univ. of Mo*., 157 F.3d 1141 (8th Cir. 1998) (stating that below average salary increases constitute adverse employment action).

[34] *Berman v. Orkin Exterminator Co., Inc*., 160 F.3d 697, 702 (11th Cir. 1998); *Collins v. Illinois*, 830 F.2d 692, 702-704 (7th Cir. 1987) (transfer altered an employee's work from consulting to reference work, along with the employee's territory and income constitute an adverse employment action); *Sanchez v. Denver Public Schs*., 164 F.3d 527 (10th Cir. 1998).

[35] *Hipp v. Liberty National Life Ins.*, 252 F.3d 1208, 1231 (11th Cir. 2001); *Sharp v. City of Palatka*, 529 F.Supp.2d 1354 (M.D. Fla. 2007).

[36] *Davenport v. MCI Telecommunications Corp.*, 973 F. Supp. 1221, 1227 (D. Colo. 1997).

[37] *DiIenno v. Goodwill Indus. of Mid-Eastern Pa.*, 162 F.3d 235 (8th Cir. 1998); But see *Dutton v. University Healthcare System*, 9 WH Cases 2d 223 (E.D. La. 2004) (merely being written up or receiving poor performance evaluation is not an adverse employment action as a matter of law).

[38] *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir.), *cert. denied*, 118 S.Ct. 336 (1997); *Dortz v. City of New York*, 904 F. Supp. 127, 156 (S.D.N.Y 1995) (holding that refusal to communicate with the plaintiff and excluding her from senior level meetings constituted an adverse employment action).

[39] *Robinson v. Shell Oil Co.*, 117 S.Ct. 843 (1997).

[40] *Reich v. Hoy Shoe Co., Inc.*, 32 F.3d 361 (8th Cir. 1994).

[41] *Thomas v. Cooper Lighting, Inc.*, 506 F.3d 1361 (11th Cir. 2007).

[42] *Chavez v. City of Arvada*, 88 F.3d 861 (10th Cir. 1996).

[43] *Clark County School District v. Breeden*, 121 S.Ct. 1508 (2001).

[44] See Generally Bonczyck, Kathleen M., "Blowing the Corporate Whistle: The Sarbanes-Oxley Act Not Your Garden Variety Discrimination Claim." The Checkoff, The Florida Bar, October/November 2005.

FLSA

By

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THE FAIR LABOR STANDARDS ACT
An Aging Law in Today's Workplace

By: Mark R. Cheskin, Carmen Manrara Cartaya, and Jenea M. Reed

I. OVERVIEW

A. The Fair Labor Standards Act (the "FLSA")

1. Initially enacted in 1938, the FLSA is one of the oldest labor laws in the United States. U.S. Dep't of Labor, Overview of FLSA, http://www.dol.gov/compliance/laws/comp-flsa.htm.

2. Most states also have enacted laws that provide similar requirements, with some states even incorporating the FLSA's fundamental components. For states whose minimum wage differs from the federal rate, the greater of the two minimum wage rates applies.

3. This paper will provide an overview of the FLSA and focus on its major components, which include requirements for minimum wage and overtime rates, record keeping standards, limits on hours worked, and enforcement procedures. The Department of Labor often posts updates and regulatory interpretation at http://www.dol.gov.

B. When Are the FLSA's Provisions Applicable?

1. The FLSA applies to employer and employee relationships, which are normally tested by economic reality rather than actual technical concepts or criteria. 29 U.S.C. §203(d), (e), (g); *see also* Comprehensive FLSA Presentation, http://www.dol.gov/whd/flsa/. Therefore, almost every employee working in the United States falls under FLSA coverage. In fact, the FLSA covers more than 130 million workers in more than seven million workplaces. Comprehensive FLSA Presentation, http://www.dol.gov/whd/flsa/. The U.S. Department of Labor's Wage and Hour Division enforces the FLSA rules for federal, state, local and private employees, as well as others. Special rules apply, however, to certain areas of employment, including state and local government employment involving law enforcement activities, fire protection, volunteer services, and compensatory time off instead of cash overtime pay. *Id.*

a. There are two types of coverage to consider when determining whether an employee falls under FLSA regulation: "Enterprise" coverage and "Individual" coverage.

b. An "Enterprise" means any activities performed by any person or persons for a common business purpose. 29 U.S.C. §§203(r)–(s). An enterprise can include all employees of a business. Otherwise, one or more employees can be covered by "Individual" coverage. *Id.*

1. For most businesses, the FLSA will apply to all employees within the "Enterprise" if it has: (i) employees engaged in commerce or in the production of goods for

commerce, or employees who deal with goods or materials that have been moved in or produced for commerce; and (ii) gross revenue of $500,000 or more on a 12-month basis (excluding hospitals, nursing homes, schools, and public employers who are covered regardless of their gross receipts). 29 U.S.C. §§203(r)–(s).

2. The Eleventh Circuit recently reviewed the broad scope of the FLSA's enterprise coverage to employers with employees "handling, selling, or otherwise working on goods or materials." 29 U.S.C. § 203(s)(1)A)(i); *Polycarpe v. E&S Landscaping Serv., Inc.*, 616 F.3d 1217 (11th Cir. 2010). The court held that for the "purposes of the FLSA's handling clause, an item will count as 'materials' if it accords with the definition of 'materials' – tools or other articles necessary for doing or making something – in the context of its use and if the employer has employees 'handling, selling, or otherwise working on' the item for the employer's commercial (not just any) purposes." *Polycarpe*, 616 F.3d at 1227. In *Polycarpe*, the court also rejected the "coming to rest" doctrine and held that employees are covered under the FLSA if they deal with goods or materials that traveled at any time in interstate commerce, even if the enterprise acquired the goods or materials intrastate.

c. "Individual" coverage applies when the "Enterprise" does not fall under the FLSA, but individual employees are entitled to FLSA protections.

1. Individual employees are entitled to "Individual" coverage if they are engaged in interstate commerce, production of goods for commerce, a closely-related process or occupation that is directly essential to such production, or domestic service.

C. Portal-to-Portal Act

1. Congress has amended the FLSA repeatedly over the years. In 1947, Congress passed one of the FLSA's most significant amendments—the Portal-to-Portal Act, 29 U.S.C. §§ 251-62, which added crucial provisions that help define compensable hours worked under the FLSA. U.S. Dep't of Labor, Wage and Hour Division (WHD), History of Changes to the Minimum Wage Law, http://www.dol.gov/whd/minwage/coverage.htm.

2. The Portal-to-Portal Act provides that employee time spent on incidental activities, before and after work, that are not an integral part of the employee's principal work activities, is not compensable working time. 29 U.S.C. §§251-62. This non-compensable working time also includes an employee's time spent getting to or from work. The Portal-to-Portal Act has been the subject of numerous class actions where courts have had to determine what is compensable working time under the Act.

II. MINIMUM WAGE

A. Federal

1. Employers must pay all covered, non-exempt employees at least the federal minimum wage rate for all hours worked. Currently, the federal minimum wage rate is $7.25 per

hour. For "tipped" employees whose employers are eligible to receive a "tip credit," the rate is $5.12 per hour.

a. A "tipped" employee is a person who customarily and regularly receives more than $30 per month in gratuities. If this requirement is met, then employers can pay tipped employees $5.12 per hour and claim a "tip credit" for the difference between this wage and the current statutory or federal minimum wage (whichever is higher). U.S. Dep't of Labor, Fact Sheet #15: Tipped Employees Under the Fair Labor Standards Act (FLSA), http://www.dol.gov/whd/regs/compliance/whdfs15.pdf.

1. An employer may only claim "tip credit" if: (i) the employer informs the employee of the tip credit allowance, including the amount which will be credited; (ii) the employer can document that the employee has received enough gratuities to bring the total wage paid up to minimum wage or more; and (iii) employees do not share gratuities with the employer or employees, unless through a valid tip pooling arrangement. 29 U.S.C. §206

2. Although called a minimum wage requirement, payment is not limited to hourly wages; rather, the FLSA only requires that all compensation for a given workweek average the applicable minimum wage rate. 29 U.S.C. §206(a).

B. **Florida**

1. The Florida Minimum Wage Act ("**FMWA**") was enacted in May 2005. Initially, the Florida Minimum Wage Act set minimum wage at $6.15 per hour—above the then-existing federal rate.

a. The FMWA requires an annual review to maintain the minimum wage at a level consistent with inflation and the market. This review occurs in September, with any adjustments to the minimum wage rate announced in October. The new rate becomes effective as of January 1 of the following year.

b. The current Florida minimum wage, as of June 1, 2011, is $7.31 per hour. The Florida rate for "tipped" employees is now $4.29 per hour. State of Florida Agency for Workforce Innovation, Florida's Minimum Wage (May 3, 2011), http://www.floridajobs.org/minimumwage/index.htm.

2. The FMWA mandates that employers who must pay the Florida minimum wage conspicuously display a related poster in their workplaces. Fla. Stat. § 448.109. This requirement, however, does not excuse the federal requirement to post the federal government's minimum wage poster as well.

3. The FMWA regulates a range of employment areas, including workday length (determining that ten hours is a legal day's work for manual laborers under § 448.01), and the minimum working age (13 years old except: (i) in the entertainment industry; (ii) in connection with children's own homes, farms or ranches; or (iii) as pages in the Florida Legislature). Under

no circumstances, however, may a person ten years old or younger engage in newspaper sales and distribution. Fla. Stat. § 450.021.

4. Employees may bring claims under the FMWA for minimum wage violations, retaliation or class actions, among others. The statute of limitations in Florida is four years, except that actions alleging willful violations of the FMWA must be brought within five years. FMWA § 448.110(8); Fla. Stat. § 95.11.

a. If found to have violated the FMWA, employers may be liable for unpaid wages, liquidated damages, attorney's fees and costs, and up to $1,000 fine per violation. One beneficial provision for employers in the FMWA, however, provides employers a requirement of pre-suit notice. To comply with the pre-suit notice requirement, employees must notify their employers in writing of their intent to file suit. The notification must include the actual or estimated work, dates and hours for which the employee is owed compensation. The employer then has 15 calendar days to pay or resolve the dispute prior to the case going to trial. During the pre-suit notice period, the statute of limitations is tolled for the employee. FMWA § 448.110(6)(b).

III. **OVERTIME**

A. **Exemptions**

1. While the FLSA requires that any work performed over 40 hours per week compels overtime payment at the rate of one-and-one-half times an employee's regular wage rate, the FLSA also provides for various exemptions from this requirement. These exemptions have been subject to much litigation over the years.

2. "White Collar Exemptions" are the main category of exemptions under the FLSA. Section 13(a)(1) allows employers to treat their employees as exempt from both minimum wage and overtime pay if they are employed in an executive, administrative, professional or outside sales capacity. 29 U.S.C. § 213(a)(1). Also, there is an exemption for computer employees and learned professional employees.

3. Exemption eligibility focuses on three areas: salary level (the amount), salary basis (accounting for the payment timeframe), and job duties.

a. Generally, for employees to be exempt, they must be paid, on a salary basis, a minimum of $455 per week. 29 C.F.R. § 541.600. This amount, however, need not be paid in weekly installments, but can also be paid biweekly, semimonthly, or monthly as well.

b. **White Collar Exemptions**. Certain exemptions are allowed for those employees who fall within the category known as "White Collar" exemptions under the FLSA's Section 13(a)(1). These exemptions require that an employee meet one of the specific sets of criteria below:

1. **Executive Exemption**. The employee must earn a salary of at least $455 per week and (i) have a primary duty of managing the Enterprise, department or subdivision; (ii) customarily and regularly direct the work of two or more employees; and (iii) have the authority to hire or fire employees, or at least have his or her recommendations be considered. 29 C.F.R. § 541.100. Additionally, for employees who own at least a 20% equity interest in the business in which they work, regardless of the type of business organization, if the employee is actively engaged in its management, then the employee is exempt. 29 C.F.R. § 541.101; *see also* U.S. Dep't of Labor, Fact Sheet #17B: Exemption for Executive Employees Under the Fair Labor Standards Act (FLSA), http://www.dol.gov/whd/regs/compliance/fairpay/fs17b_executive.pdf.

2. **Administrative Exemption**. The employee must earn a salary of at least $455 per week and (i) have the primary duty of performing office or non-manual work that is directly related to either management policies or general business operations; and (ii) the employee's primary duty includes the use of discretion and independent judgment with respect to significant matters. 29 C.F.R. § 541.200; *see also* U.S. Dep't of Labor, Fact Sheet #17C: Exemption for Administrative Employees Under the Fair Labor Standards Act (FLSA), http://www.dol.gov/whd/regs/compliance/fairpay/fs17c_administrative.pdf.

a. A non-exhaustive list of the types of work that are generally deemed to be "directly related to management or general business operations" is contained in 29 C.F.R. § 541.201(b). Examples of the types of job functions that qualify for the administrative exemption include: accounting, budgeting, auditing, human resources, and marketing.

3. **Professional Exemption**. The employee must earn a salary of at least $455 per week and have the primary duty of performing work that requires either: (i) advanced knowledge that is acquired by a prolonged course of specialized instruction or (ii) invention, imagination, originality or talent in a recognized field of artistic or creative endeavor. 29 C.F.R. § 541.300.

a. Employees that may be included in the Professional Employee Exemption could be: (i) learned professionals, who perform work that requires advanced knowledge (29 C.F.R. § 541.301), such as in the field of science or specialized academic instruction; (ii) creative professionals, whose primary duty is the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor (29 C.F.R. § 541.302), such as music, writing, acting or graphic arts; (iii) teachers (29 C.F.R. § 541.303); and (iv) employees who hold a valid license or certificate to practice law or medicine and are actually practicing (29 C.F.R. § 541.304). Nurses also fall within the professional exemption if they are registered by the appropriate state examining board.

4. **Computer-Related Exemption**. There is also a separate exemption for computer professionals. Employers may exempt a computer-related employee if the employee is paid (i) the equivalent of $27.63 per hour, regardless of whether the employee is

paid on a salary basis; or (ii) $455 per week on a salary basis. 29 U.S.C. § 213(a)(17); 29 C.F.R. § 541.400. Not everyone who works with computers meets this exemption:

> [To qualify, the employee's primary duty must consist of] (1) the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications; (2) the design development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications; (3) the design, documentation, testing, creation or modification of computer programs related to machine operating systems; or (4) a combination of the aforementioned duties, the performance of which requires the same level of skills.
>
> 29 C.F.R. § 541.400

5. **Outside Sales Employees**. Outside sales employees will be exempt from overtime payment requirements if (i) their primary duties are to make sales or obtain orders or contracts for services or for the use of facilities for which customers pay; and (ii) the duties are customarily and regularly performed away from the employer's workplace. 29 C.F.R. § 541.500.

c. **Highly Compensated**. The "Highly Compensated Test" is another method of determining minimum wage and overtime exemptions. This test requires that: (i) the employee receives a total annual compensation of at least $100,000, which must include at least $455 per week on a salary or fee basis; (ii) the employee must perform office or non-manual work; and (iii) the employee regularly performs at least one duty of an exempt executive, administrative or professional employee. 29 C.F.R. § 541.601.

1. Total annual compensation includes commissions, nondiscretionary bonuses and other nondiscretionary compensation earned during a 52-week period. 29 C.F.R. § 541.601(b)(1).

2. Total annual compensation does not include credit for board, lodging or other facilities, payments for medical or life insurance or contributions to retirement plans or fringe benefits. 29 C.F.R. § 541.601(b)(1); *see also*, elaws FLSA Overtime Security Advisor, http://www.dol.gov/elaws/esa/flsa/overtime/cr7.htm.

3. If an employee's total annual compensation does not at least equal $100,000 by year's end, the employer may pay the employee the difference within one month after the end of the year as make-up pay. *Id*. Any 52-week period will count as one year for the employee. For employees that do not work the full year, the $100,000 may be pro-rated. 29 C.F.R. § 541.601(b)(2)–(3); *see also* elaws FLSA Overtime Security Advisor, http://www.dol.gov/elaws/esa/flsa/overtime/cr7.htm.

d. **Motor Carrier Exemption**. The employee must be employed by a motor carrier or motor private carrier, and (i) have duties that affect the safety of operation of motor vehicles in transportation on public highways in interstate or foreign commerce, and (ii) not be covered by the small vehicle exception. U.S. Dep't of Labor, Fact Sheet #19: The Motor Carrier Exemption under the Fair Labor Standards Act (FLSA), http://www.dol.gov/whd/regs/compliance/whdfs19.pdf. A motor carrier is defined as someone who provides motor vehicle transportation for compensation. 49 U.S.C. § 13102. These employees fall within the jurisdiction of the Secretary of Transportation, who has the power to regulate the hours worked by these employees.

e. **Fee Basis**. Employers may pay administrative and professional employees on a fee basis, which is payment for a fixed sum agreed upon for the completion of a single job, regardless of the time required to complete the work. The fee basis payment, however, is not offered for non-unique jobs that are repeated an indefinite number of times by an employee. A fee payment will meet the minimum salary level requirement for exemption if the fee, based on the time the employee needed to complete the job, is equal to a rate that would total at least $455 per week if the employee were to work 40 hours. 29 C.F.R. § 541.605; *see also* U.S. Dep't of Labor, Fact Sheet #17G: Salary Basis Requirement and the Part 541 Exemptions Under the Fair Labor Standards Act (FLSA), http://www.dol.gov/whd/regs/compliance/fairpay/fs17g_salary.pdf.

f. **Deductions**. An employee is not considered to be paid on a salary basis if salary deductions are taken for employer-caused absences or by the business operating requirements. If the employee is able to work, deductions are not allowed for time when work is not available to the employee due to employer's fault. http://www.dol.gov/elaws/esa/flsa/overtime/cr4.htm.

1. Pay deductions are allowed: (i) for employee absences of one or more full days for personal reasons other than sickness or disability; (ii) for absences of one or more days due to sickness or disability if deductions are made under "a bona fide plan, policy or practice of providing compensation for salary lost due to illness"; (iii) to compensate for amounts received for jury fees, witness fees, or military pay; (iv) for penalties imposed by the employer in good faith due to employee infractions of any material safety regulations; (v) for uncompensated suspensions made in good faith to discipline employees for infractions of workplace conduct rules; (vi) for pro-ration of employee's first or last week of employment if the full week is not worked; or (vii) for unpaid leave taken by employee under the Family and Medical Leave Act. *Id*.

2. If the employer makes improper deductions inadvertently, he or she may reimburse the employee without violating any salary basis rule. If the employer regularly makes improper deductions, however, the salary basis exemption will be lost during the period of improper deductions for all employees in the same job classification working for the same managers who were responsible for the improper deductions. *Id.*

a. Federal regulations provide a non-exhaustive list of factors to consider when determining whether an employer has an "actual practice of making improper deductions" resulting in loss of the salary basis exemption. These factors include the number of

improper deductions, the time period of the improper deductions, the number and geographic location of the affected employees, and whether the employer has a clearly communicated policy regarding improper deductions. 29 C.F.R. § 541.603.

g. **Safe Harbor**. The FLSA's "Safe Harbor" provision applies "[i]f an employer (1) has a clearly communicated policy prohibiting improper deductions and including a complaint mechanism, (2) reimburses employees for any improper deductions, and (3) makes a good faith commitment to comply in the future." *See* U.S. Dep't of Labor, Fact Sheet #17G: Salary Basis Requirement and the Part 541 Exemptions Under the Fair Labor Standards Act (FLSA) http://www.dol.gov/whd/regs/compliance/fairpay/fs17g_salary.pdf. If the "Safe Harbor" provision applies, then the exemption will not be lost for any employees unless it is found that the employer willfully violates the exemption policy by continuing the improper deductions, even after employee complaints. *Id.*

B. Half-Time Compensation

1. Half-time compensation for overtime is used when the employee works a different amount of hours from week to week. The employee receives a salary, regardless of the number of hours worked, plus 50% of the regular rate when the employee works more than 40 hours. "Since the employee has already received straight-time compensation on a salary basis for all hours worked, only additional half-time pay is due." 29 C.F.R. § 778.114(b).

2. Half-time payment under the fluctuating workweek method pursuant to the FLSA is allowed only if "the salary is sufficiently large to assure that no workweek will be worked in which the employee's average hourly earnings from the salary fall below the minimum hourly wage rate applicable under the Act, and . . . the employee clearly understands that the salary covers whatever hours the job may demand in a particular workweek and the employer pays the salary even though the workweek is one in which a full schedule of hours is not worked." 29 C.F.R. § 778.114(c).

IV. HOURS WORKED

A. The FLSA requires that employers pay at least the minimum wage to all employees. For any amount of time worked that is over 40 hours, the employer must pay at least one-and-one-half times the employee's regular pay rate for the overtime hours worked, unless the employee is exempt. In order to accurately compensate the employee, employers must have the ability to correctly determine the number of hours worked by the employee.

1. Under the FLSA, the definition of "employ" also includes "to suffer or permit to work." 29 U.S.C. § 203(g). Therefore, an employee's workweek will typically include all hours which an employee is required to be at the workplace, on duty or at a specific location of work. U.S. Dep't of Labor, Fact Sheet #22: Hours Worked Under the Fair Labor Standards Act (FLSA), http://www.dol.gov/WHD/regs/compliance/whdfs22.pdf. The "'[w]orkday,' in general, means the period between the time on any particular day when such employee

commences his/her 'principal activity' and the time on that day at which he/she ceases such principal activity or activities." *Id*.

a. Hours are counted as worked when the employee cannot use the time effectively for his or her own purposes because the employer controls the time. Hours are not counted as worked, however, when the employee has been relieved of any duty, and the time is sufficient for the employee to use it for personal purposes. 29 C.F.R. §§ 785.15, 785.16.

2. Also, if the employer knows or has reason to know that the employee is performing work, whether or not the work has been authorized or requested or the employee has volunteered to do the work, the hours worked may be compensable under the FLSA. *See* 29 U.S.C. §§ 203(e), 203(g).

a. **Waiting Time**. Circumstances determine whether waiting time counts as hours worked. If the employee has been appointed to wait, it is considered work time; however, if the employee is waiting to be engaged, then it is not considered work. 29 C.F.R. § 785.14; U.S. Dep't of Labor, Fact Sheet #22: Hours Worked Under the Fair Labor Standards Act (FLSA), http://www.dol.gov/WHD/regs/compliance/whdfs22.pdf.

b. **On-Call Time**. An employee is considered to be working if he or she is required to remain on call on or near the employer's premises. The employee is not considered working if he or she remains at home but is on call, or is allowed to leave a message regarding where he or she can be reached. Any additional restraints imposed on the employee's time or freedom by the employer, however, may require compensation. 29 C.F.R. § 785.17; U.S. Dep't of Labor, Fact Sheet #22: Hours Worked Under the Fair Labor Standards Act (FLSA), http://www.dol.gov/WHD/regs/compliance/whdfs22.pdf.

c. **Rest and Meal Periods**. Rest periods that do not last more than 20 minutes are customary and because they generally promote employee efficiency, are considered compensable. 29 C.F.R. § 785.18. But,

> [u]nauthorized extensions of authorized work breaks need not be counted as hours worked when the employer has expressly and unambiguously communicated to the employee that the authorized break may only last for a specific length of time, that any extension of the break is contrary to the employer's rules, and any extension of the break will be punished.
>
> U.S. Dep't of Labor, Fact Sheet #22: Hours Worked Under the Fair Labor Standards Act (FLSA), http://www.dol.gov/WHD/regs/compliance/whdfs22.pdf.

Meal periods will not be considered working time if: (i) the employee is given 30 minutes or more; and (ii) the employee is completely relieved of all duties. 29 C.F.R. § 785.19.

d. **Sleeping Time and Other Activities**. Sleeping time is compensable if the employee is on duty less than 24 hours. 29 C.F.R. § 785.21. If, however, an employer requires the employee to be on duty for 24 hours or more, the parties may agree to exclude regularly scheduled sleeping periods of eight hours or less from hours worked if the employer furnishes proper sleeping facilities, and the employee is able to sleep uninterrupted; no reduction from work hours is permitted if the employee receives less than five hours of sleep. 29 C.F.R. § 785.22; U.S. Dep't of Labor, Fact Sheet #22: Hours Worked Under the Fair Labor Standards Act (FLSA), http://www.dol.gov/WHD/regs/compliance/whdfs22.pdf.

e. **Lectures, Meetings and Training Programs**. An employee's attendance of any form of training program, lecture, meeting or similar activity is not considered working time as long as: (i) it is outside normal hours; (ii) it is voluntary; (iii) it is not job-related; and (iv) the employee does not do any other work for the employer while in attendance. 29 C.F.R. § 785.27; U.S. Dep't of Labor, Fact Sheet #22: Hours Worked Under the Fair Labor Standards Act (FLSA), http://www.dol.gov/WHD/regs/compliance/whdfs22.pdf. A program will be considered to be directly related to an employee's job if it assists the employee to handle his or her present job more efficiently. 29 C.F.R. § 785.29.

f. **Travel Time**. Determining whether time spent traveling is considered compensable varies, depending on the travel.

1. **Home to Work Travel**. Travel by the employee from home to work and returning to home after work at the end of the workday is not considered to be work time. 29 C.F.R. § 785.35.

2. **Home to Work on a Special One-Day Assignment in Another City**. Travel time may be considered work time if an employee who normally works in a fixed location is required to report to work in a different city for the day. The time spent traveling to and from the other city is compensable. The time, however, that the employee would normally spend commuting to his or her regular worksite cannot be counted. 29 C.F.R. § 785.37; U.S. Dep't of Labor, Fact Sheet #22: Hours Worked under the Fair Labor Standards Act (FLSA), http://www.dol.gov/WHD/regs/compliance/whdfs22.pdf.

3. **Travel that Is All in a Day's Work**. This provision applies when travel is part of the employee's principal activity. Any time the employee spends traveling between job sites during the workday is considered work time and is compensable. 29 C.F.R. § 785.38; U.S. Dep't of Labor, Fact Sheet #22: Hours Worked under the Fair Labor Standards Act (FLSA), http://www.dol.gov/WHD/regs/compliance/whdfs22.pdf.

4. **Travel Away from the Home Community**. Any travel that keeps the employee from his or her home overnight is considered work time. This includes hours worked on regular working days during normal hours as well as any hours on nonworking days. However, time spent outside of regular working hours on a plane, train, boat, bus or automobile is not considered work time. 29 C.F.R. § 785.39; U.S. Dep't of Labor, Fact Sheet #22: Hours Worked Under the Fair Labor Standards Act (FLSA), http://www.dol.gov/WHD/regs/compliance/whdfs22.pdf.

V. **RECORD KEEPING**

A. All covered employers have an affirmative duty to maintain accurate records. All employers subject to any FLSA provision must record and retain all wage records, hours and other employment conditions and practices of its employees. 29 C.F.R. § 516.1.

1. **Records to be Retained**. While every covered employer must preserve records for each of its employees who are non-exempt, there is no specific form required by the FLSA. The FLSA only requires records containing particular information about each employee and the hours worked and wages earned.

a. **General Information**. These basic general record requirements include:

> (i) employee's full name and social security number; (ii) address, including zip code; (iii) birth date, if younger than 19; (iv) sex and occupation; (v) time and day of week when employee's workweek begins; (vi) hours worked each day; (vii) total hours worked each workweek; (viii) basis on which employee's wages are paid (per hour/week/etc.); (ix) regular hourly pay rate; (x) total daily or weekly straight-time earnings; (xi) total overtime earnings for the workweek; (xii) all additions to or deductions from the employee's wages; (xiii) total wages paid each pay period; and (xiv) date of payment and the pay period covered by the payment. 29 C.F.R. § 516.2; U.S. Dep't of Labor, Fact Sheet #21: Recordkeeping Requirements under the Fair Labor Standards Act (FLSA), http://www.dol.gov/whd/regs/compliance/whdfs21.pdf.

b. **Specific Information Required**. There are specific record retention requirements in addition to, or in lieu of certain general information requirements for certain types of employees. *See* 29 C.F.R. §§ 516.11 *et seq.* Some examples include documentation that must be prepared and retained relating to the cost of furnishing board, lodging or other facilities to employees; for employers with tipped employees, the weekly amount of tips received, the amount of tip credit claimed, the hours worked as a tipped and non-tipped employee and who is a tipped employee; and for "white collar" exempt employees, the basis on which the employee is paid.

2. **Length of Record Retention**. Any payroll ledgers, collective bargaining agreements, sales and purchase records and other similar records must be retained by employers for three years. 29 C.F.R. § 516.5. Any records upon which employers base wage computations, such as time cards, piece work tickets, wage rate tables, records of additions to or deductions from wages, must be retained by the employer for two years. 29 C.F.R. § 516.6. "All records shall be available for inspection and transcription by the Administrator or a duly authorized and designated representative." 29 C.F.R. § 516.7; *see also* U.S. Dep't of Labor, Fact Sheet #21: Recordkeeping Requirements under the Fair Labor Standards Act (FLSA), http://www.dol.gov/whd/regs/compliance/whdfs21.pdf.

3. **Timekeeping**. Employers are not under any requirement to use timeclocks for recording the work hours of non-exempt employees. "Any timekeeping plan will be acceptable as long as it is complete and accurate." U.S. Dep't of Labor, Fact Sheet #21: Recordkeeping Requirements under the Fair Labor Standards Act (FLSA), http://www.dol.gov/whd/regs/compliance/whdfs21.pdf; *see also* 29 C.F.R. § 785.48.

a. **Fixed Schedules**. If an employee is on a fixed schedule that is consistent, employers can retain documentation demonstrating the employee's daily and weekly hours schedule and indicate that the employee followed the schedule. If there is a time variation, the employer is required to record the actual number of hours worked by the employee. U.S. Dep't of Labor, Fact Sheet #21: Recordkeeping Requirements under the Fair Labor Standards Act (FLSA), http://www.dol.gov/whd/regs/compliance/whdfs21.pdf.

VI. ENFORCEMENT

A. The Wage & Hour Division ("**WHD**") of the U.S. Department of Labor enforces the FLSA through offices that are located across the U.S. WHD investigates and gathers information on employment conditions and practices, wages, and hours to determine compliance with the law. When WHD encounters FLSA violations, it may also recommend employment practice changes. Wage and Hour Division, Handy Reference Guide to the Fair Labor Standards Act (Sept. 2010), http://www.dol.gov/whd/regs/compliance/hrg.htm.

1. **Retaliation**. Employers cannot dismiss or discriminate against any employee due to the employee's filing of a complaint related to the FLSA. 29 U.S.C. § 215(a)(3).

2. **Violations**. Employers can be criminally prosecuted for willful violations of the FLSA. Fines can reach up to $10,000 and a second conviction could result in imprisonment. "Employers who violate the child labor provisions of the FLSA are subject to a civil money penalty of up to $11,000 for each employee who was the subject of a violation." Wage and Hour Division, Handy Reference Guide to the Fair Labor Standards Act (Sept. 2010), http://www.dol.gov/whd/regs/compliance/hrg.htm. Any employer who deliberately or continually violates overtime pay or minimum wage requirements will be subject to a civil money penalty that can reach $1,100 for each violation. *Id.*; 29 C.F.R. § 578.3.

B. **Recovery**. There are several methods by which an employee may recover unpaid back wages: (i) WHD can supervise an employer's payment of back wages to the employee; (ii) the Secretary of Labor can bring a suit against an employer, requesting equal amounts for back wages and liquidated damages; (iii) a private suit can be brought by an employee, requesting equal amounts in back wages and liquidated damages, plus attorney's costs and fees; and (iv) an injunction may be obtained by the Secretary of Labor to restrain anyone from violating the FLSA, "including the unlawful withholding of proper minimum wage and overtime pay." Wage and Hour Division, Handy Reference Guide to the Fair Labor Standards Act (revised Sept. 2010), http://www.dol.gov/whd/regs/compliance/hrg.htm. In addition, an employee or group of employees who have won judgment against an employer may recover any wages, including overtime wages, by either going directly to court or seeking assistance through the Solicitor's

Office of the Department of Labor. 29 U.S.C. § 16(b)–(c). Notably, any settlements and releases that are agreed upon privately must be approved by the Department of Labor or a court in order to be enforceable.

C. **Limitations on Employees**. If an employee has accepted any form of back wages under WHD's supervision, or the Secretary of Labor has already brought suit to recover the employee's wages, the employee may not bring suit against his or her employer. Wage and Hour Division, Handy Reference Guide to the Fair Labor Standards Act (Sept. 2010), http://www.dol.gov/whd/regs/compliance/hrg.htm.

D. **Statute of Limitations**. The statute of limitations for the recovery of back pay is limited to two years, unless the employer's actions were willful, in which case the time is extended to three years. Wage and Hour Division, Handy Reference Guide to the Fair Labor Standards Act (Sept. 2010), http://www.dol.gov/whd/regs/compliance/hrg.htm.

VII. CONCLUSION

Even though the FLSA is one of the oldest labor laws on the books, as shown above, it still has great relevance in today's workplace.

FMLA and ADA

By

Robert Kilbride, Stuart

FOX, WACKEEN, DUNGEY
BEARD, SOBEL, BUSH
& McCLUSKEY, L.L.P.

The FMLA and ADA: "Just the basics, please".

Presented by: Robert L. Kilbride
October 27, 2011
Tampa, Florida

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When should I be concerned?

- FMLA = 50 + employees
- ADA = 15 + employees

Practice pointer: Check the numbers with your client. Do they qualify?

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Length of Employment

- 12 months of service, and
- Employee 1,250 hours during the 12 months preceding leave, and
- Employee worked within 75 miles of a worksite where at least 50 employees are located.

- ***Practice Pointer***: Don't assume every employee is covered. Check the length of service

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Leave Entitlement

- FMLA = up to 12 weeks of unpaid leave
- FMLA military leave = up to 26 weeks of unpaid leave
- ADA = could require additional leave if needed to reasonably accommodate a disability.
- ***Practice Pointer***- Always consider ADA impact.

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2009 FMLA Adjustments

- Serious Health Condition: minor tune-up
  - Illness; injury or impairment; or physical or mental impairment; that involves:
    - Inpatient Care
    - Continuing Treatment by a HCP

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FMLA: Serious Health Condition Defined

- Inpatient treatment
- Incapacity of three consecutive full calendar days with:
  - Treatment 2 or more times w/in 30-days of first day of incapacity (extenuating)
    - 1st treatment: in person w/in 7 days of incapacity
    - HCP decides if 2nd visit is necessary
  - One treatment plus a regimen of continuing treatment

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FMLA SHC Continued

- Chronic conditions
  - Periodic visits (at least twice per year)
  - Continue over extended period
  - Episodic incapacity
- Permanent/Long-term: no changes.
- ***Practice Pointer***: You will know a SHC when you see it- but double check the definition when in doubt

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Excluded from SHC

- Routine physicals, eye examinations, or dental examinations, and at home treatment by itself does not qualify
- Cosmetic surgery - unless inpatient/complications
- Common cold, ear aches, upset stomach, minor ulcers, headaches *other than migraines*, routine dental or orthodontia, periodontal disease not covered absent complications

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Leave Requirements (cont.)

- FMLA = for an on or off the job injury or a family health condition, leave for employees who need time to fulfill military duties or to care for family members in the military.
- ADA = individual's on or off the job health condition

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FMLA Leave-Block or Intermittent

- Military
  - Qualifying exigency due to federal call-up for contingency operation (S, P or C)
  - Care for covered service member with injury or illness (S, P, C *or Next of Kin*)
- Birth or Adoption(no intermittent for birth/adopt)
- SHC of Employee
- SHC of Employee's S, P or C

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COMPLIANCE WITH NEW FMLA REGULATIONS

- Eligible employees of covered employers who have a qualifying event, and provide appropriate notice and requested certification(s) are entitled to <u>at least</u> 12/26 weeks of health insurance continuation and job protected leave per defined twelve-month period.
- Covered employers must post appropriate notices, have a comprehensive leave of absence policy and develop a standard notice/certification procedure to ensure compliance.

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New ADAAA: "Substantially Limited"

- Only <u>one</u> "major life activity" need be limited
- Episodic impairments, or even impairments *in remission* are covered if "substantially limiting" when active
- Substantial limitation is to be determined without regard to ameliorative effects of mitigating measures.
- ***Practice Pointer***: These are MAJOR changes

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New "Major Life Activities" Under ADAAA

- Eating
- Sleeping
- Standing
- Lifting
- Bending
- Reading
- Concentrating
- Thinking
- Communicating
- Caring for oneself
- Performing manual tasks
- Seeing
- Hearing
- Walking
- Speaking
- Breathing
- Learning
- Working

- ***Practice Pointer*** : Substantial limit of one can be a disability

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"Major Bodily Functions" Under ADAAA

Completely new and added to definition of "major life activities"

Immune system	Brain
Normal cell growth	Respiratory
Digestive	Circulatory
Bowel	Endocrine
Bladder	Reproductive
Neurological	

Practice Pointer : Substantial limitation affecting any one can be a disability

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Mitigating Measures Under ADAAA

- "Ameliorative" mitigating measures are NOT to be considered in determining whether an individual is substantially limited in a major life activity or major bodily function
- Minor exception for ordinary eyeglasses and contacts that are intended to fully correct vision.
- ***Practice Pointer***: If eyeglasses fully correct vision, then the employee cannot use vision problem as a disability

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Equal Application

FMLA and ADA apply equally to male and female employees.

Practice Pointer: No greater rights under FMLA and ADA for normal pregnancies.

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Paid v. Unpaid Leave

- FMLA & ADA = An eligible employee may elect, or an employer *may require* the employee, to substitute any of her paid leave for any part of the FMLA leave.
- ***Practice Pointer***: Employers should make this a part of your policies. May help to discourage abusive FMLA or sick leave.

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Disability Leave v. FMLA Leave

- Where disability leave of an employee, under a company's policy, also qualifies as FMLA leave for a serious health condition, the employer can designate the leave as FMLA leave and count it as running concurrently with the disability leave.

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Interplay between FMLA Leave & Workers' Compensation

- Either the employer or employee may choose to have the 12 weeks of FMLA leave run concurrent with a workers' compensation absence.
- However, if such a designation occurs and the employee is certified by the workers' comp health care provider to return to "light duty," the employee may choose to decline the employer's offer of a "light duty" job.

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Workers' Comp & FMLA Leave (cont.)

Thereafter, the employee may lose his right to workers' compensation benefits, but will still be entitled to remain on FMLA leave until the 12 week entitlement is exhausted.

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Avoiding Discrimination on leave

Transitional Duty Policies:

Advisory opinions from the DOL and EEOC guidance suggest that if you offer transitional duty work to employees who have on-the-job injuries then you should also offer such work to employees who have other injuries or conditions.

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Medical Documents

- FMLA = Generally, Employer cannot request additional information from the employee's health care provider if the employee submits a *completed* certification form signed by the health care provider.
- ADA = the same privilege is present.

Practice Pointer: Documentation is frequently sloppy and incomplete. Check and reject.

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FMLA Certification Process

- Employers can require with Notice Forms:
  - SHC of employee form
  - SHC of family member form
  - Illness/injury of service member form
- Employer must provide employee with certification form at same time as Eligibility Notice (w/in 5 days of employee's notice)
- Employee has 15 days to return
- ***HCP no longer checks box – employer must determine if SHC by information on form!!!!!!!!!***

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Employee Certification, continued

- Return a "complete and sufficient" certification (but employer cannot reject if no diagnosis listed)
- "Incomplete" - applicable entry not filled
- "Insufficient" – complete, but info is "vague, ambiguous or non-responsive"
- Must notify in writing if not complete or sufficient and provide 7 days to cure
- If not returned – no leave if employee advised of consequences for not returning in notice forms.
- May require one per leave year per event if condition lasts beyond a single leave year

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FMLA Certification, continued

- If complete and sufficient, after opportunity to cure, company can contact HCP to authenticate or clarify but not seek additional information
  - Must use a HCP, HR, Leave Administrator or management official (not direct supervisor)
  - HCP must have HIPAA release
  - Authenticate: verify completion by HCP
  - Clarify: understand handwriting or understand meaning of a response

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Certification, continued

- 2ND/3RD Opinions – Company pays- 3rd opinion binding
- Recertification
  - Every 30 days and in conjunction with an absence
  - If condition certified more than 30 days, can recertify at earlier of duration specified or every six months
  - Can obtain recertification in less than 30 days if:
    - Requested extension
    - Circumstances described changed (e.g. longer or more frequent absences)
    - Info casting doubt on need for leave
  - Must return w/in 15 days of request
  - No 2nd/3rd opinion

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Health Insurance Premiums

- Insurance coverage must be continued on the same terms as if the employee is continuously employed. The employer may require the employee on *unpaid* FMLA leave to pay appropriate share of the premiums. If FMLA time is *paid* then premiums would be deducted.
- ADA would be governed by the same as above.

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Return-to-Work Issues

- FMLA reinstatement rights and duty to accommodate
  - Right to be reinstated to the same or equivalent position
  - If employee can't perform an essential function of the job after leave ends, the employee is not entitled to accommodation.

Practice Pointer: Consider ADA- is employee disabled? May require reasonable accommodation.

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Return-to-Work Issues

- ADA reinstatement rights and accommodation
  - Employee must be returned to same job unless it creates an undue hardship to keep job open
  - If keeping job open creates undue hardship, employee must be transferred to an equivalent position if one is available
  - If not, employee must be transferred to a lesser position if one is available

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Return-to-Work Issues

- FMLA *fitness-for-duty* examination
  - Ok, but must be a uniformly-applied policy or practice
  - Must be job-related and consistent with business necessity
  - Certification need only be a simple statement of an employee's ability to return to work
  - Must notify at time of leave and provide description of essential functions

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Return-to-Work Issues

- ADA fitness-for-duty examinations
  - May only be requested if employer has a *reasonable belief* that an employee's present ability to perform essential job functions is impaired
  - Any examination must be limited in scope to what is needed to make an assessment of the employee's ability to work

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FMLA Fitness For Duty
- Light Duty -

- Light duty may be offered- not generally required
- Right to job restoration is "on hold" during light duty
- End of voluntary light duty, restoration rights:
  - Position the employee held at the time the employee's FMLA leave or
  - May use the remainder of FMLA leave

Practice Pointer: Light duty may save $ and benefit employer

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FMLA
- Reinstatement -

- Same or equivalent position:
  - Reinstated to the same or equivalent position
  - With equivalent pay and benefits
- Qualifications:
  - An employee must be given a "reasonable opportunity" to fulfill the qualifications of a job upon return to work
- Right to reinstatement:
  - No greater right to reinstatement than would exist if the employee had been continuously employed

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Return from Leave

Certification

- New rule:
  - Ability to perform essential functions of the job
  - Employer may contact medical provider for authentication or clarification
- Limits of certification:
  - Only regarding the particular health condition that caused the employee's need for FMLA leave

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Return from Leave

- Restoration:
  - May delay restoration until fitness-for-duty certification
  - Employer must provide advance notice that a certification will be required

Practice pointer: Make sure company has, and is using, the correct forms and notices. See D.O.L. website

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Unlawful Discharge/Discrimination

- Under the FMLA it is unlawful for an employer to discharge or discriminate against an individual because the individual:
  - Filed a charge or related action
  - Gave or is about to give information in connection with any inquiry or proceeding
  - Testified or is about to testify in any inquiry or proceeding relating to any right provided

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Terminations

- The same is true for ADA covered employees who are disabled but can still perform the essential functions of their job.

Practice Pointer: Under recent U.S. Supreme Court opinion "filed" a complaint may include and internal, oral complaint to the company.

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Military Employees Under FMLA Covered Employees

- Employee's spouse, child or parent ("covered military member")
  - On "covered active duty" or
  - Called to active duty in support of a contingency operation or foreign deployment
- Includes
  - National Guard
  - Reservists
  - Retired military (regular Armed Forces or reserves)
  - Now includes current members of regular Armed Forces or State calls to active duty

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What is a "Qualifying Exigency?"

- Short-notice deployment (7 days' notice or less)
- Military events and related activities (ceremonies, briefings, etc.)
- Childcare and school activities
- Financial and legal arrangements
- Counseling
- "R&R"
- Post-deployment activities, including funeral-related matters
- Other events agreed to by employer/employee

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Qualifying Exigency
- Details

- "Qualifying exigency" leave counts against employee's regular 12-week total
- Employer may request documentation of qualifying exigency
- Military orders will normally state whether service is in support of contingency operation
- Intermittent or reduced scheduled leave is generally available

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Military Caregiver Leave

- 26 weeks per 12-month period
- Additional 26-week leaves in other 12-month periods are allowed for
  - Serious injury or illness of a different covered service member
  - Subsequent injury or illness of same covered service member
  - Leave available for up to 5 years after a veteran leaves the service if he/she develops a service related injury/illness

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Who is Entitled to This Leave?

- Spouse, child, parent, or next of kin of covered service member
  - "Son or daughter," as with Qualifying Exigency leave, does not require that the child be "incapable of self-care" if 18 or older
  - "Parent" does not include in-laws
  - Next of Kin: Nearest blood relative other than spouse [sic], parent, or child

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Designation of Military Caregiver Leave

- If leave qualifies both for military caregiver leave and "normal" FMLA leave, employer must designate military caregiver leave first
- Employer cannot count the same leave against 26-week allotment and 12-week allotment

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QUESTIONS?

Final Practice Pointer: Always consider FMLA, ADA and Worker's Compensation laws together when evaluating a medical leave issue.

Thank you - Robert L. Kilbride Esq. (772) 287-4444

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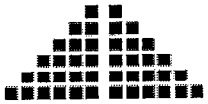
Chapter Eleven

EMPLOYEE LEAVES



Chapter Eleven

EMPLOYEE LEAVES

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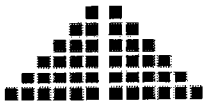

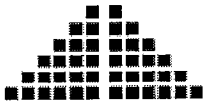

Chapter Eleven

EMPLOYEE LEAVES

Leanne C. Mehrman, lmehrman@fordharrison.com,
Chapter Editor

I. LEAVES: EMPLOYER POLICIES

A. Elements of a Leave of Absence Policy. Successful leave policies generally include a number of features designed to provide clarity and specificity. Many of these features cannot be required in certain circumstances; however they are good general provisions for leave of absence policies.

- Applications for leave must in writing and must be made in advance (specify the number of days/weeks leave should be requested in advance unless emergency).
- A leave requires written approval.
- A leave is permitted only for a fixed duration, with a date certain for return (possibly subject to extension upon application for an extension).
- The policy defines which employees are eligible (*i.e.*, full-time, part-time, probationary, or temporary employees).
- The employee must personally make arrangements for the leave. Only specific management personnel may authorize leave.
- Employers should designate the maximum length of leave, and under what circumstances the employee will be discharged if she or he does not return to work after the leave. Consideration should also be given to the number of leaves permitted during a calendar year or other time period.
- The employer should reserve the right to require a physician's statement or other written documentation (such as a copy of jury summons or military orders) satisfactory to the employer as a condition of granting any leave, and as a condition for returning to work following a leave.
- Consideration should also be given to whether wages, insurance, or holidays will be recognized and paid during the leave period. In addition, consideration should be given to the accrual of vacation and other benefits.

Note that the general policy considerations discussed above do not override the requirements of state or federal laws. Thus, for example, an employee's request for leave may be covered by the Family and Medical Leave Act (FMLA) even if it does not meet the requirements of the employer's policy, if that policy imposes requirements that are more burdensome than those in the FMLA.

Additionally, employers should be aware that courts may enforce leave policies that are more generous than the FMLA, even if that was not the employer's intent. *See Peters v. Gilead Sciences, Inc.,* 533 F.3d 594 (7th Cir. 2008) (employer's policy that contained language identical to the FMLA, but did not include the 50-employee/75-mile radius exception, may be enforceable under state law, even though employee was not covered by the FMLA because he did not work at a site with 50 employees within a 75-mile radius).

B. Examples of Types of Leave.

- Sickness and/or disability leave, including on-the-job injury and/or illness.

- Bereavement leave. The policy should define "immediate family" for purposes of application for bereavement leave and identify method of proof, if required.
- Childcare leave. The policy should define "child" and should be offered to both males and females.
- Personal leave.
- Military leave (usually covered by USERRA and/or state law).
- Jury duty leave (usually covered by state law).
- General medical leave.
- Employee assistance program.
- FMLA leave.
- Voting leave.
- Vacation/Annual Leave.

C. Vacation, Sick Leave, and Other Leaves of Absence. Employers should avoid describing various types of leaves, especially vacation, in terms of entitlement since doing so may bind the employer to pay such "earned" benefits when the employment terminates. Additionally, some state laws already require that terminated employees be paid available and/or earned paid leave benefits. Employers should check the laws of the states in which they have employees regardless of the wording of the policy. Generally, it is recommended that leave accrual be tied to actual hours worked instead of mere employment during a set period of time.

D. State-Law-Mandated Leaves of Absence. Employers should consult the laws of the states in which they operate to determine what leaves of absence they are obligated to grant to qualifying employees. Many states have family and/or medical leave laws similar to the FMLA, discussed below, although often with more generous or different eligibility requirements, qualifying leave circumstances, and leave entitlements. Many states also have other leave laws, such as school visitation leave, bone marrow donation leave, victim/witness leave, domestic violence leave, and public service leave. These laws should be carefully reviewed and compliant policies drafted for inclusion in the employee handbook or manual.

II. THE FAMILY AND MEDICAL LEAVE ACT OF 1993 (FMLA)

Of the many laws that may apply to an employee's leave of absence, the FMLA has the broadest impact and reach. When confronted with a family or medical absence, employers should examine whether the FMLA applies to the situation, comply with FMLA's various notice requirements, and then focus on any other laws (such as the Americans with Disabilities Act (ADA) or state law[1]) that may apply and internal policy commitments.

The FMLA entitles eligible employees to take a total of twelve weeks of leave during a twelve-month period due to the employee's or a family member's serious health condition, the birth, adoption, or placement of a child for adoption or foster care or any qualifying exigency related to the call to active duty of a reservist, or to take a total of 26 weeks of leave to care for a family member with an injury or illness incurred in the line of active duty. 29 U.S.C. § 2612(a)(1)(D).

---

[1] Some state and local laws are more stringent than the FMLA. Employers should check the laws of the states in which they have facilities.

A. Interference Claims. The FMLA makes it "unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under" the FMLA. 29 U.S.C. § 2615(a)(1). A violation of this provision creates what is commonly known as the interference theory of recovery. 29 U.S.C. § 2617. *See, e.g., Wisbey v. City of Lincoln,* 612 F.3d 667, 675 (8th Cir. 2010) (noting that two types of claims exist under the FMLA: interference claims, in which the employee claims that the employer denied or interfered with his rights under the FMLA; and retaliation claims, in which the employee claims the employer discriminated against him for exercising his FMLA rights – the difference between the two claims is that the interference claim merely requires proof that the employer denied the employee his entitlements under the FMLA while retaliation claims require proof of retaliatory intent) (citations omitted); *Throneberry v. McGehee Desha County Hosp.,* 403 F.3d 972 (8th Cir. 2005) (an employer is not strictly liable for interfering with an employee's FMLA leave; it is only liable for unlawfully interfering with such leave and should be permitted to present evidence that it would have made the same employment decision regardless of the taking of FMLA leave); *Krutzig v. Pulte Home Corp.,* 602 F.3d 1231, 1236 (11th Cir. 2010) ("the court is persuaded by the reasoning of other circuits which have addressed this issue that the right to commence FMLA leave is not absolute, and that an employee can be dismissed, preventing her from exercising her right to commence FMLA leave, without thereby violating the FMLA, if the employee would have been dismissed regardless of any request for FMLA leave").

In *Wisbey,* the Eighth Circuit affirmed summary judgment in favor of the employer holding that because the employee requested intermittent leave for "six months or longer" with no anticipated return date she had no interference claim because "the FMLA does not provide leave for leave's sake, but instead provides leave with an expectation that the employee will return to work after the leave ends." 612 F.3d at 675 (citing *Throneberry,* 403 F.3d at 978). The court also affirmed summary judgment on her retaliation claim because she failed to establish a causal connection between her request for leave and her termination.

B. Discrimination Claims. The FMLA also makes it "unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by" the FMLA. 29 U.S.C. § 2615(a)(2). A violation of this provision creates what is commonly known as the discrimination theory of recovery. 29 U.S.C. § 2617. *See, e.g., Throneberry,* 403 F.3d at 977.

An employer may be subject to a discrimination claim for counting an FMLA leave as an absence under "no fault" attendance policies. *See* 29 C.F.R. § 825.220; *Bachelder v. America West,* 259 F.3d 1112 (9th Cir. 2001) (because FMLA-protected absences were a negative factor in decision to discharge plaintiff, the discharge violated the FMLA); *Hunter v. Valley View Local Schools,* 579 F.3d 688 (6th Cir. 2009) (reversing summary judgment in favor of employer where employee was placed on involuntary leave for "excessive absenteeism" and some absences were covered by FMLA).

C. Enforcement. The FMLA is interpreted and enforced by the Wage and Hour Division of the Department of Labor (DOL). The DOL, as part of its enforcement authority, has issued regulations interpreting the FMLA. These regulations have the force and effect of law. Courts are required to follow the regulations unless they determine that they are unconstitutional. *See McGregor v. Autozone,* 180 F.3d 1305 (11th Cir. 1999) (portions of the FMLA regulations are invalid because they are beyond the clear intent of Congress).

On November 17, 2008, the DOL updated its FMLA Regulations, incorporating many of the changes set forth in the DOL's proposed regulations issued in February 2008, and promulgating regulations implementing the changes made by the National Defense Authorization Act (NDAA). The final regulations took effect January 16, 2009. Forms

complying with the new regulations are available on the DOL's web site at: http://www.dol.gov/whd/fmla/finalrule.htm. In its Fall 2010 Regulatory Agenda, the DOL stated that it will amend the FMLA regulations to incorporate amendments made by the National Defense Authorization Act for FY 2010 and the Airline Flight Crew Technical Corrections Act; however, as of the date of publication of the SourceBook, these regulations had not been issued.

D. Coverage. The FMLA applies to private-sector employers who employ fifty or more employees in twenty or more calendar work weeks in the current or preceding calendar year, and who are engaged in commerce or in any industry or activity affecting commerce, including joint employers and successors of covered employers, and all public agencies, including state, local, and federal employers, and local education agencies.

The DOL regulations provide that any employee whose name appears on the employer's payroll is considered employed each working day of the calendar week and must be counted regardless of whether the individual received any compensation for the week. 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. 29 C.F.R. § 825.105(b)(c)(d).

E. FMLA Eligibility. Eligible employees are those who have been employed for at least twelve months, have worked for at least 1,250 hours during the twelve-month period immediately preceding the leave of absence, and work in an office or worksite at which fifty or more employees are employed. All employees within a seventy-five-mile radius of the particular facility are counted to determine whether an employer has fifty or more employees. *See Hackworth v. Progressive Cas. Ins. Co.,* 468 F.3d 722 (10th Cir. 2006) (upholding DOL's regulation that measures the seventy-five-mile radius by surface miles, 29 C.F.R. § 825.111(b)); *Bellum v. PCE Constructors, Inc.,* 407 F.3d 734 (5th Cir. 2005) (same).

The DOL's new regulations provide that although the twelve months of employment need not be consecutive, employment prior to a continuous break in service of seven years or more need not be counted. The new regulations create two exceptions to this rule: (1) a break in service resulting from the employee's fulfillment of military obligations; and (2) a break in service such as for education or child-rearing purposes, where a written agreement or collective bargaining agreement exists concerning the employer's intent to rehire the employee. In these situations, employment prior to the break in service must be counted in determining whether the employee has been employed for at least twelve months, regardless of the length of the break in service.

1. When Determined. Eligibility for leave is determined at the beginning of the leave. Therefore, if an employee is eligible for leave at the beginning of the leave but the leave of absence (such as intermittent leave) causes the employee's hours to decline to the point at which they fall below the 1,250 hour minimum requirement normally used for initial eligibility determination, the employee remains eligible for the current leave of absence for the same qualifying reason. *Barron v. Runyon*, 11 F. Supp. 2d 676 (E.D. Va. 1998). The DOL's regulations clarify that "An employee may be on "non-FMLA leave" at the time he or she meets the eligibility requirements, and in that event, any portion of the leave taken for an FMLA-qualifying reason after the employee meets the eligibility requirement would be 'FMLA leave.'" *See* 29 C.F.R. § 825.110(d).

Importantly, even if an employer is not covered by the FMLA because it does not employ fifty or more employees, it may be required to comply with the FMLA if it states in its employee handbook that it will do so. *See Thomas v. Pearle Vision, Inc.,* 251 F.3d 1132 (7th Cir. 2001) (finding contractual obligation to comply with requirements of FMLA based on statements in employee handbook).

2. Types of Service Counted. Service as a temporary employee prior to becoming a full-time employee must be counted toward the twelve-month period. *Miller v. Defiance Metal Prods.*, 989 F. Supp. 945 (N.D. Ohio 1997).

The First Circuit has held that time an employee spends grieving a wrongful discharge does not count toward the FMLA's hours worked requirement, even if the employee is ultimately reinstated and compensated for the time spent on the grievance. *See Plumley v. Southern Container, Inc.,* 303 F.3d 364 (1st Cir. 2002); *see also Mutchler v. Dunlap Mem'l Hospital,* 485 F.3d 854 (6th Cir. 2007) (time for which nurse was compensated in accordance with "weekender" position, which was in excess of the time actually worked, did not count as hours of service for FMLA eligibility.). *But see Ricco v. Potter,* 377 F.3d 599 (6th Cir. 2004) (the hours for which an employee was awarded make whole relief by an arbitrator as a result of a wrongful discharge grievance should be counted as "hours worked" under the FMLA).

Time spent in military service (pursuant to the Uniformed Services Employment and Reemployment Rights Act (USERRA)) must be counted toward an employee's eligibility for the FMLA leave, according to the DOL. *See* 29 C.F.R. § 825.110(c)(2) (an employee returning from fulfilling his or her National Guard or Reserve military obligation must be credited with the hours-of-service that would have been performed but for the period of military service in determining whether the employee worked the 1,250 hours of service).

F. Circumstances Under Which Employees May Take FMLA Qualified Leave. An eligible employee may take FMLA qualified leave for any of the following reasons:

- Birth of a child and to care for the newborn child;
- Placement with the employee of a child for adoption or foster care;
- Caring for the employee's spouse, child under age eighteen, or child over age eighteen who is incapable of self-care because of a mental or physical disability, or parent (not parent in-law) with a serious health condition;
- For a serious health condition that makes the employee unable to perform the essential functions of the employee's job with or without reasonable accommodation. This language is intentionally similar to that of the ADA. Thus, when the employee's physical or mental condition is at issue, the employer must consider FMLA and ADA obligations when making employment-related decisions. 29 C.F.R. § 825.112(1-4);
- For a "qualifying exigency" while the employee's spouse, son, daughter, or parent (the "covered military member") is on active duty or call to active duty status; and
- To care for a covered servicemember with a serious injury or illness incurred in the line of duty.

The DOL's regulations define spouse to include all definitions of spouse in the state in which the employee resides. The FMLA does not supersede any state or local law that grants greater benefits to employees.

Under the FMLA, parent, son, and daughter need not be related by blood if the person has assumed that role. The DOL has issued Administrative Interpretation (AI) clarifying its opinion that employees are entitled to take FMLA leave for birth, bonding or to care for the child of a domestic partner or same-sex domestic partner, as well as other children for whom an employee has responsibility for day-to-day care or financial responsibility, even though the employee has no biological or legal relationship with the child. According to the DOL, the AI was issued in response to numerous inquiries from employers regarding when an employee with no legal relationship to a child is considered to be standing "in loco parentis" under the FMLA and, accordingly, entitled to leave. (The AI does not address an employee's

entitlement to take military leave under the FMLA, which is governed by different definitions.) Although the DOL states that it is clarifying the definition of when an employee is considered to stand "in loco parentis," this is the first time the agency has specifically stated that otherwise covered employees are entitled to take FMLA leave to care for the children of same-sex domestic partners.

The DOL stated that whether an employee stands "in loco parentis" to a child is a fact issue dependent on multiple factors including:

- the age of the child;
- the degree to which the child is dependent on the person claiming to be standing in loco parentis;
- the amount of support, if any, provided; and
- the extent to which duties commonly associated with parenthood are exercised.

Further, the FMLA regulations define "in loco parentis" as including those with day-to- day responsibilities to care for and financially support a child. The AI interprets this regulation to require either day-to-day responsibilities for care or responsibility for financial support, but states that an employee is not required to show both factors to be considered standing "in loco parentis" for a child. Thus, the AI states that employees with no legal or biological relationship to a child may nonetheless stand in loco parentis to a child and be entitled FMLA leave. Examples of persons who might fit the definition of "in loco parentis" include:

- an employee raising a child with the biological parent;
- same-sex partners raising a child where the employee has no legal or biological relationship with the child;
- an employee who requests leave to bond with the adopted child of a same sex-partner; and
- a grandparent or other relative who has taken on the responsibility to raise a child but has not legally adopted the child.

The fact that a child has biological parents does not prevent a finding that the child is the "son or daughter" of an employee who lacks a legal relationship with the child because "neither the statute nor the regulations restrict the number of parents a child may have under the FMLA." However, an employee who cares for a child while the child's parents are on vacation would not be considered to be "in loco parentis" to the child. According to the Administrator, an employer who is not sure whether the employee is entitled to leave as standing "in loco parentis" should be satisfied with a simple statement asserting that the requisite family relationship exists.

Adoption of Foster Child. The DOL has issued an opinion letter, FMLA2005-1-A, August 26, 2005, stating that an employee who has a child placed in the home in foster care and then, after a period of one or more years, decides to adopt that child, is only entitled to FMLA leave for the initial placement of the child in foster care, not for the subsequent adoption of the child. The DOL noted that the FMLA regulations emphasize that leave is provided when a child is newly placed for adoption or foster care and that the child in this scenario would only be newly placed for foster care, not adoption.

G. Serious Health Condition. A "serious health condition" is defined as an illness, injury, impairment, or physical or mental condition that involves:

1. Inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential medical care facility including any period of incapacity (defined to mean inability to work, attend

school, or perform other regular daily activities due to the serious health condition or treatment for or recovery from the serious health condition), and any subsequent treatment in connection with such inpatient care; or

2. A serious health condition involving continuing treatment by a health care provider that includes any one or more of the following:

a. A period of incapacity (i.e., inability to work, attend school, or perform other regular daily activities due to the serious health condition, or treatment for or recovery from the serious health condition) of more than three consecutive **full** calendar days (the new regulations added the word "full" before calendar days), and any subsequent treatment or period of incapacity relating to the same condition that also involves:

- Treatment two or more times within thirty days of the first day of incapacity, unless extenuating circumstances exist, by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services (such as a physical therapist) under orders, or on referral by, a health care provider (the new regulations added the thirty-day requirement and state that the determination of whether additional treatment visits or a regimen of continuing treatment is necessary within the thirty-day period must be made by the health care provider, not the employee); or
- Treatment by a health care provider on at least one occasion that results in a regimen of continuing treatment under the supervision of the health care provider (The new regulations provide that the requirement of treatment by a health care provider means an in-person visit. The first (or only) in-person treatment visit must take place within seven days of the first day of incapacity).

b. Any period of incapacity due to pregnancy or for prenatal care. In the new regulations, a single section, § 825.120, addresses FMLA rights and responsibilities relating to pregnancy and the birth of a child. The new regulations combine language from several sections to make clear that a mother may be entitled to FMLA leave for both prenatal care and incapacity related to pregnancy and the mother's serious health condition following the birth of a child.

c. Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one that:

- Requires periodic visits for treatment by a health care provider or by a nurse or physician's assistant under the direct supervision of a health care provider (the new regulations define the term periodic to mean twice or more a year);
- Continues over an extended period of time (including recurring episodes of a single underlying condition); and
- May cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.).

d. A period of incapacity that is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider. Examples include Alzheimer's, a severe stroke, or the terminal stages of a disease.

e. Any period of absence to receive multiple treatments (including any period of recovery) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), and kidney disease (dialysis). 29 C.F.R. § 825.115(e).

Routine examinations, common illnesses, and over-the-counter medications are not covered by the FMLA. In addition, taking over-the-counter medications such as aspirin, antihistamines, or salves, bed-rest, drinking fluids, and other similar activities that can be initiated without a visit to a doctor are not sufficient to constitute a "regimen of continuing treatment" to allow the employee to take leave. The new regulations provide, "[o]rdinarily, unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc., are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave." 29 C.F.R. § 825.113(d).

"Health care provider" is broadly defined in the regulations. It includes midwives, nurse practitioners, clinical social workers, Christian Science practitioners, physicians' assistants who are authorized to practice under State law and who are performing within the scope of their practice as defined under State law, and any health care provider from whom an employer or employers' group health plan's benefits manager will accept a substantiated claim for benefits. Therefore, continuing treatment for an illness by an unorthodox practitioner should not be dismissed from consideration for FMLA leave, absent a careful inquiry into all the relevant facts. *But see Tayag v. Lahey Clinic Hosp.,* 632 F.3d 788 (1st Cir. 2011) (holding that a "healing pilgrimage," does not constitute health care under the FMLA and its associated regulations; the DOL regulation addressing faith healing by other practitioners such as Christian Scientists, who reject ordinary medical care as defined by the statute, did not apply to the plaintiff whose religion did not prohibit the ordinary medical care.)

H. Caring for a Family Member. FMLA leave is available when an employee is needed to care for a family member with a serious health condition. The need to care for a family member includes providing psychological support to an individual with a serious health condition and includes those situations when the employee is needed to fill in for another family member who primarily cares for the seriously ill family member.

The FMLA differentiates between the need to care for a child under eighteen and a child over eighteen. *See Cruz v. Publix Super Markets, Inc.,* 428 F.3d 1379 (11th Cir. 2005) (no violation of the FMLA where employee was discharged after taking leave to care for pregnant adult daughter; employee did not provide information to employer that would enable it to determine that adult daughter suffered from a serious health condition; pregnancy is not, itself, a serious health condition and employee did not provide any information indicating daughter was unable to care for herself because of a mental or physical disability); *Navarro v. Pfizer Corp.*, 261 F.3d 90 (1st Cir. 2001) (protected activities include caring for the employee's child under age eighteen or child over age eighteen who is incapable of self-care because of a mental or physical disability).

An employee who is on FMLA leave to care for a seriously ill relative forfeits his or her FMLA reinstatement rights by not returning to work when the relative dies. *Brown v. J.C. Penney Corp.*, 924 F. Supp. 1158 (S.D. Fla. 1996).

I. Leave Because of a Qualifying Exigency (§ 825.126). The NDAA and new regulations entitle an eligible employee to take FMLA leave while the employee's spouse, son, daughter, or parent (the "covered military member") is on active duty or call to active duty status for one

or more of the qualifying exigencies. According to the DOL, this section is intended to allow immediate family of military personnel to use FMLA leave for issues directly arising from a family member's deployment.

1. Circumstances under Which Qualifying Exigency Leave May be Taken. Section 825.126(a) provides a list of "qualifying exigencies" or needs arising from a family member's deployment that would qualify an employee for FMLA leave. According to the DOL, this list is meant to be exclusive. The exigencies are divided into the following eight general categories:

a. Short-notice deployment – An employee may take leave to address any issues that arise from a covered military member's notification of an impending call or order to active duty in support of a contingency operation. The term "contingency operation" is defined in § 825.126(b). In order to qualify as "short-notice deployment," the family member must be notified of an impending call or order to active duty seven or fewer days prior to the date of deployment. Employees taking leave under this section are entitled to leave only for a period of seven calendar days starting with the day the servicemember is notified of the call or order to active duty. An employee who qualifies for leave under this section may take leave without demonstrating that the leave otherwise qualifies as an exigency under one of the other seven categories.

b. Military events and related activities – An employee may take leave in order to attend official ceremonies, programs, or events sponsored by the military and for family support and assistance programs and informational briefings sponsored or promoted by the military, military service organizations, or the American Red Cross that are related to the active duty or call to active duty status of a covered military member. In the preamble to the new regulations, the DOL provides that "arrival and departure ceremonies, pre-deployment briefings, briefings for the family during the period of deployment, and post-deployment briefings that occur while the covered military member is on active duty or call to active duty status" are types of activities that were intended to qualify under this section.

c. Childcare and school activities – An employee may take qualifying exigency leave for childcare and school activities that specifically require attention because a covered family member is on active duty or call to active duty status. Qualifying reasons include: (1) arranging for alternative childcare when the active duty or call to active duty status of a military member results in a change in the childcare arrangement; (2) providing childcare on an urgent, immediate need basis (but not on a routine, regular, or everyday basis) when the need to provide such care arises from the active duty or call to active duty status of a covered military member; (3) enrolling the child in or transferring the child to a new school or day care facility as a result of the active duty or call to active duty status of a military member; and (4) attending meetings with staff at a school or a day care facility when such meetings are necessary due to circumstances arising from the active duty or call to active duty status of a covered military member.

The DOL reiterates in the preamble to the new regulations that each of the qualifying reasons enumerated in § 825.126(a)(3) must arise directly or indirectly from the active duty status or call to active duty status of a covered military member, rather than routine events that occur regularly for all parents. The DOL further provides that leave for urgent childcare is intended only for the eligible employee to provide immediate childcare on a temporary basis. The employee would be expected to find

alternative childcare if the child's illness continues. However, the DOL provides no guidance on what timeframe would exceed a "temporary basis."

d. Financial and legal arrangements – Employees may take leave to address financial or legal arrangements related to the military member's absence while on active duty or call to active duty status. Examples include activities such as preparing and executing financial and healthcare powers of attorney, transferring bank account signature authority, and preparing or updating a will or living trust. It also includes acting as a military member's representative before a federal, state, or local agency for the purposes of obtaining, arranging, or appealing military service benefits, while the military member is on active duty or call to active duty status, and for ninety days following termination of active duty status.

e. Counseling – An employee may take leave to attend counseling provided by someone other than a healthcare provider. The employee may attend counseling for him or herself, for the covered military member, or for a family member identified in this section. In order to qualify, the counseling must arise from the active duty or call to active duty status of a covered military member. Specifically relevant is the DOL's requirement that the counseling be administered by "someone other than a healthcare provider." The FMLA may already provide leave to employees receiving counseling from a healthcare provider. The DOL enacted this section specifically to cover counseling for military families that is non-medical in nature, such as counseling by a military chaplain, pastor, or minister, or counseling offered by the military or a military service organization.

f. Rest and recuperation – Employees are entitled to time off from work to spend with family members who return on short-term, temporary rest and recuperation leave during the period of deployment. Leave under this section is limited to five days of leave for each instance of rest and recuperation.

g. Post-deployment activities – Employees are provided leave to attend arrival ceremonies, reintegration briefings and events, and any other official ceremonies or programs sponsored by the military for a period of ninety days following the termination of the covered military member's active duty status. This section also extends bereavement leave to eligible employees in order to make funeral arrangements or address other issues that arise from the death of a covered military member while on active duty status. This is an exception to the precedent that has consistently denied bereavement leave under the FMLA.

h. Additional activities – This "catch-all" provision provides employee leave for "additional activities" that arise out of a military member's activity duty or call to active duty status not specifically enumerated under § 825.126(a). However, to qualify for leave under this provision, the employer and employee must agree that the leave is qualifying and agree to both the timing and duration of the leave. According to the DOL, this provision is intended to give employees the flexibility to take leave for "unforeseen circumstances," but at the same time require an agreement between the employer and employee to ensure that the leave does not burden the employer's business operations.

2. Definition of "Covered Military Member." Section 825.126 entitles employees to take leave due to one of the above-named exigencies arising from a "covered military member's" active duty or call to active duty status. A "covered military member" is defined in § 825.126(b) as the employee's spouse, son, daughter, or parent on active duty or call to active duty status. A "son or daughter" may be of any age, and includes

biological, adopted, or foster child, stepchild, legal ward, or child for whom the employee stood in loco parentis.

The National Defense Authorization Act for Fiscal Year 2010 ("2010 NDAA") revised the scope of the FMLA's qualifying exigency provisions to permit family members of active duty service members to take leave for a qualifying exigency. Previously, only family members of National Guard and Reservists called to active duty in support of a contingency operation were permitted to take leave for a qualifying exigency.

J. Certification for Leave Taken Because of a Qualifying Exigency (§ 825.309). An employer may require an employee seeking leave for a qualifying exigency to furnish a medical certification or other documentation in support of the leave. The employer may request the following information:

1. Active Duty Orders. An employer may require the employee to provide a copy of the military member's active duty orders or other documentation by the military verifying that the military member is on active duty or received a call to active duty and the dates of the covered military member's active duty service. An employer may only request this information once. An employer may request a copy of new active duty orders or other documentation issued by the military if the need for leave arises out of a different call to duty or active duty status.

2. Certification Supporting Leave for a Qualifying Exigency. An employer may require the employee to provide a signed statement or description of the facts that sets forth information on the type of qualifying exigency for which leave is requested. In addition an employer may require the employee to provide the approximate date the qualifying exigency will commence, the beginning and end dates for leave requested for a single continuous period of time, and an estimate of the duration and frequency of leave taken on an intermittent or reduced schedule basis.

3. Additional Verification. The regulations clearly provide that if an employee submits a complete and sufficient certification to support his or her request for leave because of a qualifying exigency, the employer may not request additional information from the employee. As such, employers are not permitted to request an employee to provide recertification. However, if the qualifying exigency involves a third-party, such as a school meeting, the employer may contact the third-party to verify the meeting and the nature of the meeting. Likewise, an employer may contact the Department of Defense in order to verify a military member's active duty or call to active duty status, but no additional information may be requested. An employer need not obtain the employee's permission in order to contact a third-party or the Department of Defense.

K. Military Caregiver Leave (§ 825.127). Under § 825.127(a) an eligible employee may take FMLA leave to care for a covered servicemember with a "serious injury or illness" incurred in the line of duty on active duty for which the servicemember is (1) undergoing medical treatment, recuperation, or therapy; (2) otherwise in outpatient status; or (3) otherwise on the temporary disability retired list.

1. Defining a "Covered Servicemember." This section clarifies that the definition of "covered servicemember" includes members of the Regular Armed Forces, current members of the National Guard or Reserves, and members of the Regular Armed Forces, the National Guard and the Reserves who are on the temporary disability retired list ("TDRL"). The 2010 NDAA amended the military caregiver leave provisions to include family members of 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 (including a member of the National Guard or Reserves) at any time during the five-year

period preceding the date on which the veteran undergoes that medical treatment, recuperation, or therapy.

2. Definition of "Serious Injury or Illness Incurred in the Line of Duty on Active Duty." A serious injury or illness is defined as an injury or illness incurred by a covered servicemember in the line of duty on active duty that may render the servicemember medically unfit to perform the duties of his or her office, grade, rank, or rating. Much like the standard FMLA regulations, the focus is whether the injury or illness inhibits the servicemember from performing his or her duties. The 2010 NDAA amended the definition of serious injury or illness to include pre-existing conditions that were aggravated by service in the line of duty while on active duty as well as those incurred in the line of duty while on active duty. The 2010 NDAA defines serious injury or illness for covered veterans to mean a qualifying (as defined by the Secretary of Labor) injury or illness that was incurred by the service member in the line of duty on active duty in the Armed Forces (or a pre-existing condition that was aggravated by service in line of duty on active duty) and that manifested itself before or after the member became a veteran.

3. What is Outpatient Status? A military member is on "outpatient status" if he or she is assigned to either a military medical treatment facility as an outpatient or a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients.

4. What Active Duty Means. With regard to the term "active duty" the DOL cautions that the definition of "active duty" applied under Section 825.126 (qualifying exigency leave) should not be applied to military caregiver leave. In order to determine for purposes of military caregiver leave whether the servicemember was injured while "in the line of duty on active duty," the DOL recommends that employers seek a certification from the Department of Defense or an authorized health care provider, as provided in § 825.310.

5. Circumstances under Which Military Caregiver Leave May be Taken. Section 825.127(b) provides that in order to care for a covered servicemember, an eligible employee must be the spouse, son, daughter, or parent, or next of kin of a covered servicemember. Sections 825.127(b)(1) and (2) specifically define "son or daughter of a covered servicemember" and "parent of a covered servicemember," which differ from the previous definitions of these terms under the FMLA Sections 29 U.S.C. 2611(2) and (7) respectively. This Section also provides a detailed explanation of the new term "next of kin," which is defined as the servicemember's nearest blood relative, other than the covered servicemember's spouse, parent, son, or daughter. Unless the servicemember specifically designates in writing a particular person as a "next of kin," the Section sets out an order of priority as to which family member qualifies as "next of kin."

6. Amount of Leave Entitlement. Section 825.127(c) provides an eligible employee 26 workweeks of leave in a "single 12-month period" in order to care for a covered servicemember. This is different than the method for calculating leave under all other FMLA qualifying reasons. As such, in some instances employers will have the administrative burden of tracking two different 12-month periods, one for regular FMLA leave and another for military caregiver leave. The "single 12-month period" starts on the first day the eligible employee takes FMLA leave to care for a covered servicemember and ends 12 months after that date. This leave is on a "use it or lose it" basis, meaning that if the eligible employee does not use all of the 26 workweeks before the expiration of the 12-month period, the employee forfeits the remaining entitlement. The DOL has commented that the use of the words "single 12-month period" show that Congress

intended for military caregiver leave to be a one-time entitlement, meaning that the 12-month period does not automatically renew each year like other FMLA qualifying leave.

Section 825.127(c)(2) provides that leave is to be applied on a "per-covered-servicemember, per-injury basis," meaning that an eligible employee may take more than one period of 26 workweeks of leave if the leave is to care for different covered servicemembers or to care for the same servicemember with a subsequent serious injury or illness, except that no more than 26 workweeks of leave may be taken within any "single 12-month period."

7. Designation of Military Caregiver Leave When it also Qualifies as Leave to Care for a Family Member with a Serious Health Condition. Section 825.127(c)(3) provides that an eligible employee is entitled to a combined total of 26 workweeks of leave for any FMLA-qualifying reason during the "single 12-month period." Therefore, within the "12-month period" an employee taking military caregiver leave is not entitled to 12 weeks of regular FMLA leave in addition to the 26 workweeks provided. To illustrate this point the DOL provides the following example in the preamble to the regulations: if an employee took 20 workweeks of military caregiver leave from June-December 2009, four workweeks of leave in January 2010 for his or her own serious health condition, and another two workweeks of military caregiver leave in March 2010, the employee will have exhausted his or her 26-workweek entitlement for the "single 12-month period" of June 2009-June 2010. While the employee (under a calendar year method for calculating leave) would still have eight weeks of non-military caregiver FMLA leave available in calendar year 2010, the employee could not take such leave until after June 2010, when the "single 12-month period" ends.

Section 825.127(c)(3) further points out that during a "single 12-month period" an employee may take FMLA leave for qualifying reasons other than military caregiver leave provided that the employee is entitled to no more than 12 weeks of leave. Section 825.127(c)(3) provides the following example: an eligible employee may, during the "single 12-month period," take 16 weeks of FMLA leave to care for a covered servicemember and 10 weeks of FMLA leave to care for a newborn child. However, the employee may not take more than 12 weeks of FMLA leave to care for the newborn child during the "single 12-month period," even if the employee takes fewer than 14 weeks of FMLA leave to care for a covered servicemember. Thus, when an employee's regular FMLA leave coincides with an employee's military caregiver leave, the regulations prevent the employee from exceeding both the 26 workweek entitlement under military caregiver leave and the normal 12 week entitlement for other qualifying leave.

8. Designation of Leave. The DOL has determined that the same designation rules apply to military caregiver leave and leave taken for other FMLA-qualifying reasons. As such, the employer is required to give notice that the leave is FMLA qualifying in accordance with § 825.300. If the leave qualifies as both military caregiver leave and leave to care for a family member with a serious health condition, then the DOL regulations require that the leave should be designated as military caregiver leave first. An employer is permitted to retroactively designate military caregiver leave pursuant to § 825.301(d), just as employers have been permitted to do for other types of FMLA leave.

9. Limitation of Leave by Spouses Employed by the Same Employer. A husband and wife who are eligible for FMLA leave and are employed by the same employer may be limited to taking a combined total of 26 weeks of leave during the "single 12-month period" if the leave is taken for any of the reasons listed in § 825.127(d). The section further clarifies that this limitation may be applied where the spouses work for the same employer but at different locations or operating divisions. However, if one spouse is

ineligible for FMLA leave, the other spouse would then be entitled to the full 26 workweeks of leave.

10. Certification for Leave Taken to Care for a Covered Servicemember (Military Caregiver Leave) (§ 825.310). The employer may require an employee seeking military caregiver leave to provide a certification completed by an authorized health care provider. Section 825.310(a) identifies a list of health care providers authorized to complete a medical certification for military caregiver leave.

a. Required Information from a Health Care Provider. Section 825.310(b) provides a list of information that the employer may request from the health care provider which generally includes: the contact information of the health care provider and whether the health care provider is one of the approved health care providers listed in Section 825.310(b); whether the covered servicemember's injury or illness was incurred in the line of duty on active duty; the date the serious injury or illness commenced and its probable duration; facts demonstrating that the servicemember has a covered illness or injury that renders the servicemember medically unfit to perform his duties and whether the servicemember is receiving medical treatment, recuperation, or therapy; information establishing that the servicemember is in need of care and the duration of the care; and information supporting a need for intermittent or reduced scheduled leave including an estimate of the treatment schedule.

b. Required Information from the Employee/Covered Servicemember. Section 825.310(c) provides a list of information the employer may request from the employee and/or covered servicemember. This information generally includes: the names of the employee requesting leave and the covered servicemember the employee intends to care for; the relationship of the employee to the servicemember; whether the servicemember is a current member of the Armed Forces, the National Guard or Reserves, and the covered servicemember's military branch, rank, and current unit assignment; whether the servicemember is receiving outpatient treatment from a military medical facility and the name of the facility; whether the servicemember is on the temporary disability list; and a description of the care needed and an estimate of the amount of leave needed to provide the care.

c. Invitational Travel Orders ("ITOs) or Invitational Travel Authorizations ("ITAs"). Employers must accept as sufficient certification "invitational travel orders" ("ITOs") or "invitational travel authorizations" ("ITAs") issued by the Department of Defense for a family member to care for an injured servicemember. ITOs or ITAs are issued by the Department of Defense when a servicemember is seriously injured or ill. Employees that provide an ITO or ITA cannot be required by the employer to provide additional information. Likewise family members of a covered servicemember may rely on other family members' ITOs or ITAs as sufficient certification. The Department of Defense does not issue an ITO or ITA to every family member. However, the DOL permits all eligible family members of a covered servicemember to rely on the ITO or ITA, even though it was not specifically issued to them.

d. Authentication, Clarification, Second Opinions, and Recertification. Employers are entitled to seek authentication and clarification of medical certifications and ITOs and ITAs using the procedures set forth in § 825.307. However, the DOL has determined that employers are prohibited from seeking recertification and second and third opinions.

L. Twelve-Month Period. The employer may designate one of four "12 month periods" to be used for FMLA leave purposes. The 12-month period may be: (1) a rolling 12-month period; (2) the 12-month period measured forward from the date the employee's first FMLA leave begins (the 12-month period is essentially fixed for that employee for each succeeding year); (3) the calendar year, or (4) any fixed 12-month "leave year," such as a fiscal year, a year required by state law, or a year starting on an employee's "anniversary" date. If an employer fails to select one of these four options for measuring the 12-month period for the leave entitlements, the option that provides the most beneficial outcome for the employee will be used. 29 C.F.R. § 825.200(e). *See also Bachelder v. America West*, 259 F.3d 1112 (9th Cir. 2001) (employer's failure to clearly designate which calculation method it was using was equivalent to a failure to inform employees of the method; applying the method most favorable to the employee to find that the employee's absences were FMLA protected). Thus, employers should review their existing policies to make certain that the 12-month period used to calculate leave entitlement is clearly identified. Additionally, an employer must apply the same 12-month period to all of its facilities unless state law requires that a different period be used.

With 60 days advance notice, the employer may change the designated 12-month period so long as an employee's FMLA rights are not adversely affected. Thus, if the new or old 12-month period would confer greater leave benefits, the enhanced benefits must be made available to the employee.

Only the "rolling 12- month period" prevents stacking of the FMLA leave from one year to the next. Stacking occurs when an employee uses all or part of his or her leave at the end of the 12-month period and then requests an additional amount of leave in the beginning of the next 12-month period.

Under the military caregiver leave provision, eligible employees are entitled to 26 workweeks of leave in a "single 12-month period" in order to care for a covered servicemember. This is a different measure of leave from the other FMLA qualifying reasons. As such, in some instances employers will have the administrative burden of tracking two different 12-month periods, one for regular FMLA leave and another for military caregiver leave. The "single 12-month period" starts on the first day the eligible employee takes FMLA leave to care for a covered servicemember's particular illness or injury and ends 12 months after that date. This leave is on a "use it or lose it" basis meaning that if the eligible employee does not use all of the 26 workweeks before the expiration of the 12-month period, the employee forfeits the remaining entitlement. The DOL has commented that the use of the words "single 12-month period" show that Congress intended for military caregiver leave to be a one-time entitlement, meaning that the 12-month period does not automatically renew each year like other FMLA qualifying leave.

M. "Intermittent" and "Reduced Work Schedule" Leave. Under certain circumstances, employees may take FMLA-qualified leave on an intermittent basis or by reducing their normal work schedule. The new regulations provide that intermittent leave is FMLA leave taken in separate blocks of time due to a single qualifying reason. A reduced leave schedule is a leave schedule that reduces an employee's usual number of working hours per workweek or hours per workday. According to the new regulations, reduced leave schedule is a change in the employee's schedule for a period of time, normally from full-time to part-time. Employers must charge employees for intermittent or reduced schedule leave time using an increment of time no greater than the shortest period they use for other forms of leave. However, this can be no greater than a one-hour increment. In other words, employers must measure intermittent or reduced leave schedule time at least by the hour, if not by minutes.

An employee may take either type of the FMLA leave whenever medically necessary to care for a seriously ill family member, or because of the employee's own serious health condition, or because of a qualifying exigency. An eligible employee may also take intermittent leave for the birth or placement for adoption or foster care of a child, but only if the employer approves intermittent leave for this purpose. The Eighth Circuit Court of Appeals has held that employees unable to perform essential job functions are not entitled to intermittent/reduced schedule leave under the FMLA. *See Hatchett v. Philander Smith College*, 251 F.3d 670 (8th Cir. 2001).

An employer may transfer an employee to an alternative position to accommodate intermittent leave or a reduced schedule leave that is foreseeable, if the employee is qualified for the position and the transfer better accommodates the employer's business needs. The alternative position must have equivalent pay and benefits, but not necessarily equivalent duties. The employer may increase the pay and benefits of an already existing position to make those terms of employment equivalent to the employee's regular job. An employer cannot, however, use a temporary transfer to discourage the taking of the FMLA leave or create a hardship on the employee. 29 C.F.R. § 825.204.

Intermittent or reduced schedule leave will only reduce the total amount of leave available to an employee by the amount of leave actually taken. For example, if an employee works a fixed schedule and takes three hours of leave for medical treatment, she or he has used only three hours of the twelve weeks of leave available. To calculate the amount of leave available to an employee in a leave period as it relates to intermittent and reduced scheduled leave, multiply the employee's normal work schedule by twelve weeks. Therefore, if an employee normally works thirty hours per week, the employee has 360 (12 weeks x 30 hours) hours of FMLA leave available. Similarly, if a salaried-exempt employee normally works sixty hours each week, she or he has a total of 720 hours of leave time available. If the employee is on a reduced work schedule leave, the employer should compare the employee's reduced work schedule with the amount of hours the employee normally worked prior to going on leave. For example, if an employee working only thirty hours a week is only able to work ten hours per week, the employee has used, for each week of the reduced schedule leave, 20 hours of FMLA leave (30 hours-10 hours) or two-thirds of a week.

Employers should use care when calculating the leave available to an employee who works a varied schedule. If an employee's schedule varies from week to week to such an extent that an employer is unable to determine with any certainty how many hours the employee would otherwise have worked (but for the taking of FMLA leave), a weekly average of the hours scheduled over the 12 months prior to the beginning of the leave period (including any hours for which the employee took leave of any type) would be used for calculating the employee's leave entitlement.

N. Rights of Eligible Employees.

1. Reinstatement. The FMLA requires employees, other than certain key employees, to be restored to the same or an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment. Once an employee indicates a willingness and ability to return to work, the employer must return the employee to work within two business days (i.e., the employee is only required to give two business days notice of an intent to return to work). *See* 29 C.F.R. § 825.311. Policies requiring more advance notice prior to returning the employee to work may not be binding on an employee who takes FMLA leave. To deal with this issue, employers should require employees to report in daily, or on a specified basis, regarding their intent to return to work.

An employer's reinstatement obligations do not necessarily cease if employees are unable to perform their former job duties. If the inability to perform the job duties is due to the employee's own medical condition, an employer may have an obligation to make reasonable accommodations that will allow the employee to meet the employer's performance expectations. Additionally, employees who are no longer qualified for a position because they could not renew their license or training during leave must be given an opportunity to fulfill these requirements upon return from leave. *But see Bloom v. Metro Heart Group of St. Louis,* 440 F.3d 1025 (8th Cir. 2006) (employer was not required to reinstate employee at the end of FMLA leave where employee could not perform the essential functions of her job; affirming summary judgment in favor of employer).

The easiest way to meet the FMLA's restoration requirements is to return the employee to the position held prior to taking FMLA qualified leave. If the employer is unable to hold the employee's position open, however, the question becomes "what is an equivalent position?"

Equivalent Position. By statute, an equivalent position must have equivalent benefits, pay, and other terms and conditions of employment. In fact, the equivalent position must be "virtually identical" in all terms and conditions of employment to the employee's former position. The DOL or other fact finder will examine the position's pay, benefits, and working conditions including the employee's privileges, perquisites, status, opportunities for promotion, and whether the duties require substantially equivalent skill, effort, responsibility, and authority. Equivalent terms and conditions encompass a wide range of workplace conditions and perks, including unwritten practices of the employer. 29 U.S.C. § 2611(5); 29 C.F.R. § 825.215(d) and (e).

Equivalent Pay. Equivalent pay means the employee is not only entitled to his or her prior salary, but also any unconditional pay increases that occurred during the leave period (including cost-of-living increases). 29 C.F.R. § 825.215(c). An employer is not required to grant pay increases based on seniority, length of service, and work performance, unless it is the employer's policy or practice to grant such raises to other employees on unpaid leave. *Id.* Equivalent pay includes shift differential as well as any overtime the employee was working at the time the employee went on FMLA leave. *Id.* The regulations provide that employees on FMLA leave may be denied bonuses based on the achievement of a specified goal such as hours worked, products sold or perfect attendance, if the employee has not met the goal due to FMLA leave, unless such payments are made to employees on an equivalent leave status for a reason that does not qualify as FMLA leave. *See* 29 C.F.R. § 825.215(c).

Equivalent Benefits. Equivalent benefits include all benefits previously provided by the employer to employees, including life, health, and disability insurance, sick and annual leave, educational benefits, and pensions. 29 U.S.C. § 2611(5); 29 C.F.R. 825.215(d). Following FMLA leave, these benefits must be restored in the same manner and at the same levels as provided when the leave began (subject to any changes in benefit levels that have taken place during the leave that affect the entire work force). Importantly, upon return from leave, the employee cannot be required to re-qualify for any benefits or go through an additional waiting period. 29 C.F.R. § 825.215(d)(1). This includes both the employee's own coverage as well as that of his or her family or dependents. *Id.* In addition, the employee cannot be required to undergo physical examinations, or be subject to any exclusions for pre-existing conditions that were not in effect when the employee took FMLA leave. 29 C.F.R. § 825.215(d)(1). Wage and Hour Opinion Letter, January 10, 1994, WHM 99:3017. Therefore, if an employee satisfies the pre-existing

condition limitation period for a particular condition prior to taking leave, and suffers from a separate condition while on leave, the employee cannot be required to satisfy a new pre-existing limitation period upon return from leave. *Id.* The employee in this situation must receive credit for both conditions for the amount of time satisfied prior to beginning FMLA leave. *Id.* In light of these requirements, employers may find it necessary either to modify their current insurance and benefit programs to accommodate the FMLA leave or to make the employee's payments on his or her behalf. 29 C.F.R. §§ 825.215(d)(1) and 825.213(b); Wage and Hour Opinion Letter, January 10, 1994, WHM 99:3017.

2. Circumstances Allowing an Employer to Deny Restoration to Employment.

a. Statements Indicating Employee Will Not Return from Leave. If the employee unequivocally states that she or he will not return to work, an employer may legally refuse to reinstate the employee to his or her prior position. 29 C.F.R. § 825.311(b).

b. Circumstances Showing the Employee Would Not Have Been Employed Had Leave Not Been Taken. The regulations also provide that if the employer can show that the employee "would not otherwise have been employed at the time reinstatement is requested," an employer may legally refuse to reinstate the employee to his or her prior position. 29 C.F.R. § 825.216(a). *See also Throneberry v. McGehee Desha County Hosp.*, 403 F.3d 972 (8th Cir. 2005) ("As long as an employer can show a lawful reason, i.e., a reason unrelated to an employee's exercise of FMLA rights, for not restoring an employee on FMLA leave to her position, the employer will be justified to interfere with an employee's FMLA leave rights.")

c. Poor Performance or Misconduct Prior to Leave. Poor performance or misconduct prior to leave may provide the basis for denial of restoration rights. *Carrillo v. Nat'l Council of the Churches of Christ*, 976 F. Supp. 254 (S.D.N.Y. 1997) (employer's denial of restoration rights did not violate the FMLA where the termination decision was made prior to the leave based on the employee's investment of employer's funds resulting in a loss of $8 million).

However, some courts have held that where an employer does not learn of performance deficiencies until the employee takes leave, discharge of the employee may violate the FMLA. *See Smith v. Diffee Ford-Lincoln-Mercury,* 298 F.3d 955 (10th Cir. 2002); *but see Kohls v. Beverly Enters. Wisconsin, Inc.*, 259 F.3d 799 (7th Cir. 2001) (finding no violation of the FMLA to discharge an employee where the employer learned of the employee's embezzlement while the employee was on FMLA leave: "[t]he fact that the leave permitted the employer to discover the problems cannot logically be a bar to the employer's ability to fire the deficient employee").

d. Fraudulent Attainment of FMLA Leave. The regulations provide that "an employee who fraudulently obtains FMLA leave from an employer is not protected by FMLA's job restoration or maintenance of health benefits provisions." 29 C.F.R. § 825.216(d). *See also Vail v. Raybestos Products, Co.,* 533 F.3d 904 (7th Cir. 2008) (affirming summary judgment in favor of employer because it "clearly showed that [the plaintiff] was discharged based on the employer's honest belief that she was abusing her family leave by spending it working for another business").

e. Changes to the Job During Leave. Generally, if an employee's position was eliminated while the employee was on leave, the employer is not required to reinstate the employee. 29 U.S.C. § 2614(a)(3)(B); 29 C.F.R. § 825.216(a)(1). *See, e.g.,*

Ilhardt v. Sara Lee Corp., 118 F.3d 1151 (7th Cir. 1997) (no obligation to reinstate employee because responsibility for reinstatement ends at time of layoff). If a shift has been eliminated, or overtime has been decreased, an employee would not be entitled to return to work that shift or the original overtime hours upon restoration. However, if a position on, for example, a night shift has been filled by another employee, the employee is entitled to return to the same shift on which employed before taking FMLA leave. 29 C.F.R.§ 825.216(a)(2).

3. No Waiver of the FMLA Rights. FMLA rights may not be waived. 29 CFR § 825.220(d). The regulations explicitly state that the prohibition on waivers does not prevent the settlement of past FMLA claims by employees without the approval of a court or the DOL. This language is in reaction to the Fourth Circuit's position in *Taylor v. Progress Energy*, 493 F.3d 454 (4th Cir. 2007), which held that the waiver language in the regulations prevents employees from independently settling past claims for FMLA violations with employers without the approval of the DOL or a court. In *Whiting v. Johns Hopkins Hosp.*, 680 F. Supp. 2d 750 (D. Md. 2010), the court held that the DOL regulation applies retroactively and granted summary judgment to the employer on the plaintiff's FMLA claim based on a general release of claims she signed as part of the resolution of an EEOC discrimination charge that was resolved before she filed her FMLA lawsuit.

4. Paid Time Off. When an employee has available paid vacation, personal, or family leave, an employee may unilaterally substitute the paid leave for unpaid leave time available under the FMLA. However, if the employer's paid leave policy does not allow leave to care for a child, spouse, or parent the employer is not required to allow substitution. An employee may also substitute available unpaid sick, disability, or medical leave to the extent the leave meets the usual requirements of the sick, disability, or medical leave policy. *See Strickland v. Water Works and Sewer Board of Birmingham*, 239 F.3d 1199 (11th Cir. 2001) (an employee cannot be denied FMLA rights because he took paid sick leave. FMLA leave must run either sequentially or concurrently with paid sick leave).

The Seventh Circuit has held that an employer violated the FMLA by requiring an employee who was receiving disability pay while on FMLA leave to substitute paid sick and vacation leave. *See Repa v. Roadway Express, Inc.*, 477 F.3d 938 (7th Cir. 2007). In *Repa,* the court applied a DOL regulation, which states in part, "[d]isability leave for the birth of a child would be considered FMLA leave for a serious health condition and counted in the 12 weeks of leave permitted under FMLA. Because the leave pursuant to a temporary disability benefit plan is not unpaid, the provision for substitution of paid leave is inapplicable . . ." The court rejected the employer's argument that this regulation only applies to FMLA leave for the birth of a child. Finding the regulation applicable, the court held it was improper for the employer to require the employee to substitute paid leave for FMLA leave.

O. Prohibited Act Provision. The new regulations provide that all persons (whether or not employers) are prohibited from discriminating against any person (whether or not an employee) because that person has filed a charge, given information about, or testified in, a proceeding relating to rights under the FMLA. Thus, even if the employer employs less than fifty employees, it could violate the FMLA by either discriminating against an applicant based on the applicant's FMLA absences with a prior employer or by restraining or attempting to restrain a leased employee's use of the FMLA leave. *See Duckworth v. Pratt & Whitney, Inc.*, 152 F.3d 1 (1st Cir. 1998) (applicant may sue claiming failure to hire was due to FMLA-protected absences during previous employment).

Additionally, an employer is prohibited from structuring its workforce to avoid FMLA requirements. For example, an employer may not transfer employees to different locations to keep the total number of employees at each location below fifty.

It is not, however, a prohibited act to place an employee on FMLA leave or to designate leave as FMLA leave when the employee does not consent to the leave of absence or wish it to be considered FMLA leave. *See, e.g., Moritz-Ciancutti v. Avanti Press, Inc.*, Case No. 95-00957-CIV-Highsmith (S.D. Fla. 1996); *Haggard v. Farmers Ins. Exch.*, 68 Empl. Prac. Dec. (CCH) P44105, 1996 U.S. Dist. LEXIS 4078 (D. Or. 1996) (employer did not violate FMLA by charging an employee's leave time against the employee's accrued vacation rather than sick leave as the employee requested). *But see Foraker v. Apollo Group,* 2006 U.S. Dist. LEXIS 85737 (D. Ariz. Nov. 22, 2006) (denying defendant's motion for judgment as a matter of law after a jury entered a verdict in favor of the plaintiff, finding that the defendant retaliated against him for taking FMLA leave by placing him on paid administrative leave; the court applied the standard set forth by the U.S. Supreme Court in *Burlington Northern v. White*, 548 U.S. 53 (2006), and held that a reasonable employee likely would find such an administrative leave to be "materially adverse" as required by *Burlington*).

P. Penalties for Noncompliance. Employees can recover lost wages, salary or employment benefits, along with any actual monetary losses suffered due to FMLA violations. The prevailing employee may also obtain injunctive relief, attorneys' fees, and liquidated damages in an amount equal to the amount of lost wages, salary, benefits, or other compensation or actual monetary losses. Even if the employer pays the employee for lost wages, including interest, it may still be liable for liquidated damages. *See Jordan v. U.S. Postal Service,* 379 F.3d 1196 (10th Cir. 2004). The employer can avoid liquidated damages only if it can prove that the violation was in good faith and that it had reasonable grounds to believe that its actions did not violate the FMLA. The complicated nature of the FMLA regulations, and the fact that the employer was not aware that they applied to a particular absence, does not amount to "good faith" justifying a denial of liquidated damages. *Morris v. VCW, Inc.*, 3 Wage & Hour Cas. 2d (BNA) 1272 (W.D. Mo. 1996). Neither punitive damages nor damages attributed to stress are allowable under the FMLA. *Rodgers v. City of Des Moines,* 435 F.3d 904 (8th Cir. 2006) (FMLA does not permit recovery for emotional distress damages (citing cases)); *Graham v. State Farm Mut. Ins. Co.,* 193 F.3d 1274 (11th Cir. 1999).

To recoup attorneys' fees, the employee must achieve a favorable verdict from the court. A resolution of the case prior to a judicial determination may not entitle the employee to fees. *Stomper v. Amalgamated Transit Union*, 27 F.3d 316 (7th Cir. 1994) (interpreting the LMRDA in accordance with the FLSA and FMLA language). This result is substantially different than under Title VII of the Civil Rights Act of 1964. Under Title VII, the courts have repeatedly held similar language entitles a prevailing party to some award of attorneys' fees regardless of the actual outcome of the lawsuit, as long as some significant benefit is obtained.

Employee is Entitled to a Jury Trial. The FMLA does not expressly provide for the right to a jury trial. However, the structure of the remedial provisions of the FMLA, the reference in the FMLA's legislative history to the FLSA, and other fragments of FMLA legislative history reveal Congress's intent to create a right to a jury trial in the FMLA. Some courts have held that the FMLA includes the right to a jury trial. *See, e.g., Frizzell v. Southwest Motor Freight*, 154 F.3d 641 (6th Cir. 1998).

Penalties for Failing to Follow Posting Requirements. The DOL may charge an employer with a civil money penalty for failing to post required notices. 29 C.F.R. § 825.402. Typically, the DOL will only impose a penalty if it determines that the violation was willful.

Civil money penalties are available only to the DOL. An employee cannot recover damages from an employer who fails to comply with the FMLA's notice requirements if the employee is granted leave, restored to his or her position, and suffers no harm by the employer's failure to comply with the notice requirements. *See Graham v. State Farm Mut. Ins. Co.*, 193 F.3d 1274 (11th Cir. 1999) (failure to comply with posting and notice requirements does not state separate cause of action where employee was not harmed by failure); *Blumenthal v. Murray*, 946 F. Supp. 623 (N.D. Ill. 1996) (no private right of action for violation of the FMLA's notice requirements). However, if posters are not properly placed within the workplace, the employer may be prevented from asserting that an employee failed to furnish proper notice of the need for FMLA leave. 29 C.F.R. § 825.300(b).

Q. Individual Liability. Individuals (i.e., supervisors, owners, etc.) can be personally liable for violations of the FMLA. The FMLA definition of employer is the same as that found in the FLSA. The comments to the final regulations specifically state that "any person who acts directly or indirectly in the interest of an employer to any of the employer's employees" is an "employer" under the FMLA. Thus, not only can employees sue their employer for a violation of the FMLA, but employees may also sue the person who made the decisions regarding their leave. *See, e.g., Bryant v. Delbar Prods., Inc.*, 18 F. Supp. 2d 799 (M.D. Tenn. 1998) (individual manager held liable as "employer" along with the company defendant under the FMLA).

R. No State Immunity. The U.S. Supreme Court has held that the Eleventh Amendment does not protect the state employers from suit under the FMLA family care provisions. *See Nevada Dept. of Human Resources v. Hibbs,* 538 U.S. 721 (2003).

S. Statute of Limitations. A civil action under the FMLA must be brought within two years of the last event constituting a violation unless the employee can show that the violation was willful. An action can be brought within three years of the last event constituting a willful violation. Willful violations are those in which an employer "knew or showed reckless disregard for the matter of whether its conduct was prohibited." 29 C.F.R. § 825.400(b).

T. Health Benefits.

1. Continuation of Benefits. The FMLA requires that employers maintain coverage and continue payment of premiums under any "group health plan . . . on the same conditions as coverage would have been provided if the employee had been continuously employed during the entire leave period." 29 C.F.R. § 825.209.

If, however, the employee's FMLA leave is unpaid, the regulations provide that the employer may require that payment be made to the employer or to the insurance carrier, but no additional charge may be added to the employee's premium payment for administrative expenses (unlike COBRA, which permits a two percent add-on, in addition to paying the employer and employee portions of the premium). Employees may be required to pay their share of premium payments in any of the following ways:

- Payment would be due at the same time it would be made if made by payroll deduction;
- Payment would be due on the same schedule as payments are made under COBRA (note, however, that the taking of the FMLA leave is not a qualifying event under COBRA);
- Payment would be prepaid pursuant to a cafeteria plan at the employee's option;
- The employer's existing rules for payment by employees on "leave without pay" would be followed if such rules do not require payment prior to the

commencement of the leave of the premiums that will become due during a period of unpaid FMLA leave; or

- Another system voluntarily agreed to between the employer and the employee, which may include prepayment of premiums (such as through advance increased payroll deductions when the need for FMLA leave is foreseeable). 29 C.F.R. § 825.210(c)(1-5).

The employer must provide employees with advance written notice of the terms and conditions under which employee contributions will be required and may not require any more of an employee on FMLA leave than what would be required of an employee on unpaid leave. 29 C.F.R. § 825.210(d) and (e).

The DOL has issued an opinion letter stating that a dental plan that meets the Labor Department's definition of a "group health plan" must be continued during FMLA leave. *See* DOL Opinion Letter, FMLA20066-6-A (October 5, 2006). In this case, the employer paid 100% of the insurance premiums and employed a plan administrator to assist employees in handling disputed claims. The employer could grant exceptions for claims denied by the plan administrator. The DOL determined that, based on the facts presented, the dental plan met the definition of group health plan and did not fall within the exclusions found at 29 C.F.R. §§ 825.800 and 825.209(a), under which some health programs are excluded from the definition of group health plan and do not have to be continued during FMLA leave. Thus, the DOL opined that that the employer is required to continue its dental coverage during FMLA-covered leave periods.

Employees who contribute towards health insurance while at work must continue to do so while on leave and must pay any increase in insurance premiums that occur while on leave. If the employee is required to substitute paid leave for FMLA leave, the contributions may be deducted from the employee's paycheck if that is the usual method of payment of the employee's share of the costs.

The DOL also recently issued an opinion letter stating that an employer would not violate the FMLA by asking an employee on FMLA leave to vacate company provided lodging as long as the employer's policy is established and uniformly applied to employees on non-FMLA leave as well as those on FMLA leave. DOL Opinion Letter, FMLA2006-1-A, January 17, 2006.

IRS Regulations Regarding Cafeteria Plans and the FMLA. The Internal Revenue Service (IRS) has issued regulations that provide guidance to employers on how they can satisfy their FMLA obligations with respect to their cafeteria plans. Under the regulations, an employee who takes FMLA leave must be allowed to either: (1) revoke coverage under the employer's group health plan for the course of the leave; or (2) continue participating in the employer's group health plan, with an option to discontinue coverage and premium payments during the course of the leave. The employer does not haves to allow the employee to revoke coverage, but if this is not offered, the employer should be prepared to pay the employee's share of the premiums in addition to the employer's normal share. An employee cannot be compelled to continue coverage and pay the premiums during the entire course of their FMLA leave.

If the employee chooses to revoke coverage, the employer must ensure that group health benefits are reinstated (under the same terms and conditions as before the employee took leave, subject to any change in benefit levels) when the employee returns from leave. If the employee elects to continue group health benefits, the benefits must be provided under the same terms and conditions as if the employee had continued to work. Continuing coverage requires that the standard premium be paid while the

employee is away, however, the employee may have options as to the method of payment, including: (1) making premium payments along the way; (2) paying in advance; and (3) making payment upon return from leave. The payment options need to be offered on terms at least as favorable as the payment terms offered to employees not on FMLA leave. The employer cannot require advance payment.

2. Failure to Pay Insurance Premium. An employer is not required to continue health insurance if an employee on FMLA leave fails to make a premium payment within thirty days of the date the payment is due (assuming proper notice of the payment requirement is given). 29 C.F.R. § 825.212(a). An employer must, however, give at least fifteen days notice that the premium payment is late and that if the payment is not received within fifteen days (or longer if the remaining time is more than fifteen days prior to cancellation of coverage) coverage will cease. An employer is prohibited from discontinuing coverage if it fails to give the fifteen-day notice. 29 C.F.R. § 825.212.

If coverage is permitted to lapse during FMLA leave and the employee returns to work, the employer must immediately return the employee to the coverage and benefits in place before the leave was taken. The employer may not require the employee to "meet any qualification requirements imposed by the plan, including any new pre-existing condition waiting period, to wait for an open season, or to pass a medical examination to obtain reinstatement of coverage." 29 C.F.R. § 825.212(c).

The DOL contends that allowing insurance coverage to lapse causes the employer to become a self-insurer of the employee until the employee is covered again even if the lapse is based on the employee's failure to make required contributions. The possibility of lapsing also arises in other areas such as life insurance. The regulations do not require employers to continue life insurance coverage when the employee is on FMLA leave. Upon return from FMLA leave, however, the employee must have the same benefits the employee would have had if the leave not been taken. Therefore, the employee's life insurance coverage must be reinstated upon return to work and any failure of coverage causes the employer to be a self-insurer for the uncovered period for the amount of the life insurance policy. The regulations also provide that instead of permitting coverage to lapse, the employer may make payments on behalf of the employee and later recover that amount from the employee by filing a lawsuit. 29 C.F.R. § 825.212(b).

3. FMLA Leave Option Alternatives for Insurance Policies. As an alternative to advancing employee insurance premiums, employers can negotiate with their insurance carrier to have it accommodate FMLA leave options in the employer's policy, in the same manner in which employers negotiated with insurers when COBRA went into effect. For example, an insurance carrier could agree to:

- Waive the waiting period for employees whose insurance is canceled for nonpayment of premiums during qualified FMLA leave (i.e., negotiate with the insurer for policy provisions that allow immediate and unconditional reinstatement of coverage upon return from FMLA leave); or
- Obtain the insurer's agreement to return the premium payments for those employees who do not return to work after FMLA leave. For those employees who return, obtain their agreement that advanced premiums may be deducted from their wages.

4. Restrictions on Ability to Recover Premium Payments from Employees. Certain restrictions apply when the employer chooses to recover its share of premium payments made on behalf of an employee on FMLA leave who does not return to work.

An employer may file suit to recover its share of health insurance premiums paid during a period of unpaid FMLA leave if the employee fails to return to work (or returns to work for less than thirty calendar days) after the employee's FMLA leave entitlement has been exhausted or expires. 29 C.F.R. § 825.213. The employer cannot, however, recover such payments if the employee fails to return to work because of a serious health condition that would entitle him or her to FMLA leave or because of circumstances beyond the employee's control. 29 C.F.R. §§ 825.213(1) and (2). If the employee does not return to work because of a serious health condition, the employer may require medical certification of the condition. If the certification is not made within thirty days of the employer's request, the employer may make a claim for premium payments against the employee.

An employer may not recover contributions made during paid leave. (This restriction makes sense since deductions should be taken from the employee's check before it is given to the employee.)

Self-insured employers may recover only the employer's share of the premium recoverable under COBRA. 29 C.F.R. § 825.213(d). Self-insured employers must also recognize that the employee's failure to return to work, and the money that may be owed by the employee to the employer for advanced insurance premium payments, is separate from its fiduciary obligation as an insurer to continue to pay claims incurred during FMLA leave. 29 C.F.R. § 825.213(e).

U. Employee Notice to Employer.

1. Foreseeable Leave (§ 825.302). The regulations re quire an employee to provide thirty days notice when the need for FMLA leave is foreseeable or notice as soon as practicable when the need for leave is foreseeable but 30 days notice is not practicable. Where the employee provides less than 30 days notice, the employee must respond to a request from the employer to explain why 30 days notice was not practicable.

For foreseeable leave due to a qualifying exigency, notice must be provided as soon as practicable, regardless of how far in advance such leave is foreseeable.

The new regulations delete language that defines as soon as practicable as "ordinarily . . . within one or two business days of when the need for leave becomes known to the employee." Instead, it is defined to mean as soon as both possible and practical, depending on all the circumstances. If the employee becomes aware of the need for leave less than 30 days in advance, the employee generally should provide notice either the same day or next business day.

When an employee seeks leave for the first time for a particular qualifying reason, the employee need not mention the FMLA or expressly assert rights under it. If leave is due to a condition for which the employer has previously provided FMLA leave, the employee must specifically reference the qualifying reason for the leave or the need for FMLA leave.

If an employee has been certified for FMLA leave for multiple reasons, the employer may inquire to determine for which reason the leave is needed. The employee must respond to such questions, or the employer may deny the leave if it is unable to determine if it is FMLA-qualifying.

Absent unusual circumstances, an employee may be required to comply with the employer's notice and call-in procedures (as long as they do not require notice sooner than required by the regulations), such as requiring an employee to contact a specific

individual. If the employee fails to comply, and no unusual circumstances justify the failure, leave may be delayed or denied.

2. Unforeseeable Leave (§ 825.303). When FMLA is unforeseeable, employees are required to provide notice to the employer as soon as practicable under the facts and circumstances of the case. Formerly, employees were not necessarily required to provide advance notice as prescribed in an employer's internal rules and procedures in cases of the employee's own serious health condition or in cases of caring for a family member with a serious health condition. However, the new regulations note that absent exigent circumstances, it generally should be practicable for employees to provide notice of unforeseen leave within the time prescribed by the employer's usual and customary notice requirements applicable to such leave.

Under the new regulations, an employee must provide sufficient information to enable the employer reasonably to determine whether the FMLA applies to the employee's requested leave and the anticipated duration of the absence, if known. *See* § 825.303. *See also Woods v. DaimlerChrysler Corp.*, 409 F.3d 984 (8th Cir. 2005) (statement that employee is stressed and needs time off is not sufficient to substantiate the need for FMLA leave); *Satterfield v. Wal-Mart Stores, Inc.*, 135 F.3d 973 (5th Cir. 1998) (in light of employee's history of unexcused absences, the employer had no duty to inquire further when the employee's friend stated that employee was in a lot of pain and would not work).

Employees who are seeking FMLA qualifying leave for the first time need not mention or expressly assert rights under the FMLA. If an employee seeks leave due to a qualifying reason for which the employer has previously provided the employee with FMLA-protected leave, the employee must specifically reference the qualifying reason for leave or need for FMLA leave. Employers are still required to obtain additional information through informal means, and now employees are obligated to respond to employers' questions designed to determine whether an absence is potentially FMLA-qualifying. An employee's failure to respond may result in denial of FMLA protection if the employer is unable to determine whether the leave is FMLA-qualifying.

The new regulations in added sub-part (c) require employees to comply with the employer's customary notice procedures when requesting leave, absent unusual or emergency-related circumstances. If an employee does not comply with the employer's customary notice procedures, and no unusual or emergency-related circumstance justifies failure to comply, FMLA-protected leave may be delayed or denied.

3. Failure to Give Sufficient Notice (§ 825.304). FMLA leave may still be delayed under the new regulations due to the employee's failure to provide the required notice. In order to delay FMLA leave, it must be clear that the employee had actual notice of the FMLA notice requirements. Employers may satisfy this condition by properly posting the required notice at the worksite where the employee is employed and providing the required notice in either an employee handbook or through employee distribution.

Where the need for leave is foreseeable at least 30 days in advance and an employee fails to provide timely advance notice with no reasonable excuse, the employer may delay FMLA coverage until 30 days after the date the employee provides notice. The need for leave and the approximate date leave would be taken must have been clearly foreseeable to the employee 30 days in advance of the leave.

Under the new regulations, when leave is foreseeable fewer than 30 days in advance and the employee fails to give notice as soon as practicable under the circumstances, the extent to which an employer may delay FMLA leave is dependent upon the facts of

the particular case. This section also states that the extent to which an employer may delay FMLA leave when the need for FMLA leave is unforeseeable is likewise dependent upon the facts and circumstances.

Employers may waive an employee's FMLA notice obligations or the employer's own internal rules on leave notification. If the employer does not waive notice or its internal leave rules, the employer may take appropriate action for failure to follow its customary notification rules, absent unusual circumstances. These actions, however, must be taken in a manner that do not discriminate against employees taking FMLA leave and the employer's internal rules must not be inconsistent with § 825.303(a).

4. Notice of Planned Medical Treatment (§ 825.302(e)). When taking leave for a planned medical treatment, an employee is required to discuss the timing and scheduling of the treatment with the employer so that a mutually beneficial date and time of leave can be determined. For example, if an employee who provides notice of the need to take FMLA leave on an intermittent basis for planned medical treatment neglects to consult with the employer to make a reasonable effort to arrange the schedule of treatments so as not to unduly disrupt the employer's operations, the employer may initiate discussions with the employee and require the employee to attempt to make such arrangements, subject to the approval of the health care provider. See §§ 825.302; 825.203; 825.205.

V. FMLA Policy Options Available to Employer. DOL regulations give employers certain options when implementing a FMLA policy.

1. Medical Certification – General Rule (§ 825.305). An employer may require that an employee's need for leave to care for a covered family member's serious health condition or because of the employee's own serious health condition be supported by a certification issued by the employee's or family member's health care provider. Additionally, an employer may require certification of an employee's need for leave due to a qualifying exigency or to care for a covered servicemember with a serious injury or illness.

Generally, the employer should request certification when the employee gives notice of the need for leave or within five business days thereafter. If the leave is unforeseen, the employer should request certification within five business days after the leave commences. The employee must provide the requested certification within fifteen calendar days of the employer's request, unless this is not practicable or the employer provides more than fifteen days to return the certification.

If the employee does not provide a complete and sufficient certification, the employer must so advise the employee and state in writing what additional information is needed. A certification is insufficient if the information is vague, ambiguous, or non-responsive. The employee must cure any deficiency within seven calendar days, unless not practicable under the circumstances. If the deficiencies are not cured in a resubmitted certification, or if the employee fails to provide any certification, the employer may deny the leave.

The employee (or family member) is responsible for providing any necessary authorization to the health care provider to release a complete and sufficient certification to the employer. This also applies to recertifications, second or third opinions, and fitness for duty certifications.

If certification is for the serious health condition of the employee or family member and lasts more than a single leave year, a new certification may be required in each subsequent leave year.

2. Content of Medical Certification for Leave Taken Because of an Employee's Own Serious Health Condition or the Serious Health Condition of a Family Member (§ 825.306).

The regulations provide separate certification forms for the employee's own serious health condition and the serious health condition of a covered family member.

The medical certification requirements are revised as follows:

- The regulations now require the health care provider's fax number and specialization, in addition to the provider's name, address, telephone number and type of medical practice.
- The regulations add guidance regarding what constitutes appropriate medical facts regarding the patient's condition for which FMLA leave is required. Appropriate medical facts may include information such as symptoms, hospitalization, doctors' visits, whether medication has been prescribed, referrals for evaluation or treatment, or any other regimen of continuing treatment.
- The regulations allow the health care provider to include a diagnosis of the patient's condition. However, a diagnosis is not required if sufficient medical facts are set forth by the health care provider to establish the need for FMLA leave.
- The regulations require the health care provider to provide sufficient information to establish that the employee cannot perform the essential functions of his or her job and the likely duration of such inability.
- The regulations require the health care provider to certify that intermittent leave or reduced schedule leave is medically necessary.

The regulations eliminate language in the prior regulations that prohibited employers from seeking the above information if the employer's sick leave plan requires less information. The new regulations incorporate language from the prior regulations that explained the interaction between workers' compensation and the FMLA, and include a provision that states that if the employer may request additional information from the workers' compensation health care provider, the FMLA does not prohibit the employer from following the workers' compensation provisions. Such information may be considered in determining FMLA leave eligibility.

a. Interaction between the ADA and FMLA. The regulations add a section that clarifies that where a serious health condition may also be a disability, employers are not prevented from following the procedures under the ADA for requesting medical information. Such information may be considered in determining FMLA leave eligibility.

b. Medical Release Forms. The regulations contain a new section clarifying that employees are not required to sign a release of medical forms as a condition of taking FMLA leave.

3. Authentication and Clarification of Medical Certification for Leave Taken Because of an Employee's Own Serious Health Condition or the Serious Health Condition of a Family Member; Second and Third Opinions (§ 825.307).

If an employee submits a complete and sufficient certification signed by a health care provider, the employer may not request additional information from the health care provider. However, the employer may contact the health care provider for authentication or clarification of a medical certification after the employer has given the employee an

opportunity to cure any deficiencies. The employer may do so through a health care provider, human resources professional, leave administrator, or management official, but **not** through the employee's direct supervisor.

"Authentication" means providing the health care provider with a copy of the certification and requesting verification that the information contained on the certification form was completed and/or authorized by the health care provider who signed the document; no additional medical information may be requested. "Clarification" means contacting the health care provider to understand the handwriting on the medical certification or to understand the meaning of a response.

Employers may not ask health care providers for additional information beyond that required by the certification form. The requirements of the Health Insurance Portability and Accountability Act ("HIPAA") Privacy Rule must be followed.

It is the employee's responsibility to provide the employer with a complete and sufficient certification and to clarify the certification if necessary. If an employee chooses not to provide the employer with authorization allowing the employer to clarify the certification with the health care provider, and does not otherwise clarify the certification, the employer may deny the taking of FMLA leave.

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, from a health care provider of the employer's choosing. 29 C.F.R. § 825.307(b). The employer cannot employ the doctor providing the second opinion on a regular basis. If the opinions of the employee's and employer's health care providers differ, the employer may require the employee to obtain certification from a third health care provider at the employer's expense. This third opinion shall be final and binding. The employer and employee must jointly designate or approve the third health care provider.

The new regulations' provisions regarding obtaining a second and third medical opinion add a paragraph stating the consequences set forth in § 825.305(d) (i.e., the employer may deny the taking of FMLA leave) will apply if the employee or the employee's family member fails to authorize his or her health care provider to release all relevant medical information pertaining to the serious health condition at issue.

4. Recertification for Leave Taken Because of an Employee's own Serious Health Condition or the Serious Health Condition of a Family Member (§ 825.308).

If the medical certification indicates that the minimum duration of the condition is more than 30 days, unless the requirements of § 825.308(c) are met (explained below), an employer must wait until that minimum duration expires before requesting a recertification, but in all cases an employer may request a recertification of a medical condition every six months in connection with an absence by the employee.

Section 825.308(c) of the new regulations still permits recertifications in less than 30 days under any of the following circumstances:

a. The employee requests an extension of leave;

b. Circumstances described by the previous certification have changed significantly (e.g., the duration or frequency of the absence, the nature or severity of the illness, complications); or

c. The employer receives information that casts doubt upon the employee's stated reason for the absence or the continuing validity of the certification.

The regulations add a new section stating that the employer may ask for the same information when obtaining recertification as is permitted in the original certification. The employee has the same obligations to participate and cooperate in the recertification process as in the initial certification process. Notably, the employer may provide the health care provider with a record of the employee's absence pattern and ask the health care provider if the serious health condition and need for leave is consistent with such a pattern.

5. Mandatory Substitution of Paid Leave. Pursuant to the new regulations, an employee's ability to substitute accrued paid leave for unpaid FMLA leave is determined by the terms and conditions of the employer's normal leave policy. For instance, if an employer's paid sick leave policy prohibits the use of sick leave in less than full day increments, employees would have no right to use less than a full day of paid sick leave regardless of whether the sick leave was being substituted for unpaid FMLA leave. If the employee chooses, or the employer requires, substitution of paid leave, the employer must inform the employee that he or she must satisfy any procedural requirements of the paid leave policy only in connection with the receipt of such payment. If the employee does not comply with the requirements, the employee is not entitled to paid leave, but is still entitled to unpaid FMLA leave. Employers may not discriminate against employees on FMLA leave in the administration of their paid leave policies. *See* 29 C.F.R. § 825.207.

If neither the employee nor employer elects substitution of paid leave, the employee remains eligible for all paid leave to which he or she is entitled. Paid leave for reasons that do not qualify for FMLA leave may not be counted as FMLA leave. Leave taken under a disability leave plan would be considered FMLA leave for a serious health condition, if it meets the FMLA's requirements. Because leave pursuant to a disability benefit plan is not unpaid, the provision for substitution of the employee's accrued paid leave is inapplicable, and neither the employee nor the employer may require the substitution of paid leave. However, if state law permits, they may agree to have paid leave supplement the disability plan benefits. *See* 29 C.F.R. § 825.207.

6. Reports of the Employee's Intent to Return to Work ("Status Reports"). An employer may require an employee on FMLA leave to report periodically on his or her status and intent to return to work. *See* 29 C.F.R. § 825.311. If an employee gives unequivocal notice of intent not to return to work, the employer's obligations under the FMLA end. *Id. See also Paasch v. City of Safety Harbor*, 915 F. Supp. 315 (M.D. Fla. 1995) (FMLA leave entitlement was terminated by employee's resignation), *aff'd*, 78 F.3d 600 (11th Cir. 1996). FMLA obligations continue if an employee indicates she or he may be unable to return to work but expresses a continuing desire to do so. 29 C.F.R. § 825.311. Therefore, even if an employee has no medical chance of returning to work but expresses a desire to do so, the employee's FMLA rights must remain intact (i.e., health insurance must continue under the same terms prior to taking leave).

Requiring an employee to report on his or her status and intent to return to work will assist with scheduling problems that may arise when an employee notifies the employer he or she wants to return to work (particularly since the employer must return the employee to work within two business days). At least one court has held that when an employer has a uniform policy of disciplining and discharging employees who do not call in and report on their status and intent to return to work for all their leaves of absence, the employer could properly discharge an employee on FMLA leave when the employee failed to make these status reports. *See Reich v. Midwest Plastic Engineering, Inc.*, No.

1:94-CV-525, 1995 WL 514851, 2 Wage & Hour Cas. 2d (BNA) 1409 (W.D. Mich. 1995), *aff'd,* 113 F.3d 1235 (6th Cir. 1997).

7. Fitness-for-Duty Certificate. As a condition to restoring an employee to work following FMLA leave taken due to an employee's serious health condition, an employer may require the employee to obtain and present a certification from the health care provider that the employee is fit for duty upon his or her return to work. The designation notice (required in § 825.300) must advise the employee if the employer will require a fitness-for-duty certification to return to work and whether that fitness-for-duty certification must address the employee's ability to perform the essential functions of the employee's job. The regulations clarify that an employee has the same obligations to participate and cooperate in the fitness-for-duty certification process as in the initial certification process.

The regulations provide that an employer may seek a fitness-for-duty certification only with regard to the particular health condition that caused the employee's need for FMLA leave. The certification from the employee's health care provider must certify that the employee is able to resume work. Additionally, an employer may require that the certification specifically address the employee's ability to perform the essential functions of the employee's job. The employer may contact the employee's health care provider for purposes of clarifying and authenticating the fitness-for-duty certification. Clarification may be requested only for the serious health condition for which FMLA leave was taken. The employer may not delay the employee's return to work while contact with the health care provider is being made. No second or third opinions on a fitness-for-duty certification may be required.

An employer may delay restoration to employment until an employee submits a required fitness-for-duty certification unless the employer has failed to provide notice of the requirement. If an employer provides the required notice, an employee who does not provide a fitness-for-duty certification or request additional FMLA leave is no longer entitled to reinstatement under the FMLA.

Generally an employer is not entitled to a certification of fitness to return to duty for each absence taken on an intermittent or reduced leave schedule. However, an employer is entitled to a certification of fitness to return to duty for such absences up to once every 30 days (or longer) if reasonable safety concerns exist regarding the employee's ability to perform his or her duties. If the employer requires a certification under such circumstances, it must inform the employee at the same time it issues the designation notice. Reasonable safety concerns mean a reasonable belief of significant risk of harm to the individual employee or others. The employer cannot terminate employment while awaiting fitness for duty certification for an intermittent or reduced leave absence.

The new regulations expressly state that after an employee returns from FMLA leave, the ADA requires any medical examination be job related and consistent with business necessity. Additionally, if an employee's serious health condition may also be a disability within the meaning of the ADA, the FMLA does not prevent the employer from following the procedures for requesting medical information under the ADA.

8. Key Employees. A "key employee" is a salaried employee who is among the top ten percent of the highest paid of all employees of the employer within seventy-five miles of the employee's worksite. 29 C.F.R. § 825.217(a). A key employee may not be denied leave, but may be denied restoration to employment if the restoration to employment would cause "substantial and grievous economic injury to the operations of the employer." 29 C.F.R. § 825.218.

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. At the same time, the employer must also fully inform the employee of the potential consequences with respect to reinstatement and maintenance of health benefits if the employer should determine that substantial and grievous economic injury to the employer's operations will result if the employee is reinstated from FMLA leave. If such notice cannot be given immediately because of the need to determine whether the employee is a key employee, it shall be given as soon as practicable after being notified of a need for leave (or the commencement of leave, if earlier). As soon as an employer makes a good faith determination, based on the facts available, that substantial and grievous economic injury to its operations will result if a key employee who has given notice of the need for FMLA leave or is using FMLA leave is reinstated, the employer shall notify the employee in writing of its determination, that it cannot deny FMLA leave, and that it intends to deny restoration to employment on completion of the FMLA leave. The employer must serve this notice either in person or by certified mail. 29 C.F.R. § 825.219.

Even if the key employee does not return at the time, the employer must revisit this issue at the conclusion of the employee's leave period and determine whether reinstatement of the employee to his or her position or to an equivalent position would constitute a substantial and grievous economic injury to the employer. When determining whether a "substantial and grievous economic injury" to the employer's operations would occur, the employer may consider whether the employee's replacement would be temporary or permanent, the resulting cost of filling the vacancy, and whether restoration to the position or to an equivalent position would result in a long-term economic injury, or would threaten the financial viability of the organization. 29 C.F.R. §§ 825.218(b) and (c). This situation would most likely arise if the key employee's replacement was "permanent" or under a contract, and the cost of breaking that contract would cause substantial and grievous economic injury to the employer. In most cases, the burden of proving substantial and grievous economic injury will be difficult. The final regulations provide that the "substantial and grievous economic injury" test is more stringent than the "undue hardship" defense under the ADA.

9. Married Employees of the Same Employer. The combined total of workweeks of FMLA leave to which a husband and wife employed by the same employer and eligible for FMLA leave are entitled is limited to twelve workweeks during any twelve-month period for the following three reasons (in any combination): (a) for the birth and care of the newborn child; (b) for placement of a son or daughter for adoption or foster care, or to care for the employee's child after placement; (c) to care for a parent (but not a parent "in-law") with a serious health condition. 29 C.F.R. § 825.201(b).

The leave limitation for married couples for the above mentioned reasons does not apply to leave taken for the following reasons: (a) to care for the employee's spouse, son or daughter, who has a serious health condition; or (b) for a serious health condition that makes the employee unable to perform the employee's job. If FMLA leave was taken for these reasons, each spouse is entitled to a full twelve workweeks of FMLA leave in any twelve-month period.

W. Employers' Notice Requirements. The regulations clarify the rights and obligations of both employers and employees with respect to giving notice under the FMLA.

1. General Notice Requirements (§ 825.300(a)). Employers must post a notice explaining the FMLA's provisions and providing information concerning the procedures

for filing complaints of violations of the Act with the Wage and Hour Division. If employers have handbooks or other written materials concerning benefits and leave, such materials must include general FMLA notice information. Employers who do not have such materials must provide the general notice to new employees at the time of hire, rather than (as under the old rules) waiting until an employee requests FMLA leave. *See* 29 C.F.R. § 825.300(a)(3). Section 825.300(a)(4) provides that employers may meet the general notice requirement by duplicating the prototype general notice in the regulations (Appendix C), or by using another format with all the same information as the prototype.

2. Electronic Posting (§ 825.300(a)(1)). An employer can meet the posting requirement through an electronic posting of the general notice, as long as the employer otherwise meets the requirements of the posting section. To use the electronic posting method, the employer must make sure that all applicants and employees have access to the information. Thus, for example, all employees must have either employer-provided computer access to it, or otherwise be able to access it electronically. If some do not, then a paper posting is still necessary. In the case of applicants, if the information is only available on an intranet to which applicants do not have access, the employer must post a paper notice in an area where notices for applicants customarily are posted.

3. Language Requirements (§ 825.300(a)(4)). Employers with a "significant portion" of employees not literate in English must provide the poster and general notice in a language in which the employees are literate. Employers with multiple locations may post notices in different languages at different locations, if the posted notices are provided in languages in which the employees at each location are literate.

4. Eligibility Notice (§ 825.300(b). The eligibility determination process set forth in § 825.300(b) addresses only the statutory eligibility requirements – that is, employment by the employer for 12 months; 1,250 hours of service in the 12-month period immediately preceding the request for leave; and employment at a worksite where 50 or more employees are employed within 75 miles. Thus, the eligibility notice communicates to employees whether they meet this threshold eligibility requirement.

- **Additional Time to Notify Employees that Leave may be FMLA-Qualifying (§ 825.300(b)(1)).** An employer has five business days from the date an employee requests FMLA leave, or the employer acquires knowledge that an employee's leave may be FMLA-qualifying, to notify an employee of his or her right to take FMLA leave, absent extenuating circumstances. Under the old regulations, an employer had only two business days to respond to an employee's request for leave.
- **When Eligibility is Determined.** Section 825.300(b)(1) provides that employee eligibility is determined (and notice must be provided) at the commencement of the first instance of leave for each FMLA-qualifying reason in the applicable 12-month period. All FMLA absences for the same qualifying reason are considered a single leave and employee eligibility as to that reason for leave does not change during the applicable 12-month period.
- **Employer Must State why Employee is not Eligible for FMLA Leave (§ 825.300(b)(2)).** If an employee is not eligible for FMLA leave, the employer's notice to the employee must state at least one reason why the employee is not eligible.
- **Need for FMLA Leave During Same 12-Month Period for Different Reason (§ 825.300(b)(3)).** All FMLA absences for the same qualifying reason are

considered a single leave and the employee's eligibility does not change. If an employee applies for FMLA leave during the applicable 12-month period for a different reason and the employee's eligibility status has not changed, no additional eligibility notice is required. If, however, the employee's eligibility status has changed (e.g., if the employee has worked less than 1,250 hours of service for the employer in the 12 months preceding the commencement of leave for the subsequent qualifying reason or the size of the workforce at the worksite has dropped below 50 employees), the employer must notify the employee of the change in eligibility status within five business days, absent extenuating circumstances.

5. Rights and Responsibilities Notice (§ 825.300(c)). The regulations require employers to provide notice of the employee's rights and responsibilities under the FMLA simultaneously with the eligibility notice. Additionally, the rights and responsibilities notice must be provided every time the eligibility notice is provided. The notice of rights and responsibilities must include the following information, as appropriate: a) that the leave may be counted against the employee's annual FMLA entitlement; b) any requirement that the employee furnish certification of a serious health condition, serious injury or illness, or qualifying exigency arising out of active duty or call to active duty status, and the consequences of failing to do so; c) the employee's right to substitute paid leave, whether the employer will require the 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; d) any requirement that the employee make premium payments to maintain health benefits, arrangements for making such payments and the consequences of failing to do so; e) the employee's status as a "key employee," the potential consequence that job restoration may be denied and the conditions for such denial; f) the employee's right to maintenance of benefits during the FMLA leave and restoration to the same or an equivalent job upon return from FMLA leave; and g) 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. The notice of rights and responsibilities may include other information, such as whether the employer will require periodic reports of the employee's status and intent to return to work, but is not required to do so.

- **Notice of Change of Information Required (§ 825.300(c)(4)).** If there is any change in the information contained in the rights and responsibilities notice, the employer must, within five business days of receipt of the employee's first notice of the need for FMLA leave following any such change, provide written notice referencing the prior notice and setting forth any of the information that has changed.
- **Electronic Distribution (§ 825.300(c)(6)).** The regulations allow the employer to distribute notices of rights and responsibilities electronically, as long as the employer can show that the employee has access to the information electronically. Caution: In some instances an employee may already be on leave and may not have access to an employer-provided computer.

6. Designation Notice (§ 825.300(d)). The employer must notify the employee when leave is designated as FMLA leave.

- **Timing of the Designation Notice (§ 825.300(d)(1)).** The regulations require that the employer notify the employee whether a leave of absence will be designated as FMLA leave within five business days, absent extenuating

circumstances, of when the employer has sufficient information to determine whether the leave is being taken for an FLMA-qualifying reason. Only one notice of designation is required for each FMLA-qualifying reason per applicable 12-month period regardless of whether the leave is continuous, intermittent or reduced schedule. If the employer determines that the leave will not be designated as FMLA leave, the employer must notify the employee of that determination. If the employer requires the employee to substitute paid leave for unpaid FMLA leave or requires that paid leave taken under an existing leave plan be counted as FMLA leave, the employer must inform the employee of this designation at the time of designating the FMLA leave.

- **Designation and Eligibility Notice may be Provided Simultaneously (§ 825.300(d)(2)).** The rules expressly permit the employer to provide the designation and eligibility notices simultaneously upon an employee's request for FMLA leave, if the employer has sufficient information to do so at that time.
- **Fitness-for-Duty Certification (§ 825.300(d)(3)).** If the employer will require an employee to provide a fitness-for-duty certification in order to return to work, the employer must notify the employee of this requirement no later than when it provides the designation notice. If the employer will require the fitness-for-duty certification to specifically address the employee's ability to perform the essential functions of his or her job, the employer must state this requirement in the designation notice and must include a list of the essential functions. If an employee handbook or other written documents clearly provide that a fitness-for-duty certificate will be required, written notice is not required, but verbal notice must be provided no later than with the designation notice.
- **Designation Notice must be in Writing (§ 825.300(d)(4)).** The designation notice must be in writing. If leave is not designated as FMLA-covered leave because it does not meet the requirements of the FMLA, the notice to the employee that the leave is not being designated as FMLA leave may be in the form of a simple written statement.
- **Change of Information in the Designation Notice (§ 825.300(d)(5)).** The regulations require the employer to notify the employee if the information provided in the designation notice changes, e.g., if the employee exhausts the FMLA leave entitlement. This notice must be provided within five business days of the receipt of the employee's first notice of need for leave following any change.
- **Notification of Amount of Leave Counted Against FMLA Entitlement (§ 825.300(d)(6)).** If the amount of leave needed is known at the time the employer designates the leave as FMLA-covered, then, in the designation notice, the employer must notify the employee of the amount of leave that will be counted against the employee's FMLA leave entitlement. In situations where the amount of leave to be taken is not known at the designation stage, for example when unforeseeable intermittent leave will be needed, the new regulations require the employer to inform the employee of the number of hours counted against the FMLA leave entitlement upon employee request, no more often than once in a 30-day period and only if FMLA leave was taken during that period. The new regulations permit the employer to verbally notify the employee of the hours counted against the FMLA leave entitlement and then follow up with written notification no later than the following payday (unless the next payday is in less than one week, in which case the notice must be no later than the subsequent

payday). The written notice may be in any form, including a notation on the employee's pay stub.

7. Consequences of Failing to Provide Notice. Section 825.301(d) permits an employer that did not timely designate leave to retroactively designate leave as FMLA-covered, with appropriate notice to the employee (as required by § 825.300), as long as the employer's failure to timely designate the leave does not cause harm or injury to the employee. Additionally, 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. However, the new regulations also clarify that an employer's failure to comply with the FMLA's notice requirements could constitute interference with, restraint of, or denial of the use of FMLA leave. If the employee can show harm as the result of the employer's failure to provide a required notice, the employer could be liable for the harm suffered as a result of the violation. This may include lost compensation and benefits, other monetary losses, and appropriate equitable or other relief, including employment, reinstatement, or promotion. These provisions were adopted in the wake of the U.S. Supreme Court's decision in *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81 (2002).

X. Handling Additional Leave Beyond the FMLA Requirements. Employers may wish or be required to provide additional leave beyond the twelve-week FMLA period. Whether the extension is the result of the employer's generous leave policies, state law, or is a reasonable accommodation under the ADA, the employer should be careful not to give the employee the impression that FMLA rights extend beyond the FMLA's twelve-week period.

Y. Record Keeping. The FMLA requires employers to keep records of the FMLA leave in the same manner as records are kept under the FLSA. Although the records need not be kept in any particular form, the regulations require that certain information regarding FMLA leave be recorded in a specific manner. FMLA leave should be designated and recorded on the records as "FMLA leave," and FMLA leave taken in increments of less than one day should be recorded by the lowest increment (one hour or less) used in the employer's payroll system when accounting for absences or use of leave.

Additionally, all records, notices, correspondence, policies, insurance premium payments, and records of any dispute between an employer and an employee regarding FMLA leave should be preserved. According to the DOL, if an employer fails to keep the required records, the employee will be presumed to be eligible for FMLA.

As with the ADA, the FMLA places strict confidentiality requirements on all records relating to medical certifications, recertifications, or medical histories of employees and their family members. The records must be kept separately from the employee's personnel file and be maintained confidential, except that:

- Supervisors and managers may be informed of an employee's work restrictions and necessary reasonable accommodations;
- First aid and safety personnel may be informed (when appropriate) if the employee's physical or medical condition might require emergency treatment; and
- Government officials investigating compliance with FMLA (or other pertinent laws) shall be provided relevant information upon request. 29 C.F.R. § 825.500.

Z. Implications Regarding Leased Employees/Joint Employers. (§ 825.106). According to the regulations, the determination of whether a Professional Employer Organization (PEO) is a joint employer depends on the economic realities of the situation, and must be based on all the facts and circumstances. PEOs that contract with client

employers merely to perform administrative functions – including payroll, benefits, regulatory paperwork, and updating employment policies – are not joint employers with their clients.

If, however, in a particular fact situation a PEO has the right to hire, fire, assign, or direct and control the employees, or if the PEO benefits from the work that the employees perform, that PEO might be a joint employer with the client employer, depending upon all the facts and circumstances. According to § 825.116(d), in determining whether an employer has a sufficient number of employees for FMLA coverage, in cases where a PEO is a joint employer of a client employer's employees, the client employer is only required to count employees of the PEO (or employees of other clients of the PEO) if the client employer jointly employed those employees.

In joint employment relationships, only the "primary" employer is responsible for giving required FMLA notices to employees, providing FMLA leave, and maintaining health benefits required by the FMLA. Where a PEO is a joint employer, the client employer usually would be the "primary" employer. (§ 825.106(c).)

AA. Successor/Predecessor Employer Liability. An eligible employee of a covered predecessor employer who commences FMLA leave before the business is sold is entitled to restoration to employment with the successor employer. According to the DOL, this type of predecessor liability applies regardless of the fact that the predecessor failed to give any information regarding this employee to the successor (unless, Ford & Harrison believes, you can show termination from employment would have occurred if leave were not taken). Therefore, this provision leaves open the possibility of an FMLA "surprise" to the successor. *See Jolliffe v. Mitchell*, 971 F. Supp. 1039 (W.D. Va. 1997). These issues should be addressed in the purchase agreement and during the due diligence phase of the purchase so that the buyer has notice of any FMLA leave. 29 C.F.R. § 828.107.

The successor is bound by the FMLA leave requirements regardless of whether the successor is actually a covered employer. In other words, even if the successor does not have fifty or more employees, it is required to reinstate any predecessor employee on FMLA during the transition period. 29 C.F.R. § 828.107. A successor that meets FMLA's coverage criteria must count periods of employment and hours worked for the predecessor for purposes of determining employee eligibility for FMLA leave. 29 C.F.R. § 825.107(c).

III. FMLA IMPACT ON OTHER LABOR LAWS

A. FMLA and the ADA.

1. Impact. The FMLA provides that "nothing" in its provisions "modifies or affects federal or state law prohibiting discrimination on the basis of . . . disability . . . under the Americans with Disabilities Act." An employer may have an obligation to extend an employee's leave of absence following FMLA leave as a reasonable accommodation of an employee's qualifying disability under the ADA. To see the EEOC's guidance on the interaction of the FMLA and the ADA, go to http://www.eeoc.gov/policy/docs/fmlaada.html.

Additionally, the FMLA does not pre-empt an action by an employee under the Rehabilitation Act claiming a failure to accommodate by granting a leave of absence. *McWright v. Alexander*, 982 F.2d 222 (7th Cir. 1992).

2. Employee's Choice. An employer cannot mandate that an employee take a leave of absence under the FMLA if the employee is willing to continue working and if the employee is able to perform the essential functions of his or her position with or without reasonable accommodation under the ADA. Similarly, an employer cannot force an

employee to continue working if the employee qualifies for an FMLA absence (is eligible and has a qualifying condition). The employer must be able to recognize whether the employee wants leave or wants to continue working and evaluate the situation accordingly. However, nothing prevents an employer from placing an employee on leave as a form of reasonable accommodation or if the employee is unable to perform the essential job functions of the position even with a reasonable accommodation. In addition, an employee is entitled to take FMLA leave, and at the conclusion of the FMLA leave period, return to work and request an accommodation in order to perform the essential functions of the job. *See Harrison v. Landis Plastics, Inc.*, 1998 WL 417493, 1998 U.S. Dist. LEXIS 11311 (N.D. Ill. July 22, 1998). For a more in-depth discussion of the ADA and the reasonable accommodation process, see the *ADA* Chapter of the SourceBook.

3. Medical Examinations and Inquiries. ADA discrimination includes requiring medical examinations, or making inquiries about disabilities, unless the inquiry is job related and consistent with business necessity. Under the FMLA, once an employee is unable to work due to illness, an employer is required to ascertain whether the employee has a serious health condition. An inquiry into the type of illness suffered by the employee is appropriate when there is mandatory substitution of paid leave for a qualified FMLA leave or when verifying the need for leave.

B. FMLA's Impact on the FLSA.

1. Exempt Employees Under the FLSA. The FMLA specifically permits a limited exception to the requirement that an exempt employee's salary may not be subject to partial day deductions (other than deductions for serious safety violations). The regulations provide that exempt employees may have periods of the FMLA leave deducted from their pay (even partial-day deductions) without affecting their exempt status. The DOL has advised, however, that deductions for partial-day absences from the salary of an exempt employee who is not eligible for FMLA leave, for leave that would normally qualify for FMLA leave, would jeopardize the employee's exempt status. Therefore, while employers may be generous and offer FMLA leave to employees who have worked less than the statutory requirements, employers should be careful not to make partial-day deductions from salaries of exempt employees who are not eligible for leave under the FMLA. Some courts have held that partial-day deductions from the salary of exempt employees not only invalidate the individual employee's exempt status, but also invalidate the exempt status of all other employees in the same job classification. *See Martin v. Malcolm Pirnie, Inc.*, 949 F.2d 611 (2d Cir. 1991). (Note that the Department of Labor effectively overruled *Malcolm Pirnie,* by adopting 29 C.F.R. § 541.5d, which allows employees of a public agency to qualify for exemption from FLSA despite docking of pay "for absences for personal reasons or because of illness or injury of less than one work-day.")

2. Fluctuating Work Week (FWW) Pay Plan. The regulations create two options for employers when a nonexempt employee on a fluctuating workweek salaried pay plan takes FMLA qualified leave. For an employee paid in accordance with the FWW play plan, the employer, during the period in which intermittent or reduced schedule FMLA leave is to be taken, may compensate an employee on an hourly basis and pay only for the hours the employee actually works, including time and one-half the employee's regular rate for overtime hours. The change to payment on an hourly basis (instead of a salary) would include the entire period during which the employee is taking FMLA intermittent leave, including weeks in which no leave is taken. For example, if an employee needs to go to chemotherapy for a four-hour session once every two weeks

over a six-month period, the employee may be converted to an hourly basis throughout the six-month period until the employee finishes chemotherapy. The employee would have to be paid an hourly rate and overtime at one and one-half times the regular hourly rate in all weeks, even weeks in which she or he does not go for a therapy session. The hourly rate is determined by dividing the employee's weekly salary by the employee's normal or average scheduled hours worked during normal weeks prior to FMLA leave commencing. If an employer chooses to follow this exception, Ford & Harrison recommends it be placed in the FMLA policy and the FWW written contract.

Additionally, if an employer chooses to follow this exception from the fluctuating workweek method of payment, the employer must do so uniformly, with respect to all employees paid on a fluctuating workweek basis who take FMLA leave on an intermittent or reduced leave schedule basis. If an employer does not elect to convert the employee's compensation to hourly pay, no deduction may be taken for FMLA leave absences. Once the need for intermittent or reduced scheduled leave is over, the employee may be restored to payment on a fluctuating work week basis. *See* 29 C.F.R. § 825.206(b).

3. Substitution of Compensatory Time for Public Sector Employers. Section 825.207(f) provides that if a public employee requests and is permitted to use accrued compensatory time to receive pay for time taken off for an FMLA reason, or if the employer requires such use pursuant to the FLSA, the time taken may be counted against the employee's FMLA leave entitlement.

C. FMLA and COBRA. The 1994 Internal Revenue Service bulletin explaining the effect of the FMLA on COBRA continuation coverage provides that, when FMLA leave is involved, the COBRA qualifying event (the event that requires the employer to send out the federally mandated COBRA notice) is the last day of the FMLA leave, or when the employee fails to return to work.

D. FMLA and Workers' Compensation.

1. Light Duty Assignments. An employee may not be forced to take a light duty assignment instead of going on or continuing a FMLA leave of absence. *See* 29 C.F.R. § 825.220(d) (the prohibition on waiver of prospective FMLA rights does not prevent an employee's "voluntary and uncoerced acceptance (not as a condition of employment) of a 'light duty' assignment while recovering from a serious health condition.") Additionally, the regulation provides that an employee's acceptance of such "light duty" assignment does not constitute a waiver of the employee's prospective rights, including the right to be restored to the same position the employee held at the time the employee's FMLA leave commenced or to an equivalent position. The employee's right to restoration, however, ceases at the end of the applicable 12-month FMLA leave year.

The DOL has taken the position that the time in the light duty position does not count against the employee's twelve week FMLA leave entitlement since, technically, the employee is working and not on leave. Moreover, according to the DOL, the employee is entitled to reinstatement to his or her old position if she or he is capable of doing so by the time his or her leave would have ended. Therefore, an employee appears to be entitled to the "best of both worlds." The employee in a light duty position retains the reinstatement rights of the FMLA, but also retains eligibility for further FMLA leave. Advisory Opinion of the Wage/Hour Administrator, March 15, 1995, Opinion FMLA-55, WHM 99 - 3054 (BNA).

2. Failing to Return an Employee to Work Following a Leave of Absence. A state's workers' compensation law may provide additional protections and/or benefits to

employees on leave. Employers should check the laws of the states in which they have employees.

E. FMLA and OSHA. Under OSHA's General Duty Clause, an employer has an obligation to "furnish to each of [its] employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to [its] employees." 29 U.S.C. § 654(a)(1).

Returning an employee to a position that endangers the employee or his or her fellow workers may violate OSHA's General Duty Clause. For example, returning an employee (who still suffers from bouts of dizziness) to work at a construction site where the employee is required to work at high altitudes may create a hazard with potential for serious harm to the employee and other workers. Note, when an employer cannot return an employee to their former position without violating OSHA, the employer may be able to use the "direct threat" defense to any ADA claim brought due to the employer's failure to reinstate. However, there is no "direct threat" defense available under the FMLA. Accordingly, the employer's defense would be that the employee is unable to perform the functions of his or her job, making reinstatement to that position improper (for safety reasons).

F. FMLA and Exceptions to the Employment-At-Will Doctrine. Some courts have examined whether the passage of the FMLA has created a public policy exception to the employment-at-will doctrine in various states. A state court in California created such an exception to the employment-at-will doctrine. Other courts, however, have rejected similar arguments. *See, e.g., Sullivan v. Progressive Casualty Ins. Co.,* No. 03-C-8487, 2004 WL 1687123, 2004 U.S. Dist. LEXIS 14322 (N.D. Ill. July 26, 2004) (dismissing former employee's state law wrongful discharge claim, which was based on her employer's alleged violation of the FMLA; finding the Illinois Supreme Court was unlikely to permit a claim for retaliatory discharge based on rights set forth in the FMLA because that statute protects private interests rather than the interests of Illinois citizens in general).

G. FMLA and Collective Bargaining Agreements. Typically, when bargaining over the policy, unions will attempt to limit the employer's use of the options available to it and/or attempt to gain additional leave time (either paid or unpaid) beyond FMLA's twelve weeks. The Seventh Circuit Court of Appeals has held that a collective bargaining agreement that required an employee to notify the employer of the employee's anticipated return date by the third day of an absence does not violate the FMLA. *See Gilliam v. UPS*, 233 F.3d 969 (7th Cir. 2000). *See also Harrell v. United States Postal Service,* 445 F.3d 913 (7th Cir. 2006) (a return to work certification requirement that is more burdensome than the FMLA's does not violate the act); *Callison v. City of Philadelphia*, 430 F.3d 117 (3d Cir. 2005) (call-in policy in the CBA was not invalid under the FMLA because it did not conflict with or diminish the protections guaranteed by the FMLA); *Harris v. Emergency Providers, Inc.*, 51 Fed. Appx. 600 (8th Cir. 2002) (requirement that an employee undergo a fitness for duty examination before returning to work did not violate the FMLA where it was consistent with the CBA and was not inconsistently applied). *But see Solovey v. Wyoming Valley Health Care Sys. – Hosp.,* 396 F. Supp. 2d 534 (M.D. Pa. 2005) (CBA requirement of two weeks notice prior to using vacation leave could not be applied when substituting paid vacation leave for FMLA leave; holding that notice provision places an impermissible requirement on the use of accrued vacation leave that diminishes the right to use leave when the need for FMLA leave is not adequately foreseeable).

The Seventh Circuit has held that an employer covered by the Railway Labor Act (RLA) cannot require employees to substitute the paid vacation and personal leave provided in collective bargaining agreements (CBAs) for unpaid FMLA leave. *See BMWE v. CSX Transp., Inc.*, 478 F.3d 814 (7th Cir. 2007). In this case, which was brought by twelve unions

against five rail carriers, the carriers relied on the section of the FMLA that states that paid leave may be substituted for unpaid FMLA leave. The court held that this provision of the FMLA is not an implied exception to the RLA. Although this provision permits employers to substitute paid leave for unpaid FMLA leave, it does not require them to do so. Thus, the court held that the carriers could not require substitution without complying with the procedures set forth in the RLA for making changes to CBAs.

H. FMLA and Arbitration Agreements, Including Collective Bargaining Agreements. Several courts have addressed whether an employee is required to arbitrate a FMLA claim prior to bringing a private lawsuit. In *Seawright v. American Gen. Fin. Serv., Inc.*, 507 F.3d 967 (6th Cir. 2007), the court held that an employee should have submitted her FMLA claim to arbitration where there was an enforceable arbitration agreement between the employer and employee. The employee's continued employment after signing the agreement constituted acceptance of a valid and enforceable contract to arbitrate and the obligation by both parties to arbitrate employment related disputes constituted consideration.

Where the arbitration requirement is contained in a collective bargaining agreement, it may not be enforceable against a plaintiff's FMLA claims. In *McGinnis v. Wonder Chemical Company*, 3 Wage and Hour Cas. 2d (BNA) 71, 73 (E.D. Pa. 1995), the court held that the employee's claim was an effort to secure his statutory rights and not to settle a dispute governed solely by the collective bargaining agreement. As such, he could not be required to submit his statutory claims to the agreement's grievance procedures. *See also Hoffman v. Aaron Kamhi, Inc.*, 927 F. Supp. 640 (S.D.N.Y. 1996) (same).

The DOL has issued an opinion letter stating that when an employee files both a FMLA claim with the DOL and a grievance that is subject to binding arbitration, the DOL can defer processing of the FMLA claim until conclusion of the arbitration process. See FMLA Opinion Letter 2003-1 (March 5, 2003), http://www.dol.gov/whd/opinion/FMLA/2003_03_05_1A_FMLA.pdf.

I. FMLA and State and Local Leave Laws. Nothing in the FMLA supersedes any provision of state or local law providing greater family or medical leave rights than those provided by the FMLA. Therefore, if a local ordinance or state law provides greater benefits than the FMLA, the employee is eligible for whichever provision gives them greater benefits. Note that many states have family and/or medical leave laws that have more generous eligibility requirements, leave entitlements, and circumstances for leave. Employers are cautioned to check the laws of the state(s) in which they operate to ensure compliance with those laws, since mere compliance with federal FMLA requirements may be insufficient. Note, however, that leave granted under a state or local law that does not qualify under the FMLA does not count against the employee's federal twelve-week entitlement.

IV. LEAVE FOR JURY DUTY

Many states have statutes guaranteeing time off for jury duty (some with pay) and also protecting employees from retaliation based on absences due to jury duty. On any issue arising regarding jury duty, the specific state statute and any relevant local ordinance must be reviewed to determine the exact parameters of protections for the employee. See the *Discipline and Discharge* Chapter for more information on jury duty leave.

V. MILITARY LEAVE

The Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA") applies to public and private employers regardless of their size or number of employees. In a nutshell,

USERRA prohibits discrimination based on military service, requires employers to grant military leaves of absence to qualifying military service members, requires reinstatement of the service members upon their completion of military service, and prohibits retaliation for taking military leave or serving in the military. USERRA is specifically designed to benefit returning service members, and the law is to be liberally construed in favor of the returning members. *Coffy v. Republic Steel Corp.*, 447 U.S. 191 (1980). Subject to various other exceptions and modifications, the basic law regarding military leave and reinstatement rights is as follows:

A. USERRA. USERRA, 38 U.S.C. §§ 4301-4334, was enacted in 1994. USERRA replaces the Veterans' Reemployment Rights Act (VRRA) and expands employment rights for all individuals who have served or may serve in the future in the uniformed services. *See, e.g., Francis v. Booz, Allen & Hamilton, Inc.*, 452 F.3d 299, 304 (4th Cir. 2006) (explaining that 38 U.S.C. § 4312 requires an employer to rehire covered employees; § 4311 then operates to prevent employers from treating those employees differently after they are rehired; and § 4316 prevents employers from summarily dismissing those employees for a limited period of time after they are rehired; "[w]hile combining to form comprehensive protection from the point of rehire to untimely dismissal, each provision is nonetheless functionally discrete.")

Uniformed services include the performance of duty on a voluntary or involuntary basis, including, but not limited to, active duty, active duty for training, initial active duty for training, inactive duty training, and full-time National Guard duty. Service in the uniformed services also includes absence from work for an examination to determine a person's fitness for any of the above types of duty, funeral honors performed by National Guard or reserve members, duty performed by intermittent disaster response personnel for the Public Health Service, and approved training to prepare for such service. *See* 42 USC § 300hh-11(e). According to the Federal Circuit Court of Appeals, USERRA and VRRA do no apply to employees departing for career military service, however this decision must be read in the context of other court decisions involving long term military activations, as well as the plain language of the statute. *Compare Woodman v. Office of Personnel Mgmt*, 258 F.3d 1372 (Fed. Cir. 2001) ("USERRA (as well as its predecessor the Veterans' Reemployment Rights Act of 1974) applies 'only with respect to non-career military service.'"), *with Wrigglesworth v. Brumbaugh,* 121 F. Supp. 2d 1126 (W.D. Mich. 2000) (servicemember who signed resignation letter and was on active duty for over eleven years not deemed to have waived rights) *and* 38 U.S.C. § 4312(h) (reemployment rights not dependent on the nature, timing, frequency or duration of one's military service).

Several courts have held that USERRA does not apply retroactively. *See, e.g., Bowlds v. General Motors Mfg. Div. of General Motors Corp.,* 411 F.3d 808, 811 (7th Cir. 2005) (affirming dismissal of Vietnam veteran's USERRA claim because claim accrued prior to effective date of the law).

B. Eleventh Amendment Immunity for State Entities. The 1998 amendments to USERRA allow actions against a state (as an employer) in state court, subject to a claim of sovereign immunity unless waived. *See Larkins v. Dept of Mental Health and Mental Retardation*, 806 So. 2d 358 (Ala. 2001) (the Alabama Constitution protects the state from suit; rejecting "any contention that substantive federal law by its own force necessarily overrides the sovereign immunity of the States").

C. Required Use of Vacation. An employee cannot be required to use earned vacation while performing military service, but may choose to do so. 38 U.S.C. § 4316.

D. Military Leave: Anti-discrimination/Anti-retaliation. USERRA sets forth numerous protections for those who have served, are serving, or may serve in the uniformed services. The anti-discrimination/anti-retaliation provisions apply to all employers, regardless of size. The definition of employer is "any person, institution, organization, or other entity that pays

salary or wages for work performed or that has control over employment opportunities." 38 U.S.C. § 4304(4). This definition can be read to include individual supervisors as employers. *Novak v. Mackintosh*, 919 F. Supp. 870 (D.S.D. 1996) (VRRA, like the FLSA, imposes joint and several liability upon employers as both individuals and entities).

USERRA prohibits employment discrimination against any employee or prospective employee because of past, present, or future military obligations. This applies to most areas of employment including hiring, reemployment, retention, promotion, and benefits.

USERRA specifically provides that the retaliation provision prohibits an employer from retaliating against an individual for: (1) complaining of a violation of USERRA; (2) testifying, assisting or participating in an investigation under USERRA; or (3) exercising any right under USERRA. 38 U.S.C. § 4311. This section explicitly provides that a violation occurs if the employee's connection with the uniformed services is a "motivating factor" for the action, unless the employer can prove that the same action would have been taken in the absence of any connection with the uniformed services. In other words, connection with military service need not be the **sole** motivating factor behind an adverse employment decision for a violation to be found. *See Mills v. Earthgrains Baking Companies, Inc.*, 2004 WL 1749500, 2004 U.S. Dist. LEXIS 14582 (E.D. Tenn. July 19, 2004) (unpublished decision) (if the employer relied upon, took into account, considered, or conditioned its decision to discharge the plaintiff on the plaintiff's reservist status, the reservist's status was a motivating factor in his discharge).

Cat's Paw Theory of Liability. In *Staub v. Proctor Hosp.*, 131 S. Ct. 1186 (2011), the U.S. Supreme Court held that an employer could be liable for a violation of USERRA even if the person who made the adverse employment decision was not hostile toward the employee's membership in a uniformed service but was influenced by previous company action that was the product of such hostility. In this case, Staub's immediate supervisor and second level supervisor both harbored unlawful animus based on Staub's military service and falsely accused him of performance deficiencies. The decision maker was at a higher level than those two supervisors. The decision maker investigated the alleged performance deficiencies, rejected Staub's objection that the supervisors' accusations were motivated by unlawful animus, and also considered Staub's personnel file and other information. The decision maker decided to fire Staub and he sued, alleging a violation of USERRA.

A jury ruled in favor of Staub, and Proctor appealed. The Seventh Circuit reversed, because the decision maker did not depend wholly on the tainted accusations in making the decision to fire Staub. According to the Seventh Circuit, an employer is not liable in a cat's paw [2] case unless the non-decision maker exerted "such 'singular influence' over the decision maker that the decision . . . was the product of 'blind reliance.'"

The Supreme Court rejected the Seventh Circuit's approach. The Court first pointed out that to establish liability under USERRA, Staub was required to prove that his military status was "a motivating factor" in the adverse action, and that there can be multiple motivating factors. The Court then analyzed the lower level supervisors' actions, noting that the jury had found that they made their false accusations because of unlawful animus, and finding that they intended that their accusations would result in adverse action against Staub. The Court further found that Proctor had effectively delegated the fact finding portion of the decision

[2] The term "cat's paw" is derived from a 17th century fable in which a manipulative monkey convinces an unsuspecting cat to retrieve chestnuts from a fire. The cat burns its paw getting the chestnuts, while the monkey devours them one by one. In discrimination cases, courts have used this term to describe the imposition of liability on an employer for the discriminatory animus of a non-decision maker where that person so influenced the decision maker that the decision maker was nothing more than a puppet or "cat's paw" for the biased non-decision maker.

maker's investigation to the biased supervisors and that the false accusations were one factor in the decision to terminate. Because the false accusations were the product of unlawful animus and were a motivating factor in the discharge decision, they were a proximate cause of the discharge and Proctor could be liable, even though other factors might be additional proximate causes. Nonetheless, the Court agreed that Proctor could avoid liability if it could establish that the decision maker's investigation resulted in the discharge for reasons unrelated to the supervisors' original biased action.

No Hostile Environment Claim under USERRA. In *Carder v. Continental Airlines*, 2011 U.S. App. LEXIS 5847 (5th Cir. March 22, 2011), the Fifth Circuit held that USERRA does not provide a cause of action for harassment claims. Accordingly, the court affirmed the dismissal of a class action filed against the airline by a group of pilots who claimed they were subjected to a hostile work environment because of their military service and service obligations. In determining that USERRA does not provide for a hostile work environment claim, the court first noted that the express language of the statute does not permit such a claim. The court then held that Congress did not intend to create a cause of action under USERRA for harassment of service members since the language of USERRA is not similar to that of other antidiscrimination laws that have been held to prohibit harassment. The court noted that in *Meritor Sav. Bank, FSB v. Vinson*, the U.S. Supreme Court relied heavily on Title VII's language prohibiting discrimination with respect to the "terms, conditions or privileges of employment" in permitting a plaintiff to assert a harassment claim under Title VII. The court held that the *Meritor* opinion makes it clear that it is the word "conditions" in particular that the Supreme Court relied on in inferring a claim for harassment under Title VII. Since USERRA was enacted several years after the Court's decision in *Meritor*, if Congress intended to create a cause of action for harassment based on military service under USERRA, it could have easily expressed that intent by using the phrase "terms, conditions or privileges of employment." According to the court, the fact that Congress did not do so but instead used the narrower term "benefits of employment" indicates that "Congress intended to create a somewhat more circumscribed set of actionable rights under USERRA." Thus, while clarifying that "nothing in this opinion alters the ability of service members to sue under USERRA for the denial of contractual benefits of their employment on the basis of military service as defined in the statute," the court concluded that "service members may not bring a freestanding cause of action for hostile work environment against their employers."

Types of Relief Available. A successful plaintiff may obtain injunctive relief, recover lost wages or benefits, liquidated damages in the amount equal to the employee's lost wages and benefits, and attorneys' fees. The protections of the USERRA apply not only to employees within the United States, but also employees (who are either citizens, nationals, or permanent resident aliens of the United States) employed in a foreign country. In *Serricchio v. Wachovia Sec. LLC*, 606 F. Supp. 2d 256 (D. Conn. 2009), a jury awarded a plaintiff over $389,000 in back pay after determining that his employer did not return him to a position that was comparable to the one he held before taking military leave because his new position would permit him to manage only a handful of accounts and would produce only a small amount in commissions compared to his prior position in which he was a financial adviser who serviced more than 200 accounts, managed in excess of $9 million, and earned $6,500 per month based on those accounts. The trial court awarded him an additional $389,453 in liquidated damages, concluding that the defendant's actions were willful.

E. Reinstatement Rights. Employees who serve in the uniformed services are entitled to reinstatement upon their return from service under certain conditions. To take advantage of the reemployment provisions, the individual must meet certain requirements under USERRA. These include: (1) pre-service employment in a position that is more than a brief, nonrecurrent period that could reasonably be expected to continue indefinitely or for a

significant period (38 U.S.C. § 4312(a) and (b)); and (2) discharge from military service under honorable or general conditions (38 U.S.C. § 4304). Additionally, the accumulated absences cannot total more than five years unless: (1) more than five years is required to complete an initial period of obligated service; (2) the person is unable, through no fault of his or her own, to obtain a release within the five year limit or is involuntarily retained on active duty beyond the expiration of the obligated service date; (3) more time is required to complete additional certified training for professional development or completion of skill training or retraining; (4) the service member is subject to an involuntary order to, or to be retained on, active duty during domestic emergency or national security related situations; (5) the service member is under an order to, or to remain on, active duty (other than for training) because of war or a national emergency declared by the President or Congress (This currently includes a number of military missions including but not limited to the Global War on Terror ("GWOT"), Operation Iraqi Freedom, and Operation Enduring Freedom); (6) the service is active duty (other than for training) by volunteers supporting "operational missions" for which Selective Reservists have been ordered to active duty without their consent; (7) the service is by volunteers who are ordered to active duty in support of a "critical mission or requirement" in times other than war or national emergency and when no involuntary call up is in effect; or (8) the service is federal service by members of the National Guard called into action by the President to suppress an insurrection, repel an invasion, or to execute the laws of the United States. 38 U.S.C. § 4312(c). The service member must also make a timely application for reemployment as follows:

Period of Service	**Action Required by Returning Service Member**
Less than thirty-one days	Report to employer not later than beginning of the first full regularly scheduled work period on the first full calendar day following completion of service (with an eight hour period allowed for safe transportation home) or as soon as possible after such eight hour period (this time limit also applies for a person who is absent from work to take a fitness-for-service examination regardless of the length of absence). *See* 20 C.F.R. § 1002.115.
More than thirty days and fewer than one hundred eighty-one days	Submit application for reemployment with employer not later than fourteen days after completion of service. The application does not have to be in writing. *See* 20 C.F.R. § 1002.117.
More than one hundred eighty-one days	Submit application for reemployment with employer not later than ninety days after completion of service. *Id.* The application does not have to be in writing.

Extensions are available when the individual is hospitalized, convalescing, or recovering from an active duty injury or illness. In addition, failure to comply with USERRA's return to work time frames following military service does not automatically forfeit a person's entitlement to rights and benefits under USERRA. Rather, such an individual would be subject to the rules, established policies, and general practices of the employer regarding explanations and discipline as to absences from scheduled work. 38 U.S.C. § 4312(e).

In addition, the leave period envisioned under the federal statute includes not only time at active service, but also any necessary travel associated with the service, such as traveling to a reserve base. *See Smith v. Thomas Lighting*, 1998 WL 527307, 1998 U.S. Dist. LEXIS

12601 (N.D. Miss. Aug. 5, 1998) (leave time did not, however, include time off to engage in personal activities that would normally be done during off work hours but which the employee was precluded from doing because of the military leave). *See also Gordon v. WAWA, Inc.*, 388 F.3d 78 (3d Cir. 2004) (affirming summary judgment in favor of employer against deceased employee's estate; the estate claimed the employer violated USERRA by not giving the employee eight hours of rest after returning from military leave before requiring him to work. The employee was killed in an automobile accident after working an eight-hour shift immediately upon return from his weekend Reserve duties.)

F. Documentation Upon Return. USERRA provides that, upon request, an individual away for more than thirty days of military service must provide the employer with documentation that establishes the timeliness of the application for reemployment and the length and character of military service. If the documentation is unavailable, the employer must reemploy the individual until the documentation becomes available. If an individual is absent for more than ninety days, the employer may require documentation before making retroactive pension contributions. 38 U.S.C. § 4312(f).

G. Veterans' Status Upon Reinstatement. A returning service member's right to reinstatement in a position of employment is based upon his or her length of military service as follows:

Length of Service	Position to Which Entitled
Less than ninety-one days	If qualified, the employee is to be returned to the position they would have attained as if continuously employed. If the employee is not qualified for the position after their military service (even after reasonable efforts at accommodation), the employee is to be reinstated to the position the employee held before the military service began. (Under USERRA, employers are required to make reasonable efforts to bring a returning service member to the point of qualification. 38 U.S.C. § 4313(a)(4); 20 C.F.R. § 1002.198.)
Ninety-one or more days	If qualified, the employee is to be returned to the position that he or she would have attained as if continuously employed, or a position of like seniority, status and pay. If not qualified (even after reasonable efforts at accommodation) the employee is to be placed in the next lower position to which he or she is qualified.

H. Veteran Retraining and Accommodation. USERRA requires employers to accommodate and train those who seek reemployment after military service and who have incurred or aggravated a disability during such service. It is important to note that this requirement applies to all employers, regardless of size, and therefore applies to employers who are not subject to the ADA.

Employers must conform to the following guidelines in the reemployment of individuals with service-related disabilities:

- Make reasonable efforts to accommodate a person's disability so she or he can perform the job to which she or he would be entitled if continuously employed;

- If not qualified for the position despite reasonable accommodation efforts, the employer is required to reemploy the person in a position of equivalent seniority, status, and pay for which the person is qualified or can become qualified through reasonable efforts of the employer; and
- If still unqualified for the position, the employer is required to reemploy the person in a position that is the nearest approximation in terms of seniority, status and pay in light of the circumstances.

The employer is not required to incur "undue hardship" when making accommodation efforts. Undue hardship is defined in essentially the same manner in USERRA as it is under the ADA.

I. Job Protections Following Reinstatement. USERRA provides limited protection against discharge to reemployed individuals. Thus, if the period of military service was more than one hundred eighty days, a reemployed individual may not be discharged from his or her position for one year except for cause. When the period of service is less than one hundred eighty days and more than thirty days, the for-cause period is six months. 38 U.S.C. § 4316(c); 20 C.F.R. § 1002.247. The act and regulations are silent regarding a period of service of thirty days or less, implying that the discharge for-cause provision would not apply; however, the antidiscrimination provisions of the Act do apply.

J. Escalator Principle and Fringe Benefit Entitlements Following Military Leave. Similar to VRRA, USERRA requires that upon reemployment, an individual is entitled to seniority and other rights and benefits determined by seniority that accrued as of the time service began, plus any seniority and benefits that would have accrued had the person remained continuously employed. USERRA specifies that any individual who is absent due to military service shall be deemed to be on furlough or leave of absence while performing such service.

USERRA does not require an employer to pay an employee while the employee is on military leave. However, an individual serving in the uniformed services is entitled to the same rights and benefits not determined by seniority as those provided by the employer to employees on other types of leave. Under VRRA, the U.S. Supreme Court has held that a returning veteran steps back on the "seniority escalator" at the precise point he would have occupied had he kept his position with his employer continuously during the period of military service. *Coffy v. Republic Steel Corp.*, 447 U.S. 191 (1980).

When two or more individuals are entitled to reemployment in the same position, USERRA provides first right to the person who left first. However, the other individual is entitled to be employed in any other position that is equivalent in seniority, status, and pay.

USERRA retained language similar to VRRA concerning the reinstated employee's benefits. Therefore, cases interpreting the scope of "seniority and other benefits" may still apply or at least provide interpretative authority. Under VRRA, as interpreted by the courts, there appear to be two distinct requirements. First, if a benefit is a perquisite of "seniority," a veteran must be given the benefit regardless of the terms of the plan. Second, even if a benefit is not a perquisite of "seniority," the "other benefits" clause requires inclusion of returning veterans pursuant to the established practices of the plan relating to laid off employees or employees on leave. The "other benefits" clause provides additional protection to that provided under the "seniority" clause. *Accardi v. Pennsylvania Railroad Company*, 383 U.S. 225 (1966). Types of benefits:

- ***Vacation.*** USERRA provides that any person whose employment is interrupted (including temporary employees) can use any vacation or annual leave that was accrued prior to service. 38 U.S.C. § 4316(d). However, an employer cannot require

an employee taking leave for military service to take or exhaust accrued or vested benefits, such as vacation.

- ***Holidays.*** In *Waltermyer v. Aluminum Co. of America*, 804 F.2d 821 (3d Cir. 1986), the court required payment for a holiday that occurred during a National Guardsman's annual two-week military training.
- ***Severance.*** In *Accardi*, 383 U.S. at 225, discussed above, the U.S. Supreme Court held that the "seniority" clause of VRRA required an employer to credit returning veterans for time previously spent in military service for the purpose of calculating severance payments where the amount of severance benefits depended on the length of "compensated service." A month of "compensated service" was defined as any month in which the employee worked one or more days. The court held that "the real nature of these payments was compensation for loss of jobs," rather than wages for time worked by the employees. The requirement for one day's work to obtain a month of compensated service made clear that the severance benefits were not compensation for work, but rather for length of service, resulting in entitlement to them under the "seniority" clause of VRRA.
- ***Pension and Profit Sharing.*** USERRA protects a reemployed employee's rights to accrued pension plan benefits. Reemployed employees are guaranteed pension plan benefits that accrued during military service, whether the plan is a defined benefit plan or a defined contribution plan. As for the seniority benefits, no break in employment is considered as having occurred due to military service, and there is no forfeiture of benefits and no need to requalify for participation in a plan upon reemployment. For contributory plans, which offer benefits only when the employee makes contributions, an individual returning from military service has up to three times the period of military service to make missed contributions (not to exceed five years). The employee is not credited with interest or forfeitures on retroactive contributions. 38 U.S.C. § 4318.
- ***Life Insurance.*** In *Petry v. Delmarva Power & Light Co.*, 631 F. Supp. 1532 (D. Del. 1986), the plaintiff sought life insurance proceeds from her deceased husband's group policy from his employer. The policy amount was calculated on the basis of the husband's earnings in the year prior to death, but the employer did not credit two weeks of earnings during the period of time that the plaintiff's husband was on National Guard leave. The court held that because the life insurance benefits were strictly tied to compensation and were not a reward for length of service, they were not "perquisites of seniority," but rather a form of short-term compensation for work performed.
- ***Medical Insurance.*** USERRA requires that the employer's health plan (including vision, dental, and prescription drug benefits) allow the employee (and his or her dependants) the opportunity to elect to continue coverage. The maximum period of coverage is the lesser of twenty-four months beginning on the first day of absence due to military service or the day after the date on which the person could return to work. *See* Veterans Benefits Improvement Act of 2004, amending 38 U.S.C. § 4317(a)(1). The Benefits Improvement Act extended the coverage period from eighteen to twenty-four months for elections made under § 4317 on or after December 10, 2004. The plan cannot require the employee to pay more than the employee's share for coverage if the period of service is not more than thirty-one days. If beyond thirty-one days, the employee may be required to pay not more than 102% of the full premium under the plan, which is consistent with COBRA. Moreover, there can be no "waiting period" for the individual or the individual's family

members upon reemployment. 38 U.S.C. § 4317. This is similar to COBRA insurance continuation rights except that this requirement applies to employees with fewer than twenty employees who are generally exempt from the COBRA requirements.

- ***Supplemental Unemployment.*** In *Coffy v. Republic Steel Corp.*, 447 U.S. 191 (1980), the U.S. Supreme Court held that a veteran was entitled to credit for time spent in military service for the purpose of determining the amount of supplemental unemployment benefits paid by the employer. The Court's decision was based on the facts that the purpose of such benefits is to provide employment security, rather than to afford additional compensation for work actually performed; that the plan provided for credits for any week in which an employee worked any number of hours; and that such benefits were therefore measured by length of service, and were analogous to the severance payments at issue in *Accardi*.

  Benefits: Treating Employees on Military Leave the Same as Those on Non-Military Leave. The Fifth U.S. Circuit Court of Appeals has held that an employer's collective bargaining agreement (CBA) and policies, which treat employees on military leave the same as employees on nonmilitary leave with regard to opportunities for straight-time pay, overtime opportunities and upgrade opportunities, do not violate USERRA. *See Rogers v. City of San Antonio*, 392 F.3d 758 (5th Cir. 2004).

K. Promotions During Military Service. USERRA provides no guidance regarding the handling of promotions that would have occurred during the military absence. However, the USERRA regulations provide that if an opportunity for promotion, or eligibility for promotion, that the employee missed during service is based on a skills test or examination, then the employer should give the service member a reasonable amount of time to adjust to the employment position and then give a skills test or examination. *See* 20 CFR § 1002.1, *et seq.* Under VRRA, a returning veteran had no absolute right to promotion the veteran claimed she or he would have received during military service, if the promotion depended on satisfactory completion of a period of training. The veteran is entitled to receive the training and, upon satisfactory completion, can insist on a seniority date reflecting the delay caused by military service. *See Tilton v. Missouri Pacific Railroad*, 376 U.S. 169 (1964).

Similarly, there is no automatic right to a promotion when the employer has discretion over selection of an incumbent for the promotion. *McKinney v. Missouri-Kansas-Texas Railroad*, 357 U.S. 265 (1958). However, a returning veteran may be entitled to a higher position, if she or he would automatically have received the promotion had she or he remained employed rather than entering military service. *Power v. Northern Illinois Gas Co.*, 388 F.2d 427 (7th Cir. 1968).

L. Posting Requirement. The Veterans Benefits Improvement Act of 2004 amended USERRA by adding § 4334, which requires employers to "provide to persons entitled to rights and benefits under [USERRA] a notice of the rights, benefits, and obligations of such persons and such employers." Employers can meet the notice requirement by posting the notice where they customarily place notices for employees.

M. Arbitration of USERRA Claims. In *Garrett v. Circuit City Stores, Inc.*, 449 F.3d 672 (5th Cir. 2006), the Fifth Circuit held that claims under USERRA are subject to mandatory arbitration. The court held that USERRA provides for substantive rights relating to compensation and working conditions, not to a affording a particular forum for dispute resolution. *Id.* at 678. "An exclusive judicial forum is not a right protected by Chapter 43 of USERRA or is it within the scope of § 4302(b)." *Id.* The court held that § 4302(b) does not conflict with the FAA's policy to encourage the procedural remedy of arbitration. Accordingly,

the court reversed the trial court's refusal to order arbitration of the plaintiff's USERRA claim. *See also Landis v. Pinnacle Eye Care, LCC,* 537 F.3d 559, 562 (6th Cir. 2008) (enforcing contract providing for arbitration of a veteran's USERRA claim). *But see Breletic v. CACI, Inc.,* 413 F. Supp. 2d 1329 (N.D. Ga. 2006) (refusing to require arbitration of plaintiff's USERRA claim).

N. Waivers/Releases of USERRA Claims. A state court in California has held that a release of rights in a severance agreement does not bar claims arising from USERRA. *See Perez v. Uline,* 157 Cal. App. 4th 953 (Cal. App. 4th 2007). In this case, the court held that the language of USERRA, which states, "a contract may not limit the protections of USERRA, which prohibits termination of employment based on membership in the military or performance of military service" meant that a severance agreement was not a valid waiver of the plaintiff's rights under USERRA. However, the Sixth Circuit held that a release in which the plaintiff agreed to waive his claims based on "veteran status" in exchange for over $6,000 effectively waived his USERRA rights, thus the court granted the employer summary judgment. *See Wysocki v. IBM,* 607 F.3d 1102 (6th Cir. 2010), *cert. denied* 2011 U.S. LEXIS 54 (2011). The court held that while § 4302(b) of USERRA supercedes any law, plan or agreement that reduces, limits or eliminates in any manner the rights provided by USERRA, its application is limited by § 4302(a) which exempts any law, plan, or agreement that is more beneficial to or in addition to the rights provided by USERRA. The court held that the plaintiff could have believed the benefits he received in exchange for waiver of his USERRA rights ($6,000) were more beneficial than what he gave up. Accordingly, the court found the plaintiff's waiver of his USERRA rights enforceable.

O. DOL Regulations. The DOL has issued regulations interpreting USERRA, which are written in "plain English" in a question and answer format similar to the FMLA regulations. The regulations are divided into five subparts: Subpart A - introduction to the USERRA regulations; Subpart B - description of USERRA's antidiscrimination and anti-retaliation provisions; Subpart C - steps service members must take to return to civilian employment; Subpart D - rights, benefits and obligations of persons absent from employment because of service in the uniformed services; Subpart E - rights, benefits and obligations of the returning veteran or service member; and Subpart F - role of the DOL in enforcing USERRA. The regulations are available on the DOL web site at: http://www.dol.gov/compliance/laws/comp-userra.htm.

P. State Laws Impacting Military Leave. Various state laws provide protection to employees who take military leave. The statutes vary in the kinds of protection, damages, and the relief that can be obtained. When violations of the state statute constitute a criminal violation, a civil action may be foreclosed. Employers should examine the laws of the state(s) in which they are located.

Q. Federal Laws Providing Additional Benefits to Military Reservists. The Heroes Earnings Assistance and Relief Tax Act of 2008, among other provisions, makes permanent the expiring tax provision that permits active duty reservists to make penalty-free withdrawals from retirement plans. The law also requires employers who make up the difference between military pay and regular pay for employees called up from the reserves for active service to factor that compensation into retirement benefits calculations. Additionally, the law permits employees who are called to active duty to cash in unused health care flexible spending account balances. It also permits recipients of military death benefits to roll over the amounts received, tax-free, to a Roth IRA or an education savings account.

R. Veterans Reinstatement Rights Summary.

Length Of Service	Time To Reapply	Status	Discharge For Cause
Less than thirty-one days	First regularly scheduled day following completion of service (with an eight-hour period allowed for safe transportation home)	If qualified, the employee is to be returned to the position she or he would have attained if continuously employed. If not qualified (even after reasonable efforts at accommodation), the service member should be returned to the position held when service began.	Discrimination prohibited
More than thirty days and less than ninety-one days	Fourteen days following completion of service	Same as above	Six months "cause" protection; discrimination prohibited
More than ninety days and less than one hundred eighty-one days	Fourteen days following completion of service	If qualified, the service member should be returned to the position that she or he would have attained if continuously employed or a position of like seniority, status and pay. If not qualified, because of a disability or break in employment,(even after reasonable efforts at accommodation) she or he should be returned to the incrementally lesser position for which she or he is qualified.	Same as above
More than one hundred eighty- one days	Ninety days after completion of service	Same as above	One year "cause" protection; discrimination prohibited

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THE AMERICANS WITH DISABILITIES ACT AND OTHER DISABILITY DISCRIMINATION LAWS

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I. INTRODUCTION

This Chapter provides a general discussion of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101, *et seq.,* focusing primarily on the employment-related provisions found in Title I of the Act. This Chapter also briefly addresses the Rehabilitation Act of 1973, which imposes certain affirmative action and non-discrimination requirements on covered federal contractors and recipients of federal funds, and the Genetic Information Nondiscrimination Act (GINA), which prohibits discrimination by employers and insurers based on genetic information. Disability-related issues in the workplace may also be impacted by other federal laws, such as the Family and Medical Leave Act (FMLA) and the Patient Protection and Affordable Care Act (PPACA), which are addressed in other Chapters of the SourceBook. Additionally, employers addressing disability-related issues in the workplace must consider the impact of applicable state and local laws, which are beyond the scope of this Chapter.

In 2008 Congress enacted the ADA Amendments Act, 110 Pub. Law 325, 122 Stat. 3553 (2008), (ADAAA) for the stated purpose of rejecting certain U.S. Supreme Court decisions that interpreted the ADA too narrowly and created too high of a standard for individuals seeking to establish a disability under the law. The ADAAA specifically provides that the definition of disability is to be construed in favor of broad coverage under the Act, to the maximum extent permitted by the Act. *See* 42 U.S.C. § 12102(4)(A), *as amended.* Additionally, the Findings and Purposes of the ADAAA state that it is the intent of Congress that the "primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis." 110 Pub. Law 325, 122 Stat. 3553.

The ADAAA was effective January 1, 2009 and is not retroactive. *See, e.g., Fredricksen v. UPS, Inc.,* 581 F.3d 516, 521 n.1 (7th Cir. 2009) ("Significant changes to the ADA took effect on January 1, 2009, after this appeal was filed. . . . Congress did not express its intent for these changes to apply retroactively, and so we look to the law in place prior to the amendments.") (citing *Lytes v. DC Water & Sewer Auth.,* 572 F.3d 936, 939-42 (D.C. Cir. 2009)); "EEOC Questions and Answers on Final Rule Implementing the ADA Amendments Act of 2008," available at: http://www.eeoc.gov/laws/regulations/ada_qa_final_rule.cfm. Accordingly, the analysis of certain issues, such as whether an individual is disabled under the Act, will be significantly different for claims arising before the effective date of the ADAAA versus those arising after that date.

II. OVERVIEW OF THE ADA

The ADA prohibits discrimination against individuals with disabilities in employment, public accommodations, transportation, state and local government services, and telecommunications.

A. Title I. Title I of the ADA concerns employment. It applies to all employers, public or private, that have fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding year. Covered employers are required to post notices of the Act's requirements. 42 U.S.C. § 12115.

1. Remedies and Procedures. The employment provisions of the ADA incorporate, by reference, the remedies and procedures of Title VII. These remedies include reinstatement, back pay, and an award of attorneys' fees to the prevailing party. Additionally, prevailing plaintiffs may be able to recover compensatory and punitive damages, if appropriate. Plaintiffs are also entitled to demand a trial by jury.

The Equal Employment Opportunity Commission (EEOC) is charged with enforcement of the ADA and plaintiffs are required to exhaust their administrative remedies by filing a discrimination charge with the EEOC prior to filing a lawsuit under Title I. *See, e.g., Cronin v. Visiting Nurses Ass'n of St. Luke's Hosp.*, 2009 U.S. Dist. LEXIS 91640 (E.D. Pa. Sept. 30, 2009) ("Before a plaintiff may file a civil suit for violations of the Americans with Disabilities Act, she must exhaust her administrative remedies by filing a claim with either the EEOC or the PHRC. 42 U.S.C. § 12117; 42 U.S.C. § 2000e-5."), *summary judgment granted,* 2010 U.S. Dist. LEXIS 102447 (E.D. Pa. Sept. 27, 2010).

2. Confidentiality of Medical Records. The ADA mandates that employees' medical information be kept confidential. *See* 42 U.S.C. § 12112(d)(B). Medical information must be kept in separate files, segregated and secured from general personnel files. Persons without a need to know the information should not have access to the medical information. In some instances, this includes not disclosing medical information to managers and supervisors, who may simply need to be aware that an accommodation is being made (and their role in an accommodation). Persons involved in the accommodation process and first aid personnel may have access to employee medical information.

3. State Employees. In *Board of Trustees v. Garrett*, 531 U.S. 356, 374 (2001), the Supreme Court held that Congress did not validly abrogate states' sovereign immunity from suit by private individuals for money damages under Title I of the ADA. The Court noted, however, that "this does not mean that persons with disabilities have no federal recourse against discrimination. Title I of the ADA still prescribes standards applicable to the States. Those standards can be enforced by the United States in actions for money damages, as well as by private individuals in actions for injunctive relief." *Id. See also United States v. Mississippi Dep't of Public Safety*, 321 F.3d 495 (5th Cir. 2003) (permitting federal government attorneys to bring ADA actions on behalf of individual state employees).

4. Shareholders as Employees. In *Clackamas Gastroenterology Associates v. Wells*, 538 U.S. 440 (2003), the U.S. Supreme Court held that the common-law element of control is the principal guidepost that should be followed in determining whether physicians, who were shareholders and directors of a professional corporation, should be considered employees when determining whether the employer is covered by the ADA.

B. Title II. Title II of the ADA concerns "public services." The first part of Title II essentially makes § 504 of the Rehabilitation Act applicable to all public entities, state and local. The Eleventh Circuit has held that an employee may sue his or her municipal employer under Title II of the ADA. *See Bledsoe v. Palm Beach County Soil & Water Conservation Dist.*, 133 F.3d 816 (11th Cir. 1998) (the broad language of Title II allows a public employee to sue for employment discrimination under Title II of the ADA). The U.S. Supreme Court did not rule on this issue when it addressed state sovereign immunity under Title I of the ADA in *Garrett, supra.*

The second part of Title II deals with prohibited discrimination by public entities with respect to public transportation.

C. Title III. Title III of the ADA prohibits discrimination by private entities with respect to "public accommodations" (i.e., motels, hospitals, restaurants, grocery stores, shopping

centers, libraries, golf courses, hospitals, barbershops, etc.). Title III prohibits discrimination "in the full and equal enjoyment" of the goods, services, and facilities offered to the public. In addition, Title III of the ADA places accessibility requirements on all places of public accommodation and commercial facilities when altering a current workplace or when performing construction. Title III also requires that public accommodations be made accessible to individuals with disabilities.

The Department of Justice has published regulations interpreting the requirements of Title II and Title III, which are available at: http://www.ada.gov/.

III. DEFINITION OF DISABILITY UNDER THE ADA

The ADA as amended by the ADAAA provides that the term "disability" means, "with respect to an individual – (A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment (as described in paragraph (3))." 42 U.S.C. § 12102(1).

A. "Actual Disability." Although the ADAAA did not change the "actual disability" prong, subsection (1)(A), which defines disability as a physical or mental impairment that substantially limits one or more major life activities, it changed the way statutory terms relating to the definition of disability should be interpreted and requires the definition of disability to be broadly construed in favor of coverage.

On March 25, 2011, the EEOC issued revised regulations and a revised Appendix, which incorporate the ADAAA's revisions. Similar to the ADAAA, the EEOC's revised regulations retain the basic definition of "disability" but modify the terms underlying the definition – "impairment," "major life activities," "substantially limits," etc. – in favor of "broad coverage to the maximum extent permitted by the terms of the ADA as amended." Furthermore, the stated goal of the final regulations (like that of the ADAAA) is to limit "extensive analysis" into whether an individual has a disability, and instead focus on whether employers have "complied with their obligations and whether discrimination has occurred." *See* 29 C.F.R. § 1630.2. The EEOC has issued questions and answers on the revised regulations, which are available on its web site at: http://www.eeoc.gov/laws/regulations/ada_qa_final_rule.cfm.

1. Mitigating Measures. The ADAAA provides that mitigating measures should not be considered in determining whether an individual has a disability. Through this provision, the ADAAA specifically overrules the U.S. Supreme Court's decisions in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and its companion cases (*Murphy v. UPS*, 527 U.S. 516 (1999), and *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999)). The Act specifically excludes ordinary eyeglasses and contact lenses from the list of mitigating measures that should not be considered. The EEOC's revised regulations include a similar provision. *See* 29 C.F.R. § 1630.2(j)(iv).

2. Substantially Limits. The ADAAA also expands the definition of "substantially limits" as used in the ADA and overrules the U.S. Supreme Court's decision in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), which held that an impairment substantially limits a major life activity if it "prevents or severely restricts the individual" from performing the activity. The ADAAA states that this definition imposes too high of a standard. The EEOC revised its regulations addressing the definition of "substantially limits" to be consistent with the Act's goal of broadening coverage of individuals protected under the ADA. The EEOC's regulations now provide nine new "rules of construction," including:

a. The impairment does not have to "prevent" or "significantly or severely restrict" the individual from performing a major life activity. The impairment need only

substantially limit "the ability of an individual to perform a major life activity as compared to most people in the general population." According to the regulations, this comparison usually will not require scientific, medical, or statistical analysis; however, nothing prohibits the presentation of such evidence where appropriate.

b. The focus in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether an individual's impairment substantially limits a major life activity. Therefore, the threshold issue of whether an impairment "substantially limits" a major life activity should not demand extensive analysis.

c. The determination of whether an impairment substantially limits a major life activity requires an individualized assessment, as was the case before the ADAAA was enacted. However, the new regulations specifically state that in making this assessment, the term "substantially limits" requires a lower degree of functional limitation than was the standard prior to the ADAAA. According to the EEOC regulations some types of impairments will "in virtually all cases" result in a determination of coverage under the "actual" disability prong or the "record of" prong. Such impairments include: deafness; blindness; intellectual disability; missing limbs; autism, cerebral palsy; diabetes; epilepsy; HIV infection; multiple sclerosis, muscular dystrophy; and major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia. *See* 29 C.F.R. § 1630.2(j)(3)(iii).

3. Major Life Activity. The ADAAA provides a non-exhaustive list of major life activities, such as seeing, hearing, eating, sleeping, walking, learning and concentrating. The EEOC's regulations add a number of activities to this list including: standing; sitting; reaching; lifting; bending; reading; thinking; communicating; and interacting with others. 29 C.F.R. § 1630.2(i)(1)(i). Additionally, the ADAAA provides that major life activities also include the operation of "major bodily functions," such as the immune system, normal cell growth, and the endocrine system. The EEOC regulations provide additional examples. *See* 29 C.F.R. § 1630.2(i)(1)(ii). The EEOC regulations also state that "[w]hether an activity is a 'major life activity' is not determined by reference to whether it is of 'central importance to daily life,'" thus rejecting prior definitions that included this requirement. 29 C.F.R. § 1630.2(i)(2).

The ADAAA further provides that an impairment that limits one major life activity need not limit other major life activities in order to be considered a disability. An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. The EEOC's new regulations echo these provisions.

B. A Record of Impairment. As noted above, persons with a "record" of a physical or mental impairment that substantially limits a major life activity are also protected from discrimination. 42 U.S.C. § 12102(1)(B). The EEOC's new regulations require employers, absent substantial hardship, to provide a reasonable accommodation to an otherwise qualified individual who meets the definition of disability under the "record of" prong (as well as the actual disability prong). 29 C.F.R. § 1630.9(e). The EEOC's Interpretive Guidance provides that "an individual may have a 'record of' a substantially limiting impairment – and thus be protected under the 'record of' prong of the statute – even if a covered entity does not specifically know about the relevant record." However, the individual must show that the covered entity discriminated on the basis of the record of disability for the entity to be liable for discrimination under Title I of the ADA. EEOC Interpretive Guidance.

C. Regarded as Disabled. The ADAAA provides that employees who claim they are "regarded as" disabled only need to show that discrimination based on a perceived disability

violates the law, regardless of whether the impairment actually substantially limits, or is perceived to limit, a major life activity. 42 U.S.C. § 12102(3)(A). The EEOC's regulations note that establishing that an individual is "regarded as" having an impairment does not establish liability under the ADA. Liability under Title I of the ADA is established "only when an individual proves that a covered entity discriminated on the basis of disability within the meaning of section 102 of the ADA, 42 U.S.C. 12112." 29 C.F.R. § 1630.2(l)(3).

Further, resolving a disagreement among federal courts, the ADAAA and the EEOC regulations clarify that employers do not have a duty to reasonably accommodate individuals who claim "regarded as" discrimination. *See* 29 C.F.R. § 1630.9(e) ("a covered entity . . . is not required to provide a reasonable accommodation to an individual who meets the definition of disability solely under the 'regarded as' prong"). The ADAAA also specifically states that "regarded as" claims cannot be based on impairments that are transitory and minor, which the Act defines as impairments with an actual or expected duration of six months or less. 42 U.S.C. § 12102(3)(B).

In *Tice v. Centre Area Transportation Authority*, 247 F.3d 506 (3d Cir. 2001), the court held that a request for an independent medical examination of an employee is not enough to demonstrate that the employer "regards" the employee as disabled; "doubts alone" over an individual's ability to perform his job does not show that the employee is regarded as disabled. In *Berry v. T-Mobile USA, Inc.*, 490 F.3d 1211 (10th Cir. 2007), the court held that an employer's grant of FMLA leave to employee with multiple sclerosis did not show that she was regarded as disabled; the standards under the two statutes are different – the definition of "disability" and the applicable regulations state that the FMLA's "serious health condition" is a different concept that must be analyzed separately.

IV. ASSOCIATIONAL PROTECTIONS

The ADA also forbids "excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association." 42 U.S.C. § 12112(b)(4).

The Seventh Circuit has identified three categories of situations in which association claims arise: expense; disability by association; and distraction. *Larimer v. International Business Machines Corp.*, 370 F.3d 698 (7th Cir. 2004). The court gave the following examples of these categories: an employee is fired (or suffers some other adverse personnel action) because: (1) ("expense") his spouse has a disability that is costly to the employer because the spouse is covered by the company's health plan; (2a) ("disability by association") the employee's homosexual partner is infected with HIV and the employer fears that the employee may also have become infected through sexual contact with the companion; (2b) (another example of disability by association) one of the employee's blood relatives has a disabling ailment that has a genetic component and the employee is likely to develop the disability as well (maybe the relative is an identical twin); (3) ("distraction") the employee is somewhat inattentive at work because his spouse or child has a disability that requires his attention, yet not so inattentive that to perform to his employer's satisfaction he would need an accommodation, perhaps by being allowed to work shorter hours. The qualification concerning the need for an accommodation (that is, special consideration) is critical because the right to an accommodation, being limited to disabled employees, does not extend to a nondisabled associate of a disabled person. *Id.* at 700. The court dismissed the plaintiff's claims in *Larimer*, holding that the premature birth of twin daughters who appeared healthy at the time the case was filed but who may develop disabilities in the future fit none of the above categories. *Id.* at 701. *See also Overley v. Covenant Transport, Inc.*, 178 Fed. Appx. 488 (6th Cir. 2006) (no violation of ADA for discharging truck driver with disabled daughter who failed to report for scheduled shift; plaintiff claimed she had a

right to a modified work schedule in order to care for her daughter, however, the court held that no right to accommodation exists in such a situation).

Associational cases are fairly rare. Courts have limited protections under this theory to persons with a close familial, social, or physical relationship with disabled persons. *See, e.g., Wascura v. City of S. Miami*, 257 F.3d 1238 (11th Cir. 2001) (employee must also show link between association and adverse job action); *O'Connell v. Isocor Corp.*, 56 F. Supp. 2d 649 (E.D. Va. 1999) (barring associational claim by work colleague not considered to be allied with another employee with a disability); *Hilburn v. Murata Electronics of North America*, 17 F. Supp. 2d 1377 (N.D. Ga. 1998), *aff'd,* 181 F.3d 1220 (11th Cir. 1999). *But see Foster v. Time Warner Entertainment Co.*, 250 F.3d 1189 (8th Cir. 2001) (ADA protects worker fired because she made scheduling accommodations for employee with epilepsy (decided on associational and retaliation for protected activity grounds)). In addition, persons simply associated with persons with disabilities are not entitled to reasonable accommodations. *See Kennedy v. Chubb Group of Insurance Companies*, 60 F. Supp. 2d 384 (D.N.J. 1999); *Hilburn*, 17 F. Supp. 2d 1377 (N.D. Ga. 1998).

V. "QUALIFIED INDIVIDUALS" UNDER THE ADA

Prior to the ADAAA amendments, the ADA prohibited discrimination against a "qualified individual with a disability because of the disability of such individual." The ADAAA amended this provision to prohibit discrimination "against a qualified individual on the basis of disability." 42 U.S.C. § 12112. The EEOC regulations and Appendix incorporate this change. According to the Appendix, "[t]his ensures that the emphasis in questions of disability discrimination is properly on the critical inquiry of whether a qualified person has been discriminated against on the basis of disability, and not unduly focused on the preliminary question of whether a particular person is a 'person with a disability.'" 29 C.F.R. Part 1630 Appendix, "Note on Certain Terminology Used," 17 Fed. Reg. 17005 (citing 2008 Senate Statement of Managers at 11.)

As defined by the ADA, a "qualified individual" is "an individual who with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8).

A. Essential Functions. The EEOC regulations define "essential functions" to mean "the fundamental job duties," and provide that the term does not include the "marginal" functions of the position. 29 C.F.R. § 1630.2(n)(1). *See Deane v. Pocono Med. Ctr.*, 142 F.3d 138 (3d Cir. 1998) (the ADA requires proof only of plaintiff's ability to perform job's essential functions, not all functions, in order to be "qualified"). The employer has substantial leeway in determining a job's "essential functions." "[C]onsideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job." 42 U.S.C. § 12111(8). *See also Phelps v. Optima Health*, 251 F.3d 21 (1st Cir. 2001) ("evidence that accommodations were made so that an employee could avoid a particular task 'merely shows the job could be restructured, not that [the function] was non-essential.'"); *Stafne v. Unicare Homes*, 266 F.3d 771 (8th Cir. 2001) (arthritic nurse at an extended care facility could not perform the essential function of pushing wheelchair-bound patients, and therefore was not a "qualified individual" with a disability). *But see Turner v. Hershey Chocolate, USA,* 440 F.3d 604 (3d Cir. 2006) (genuine issues of material fact precluded summary judgment in the employer's favor on whether rotating among job functions was an essential function of plaintiff's position).

The EEOC regulations provide that a job function may be considered essential for any of several reasons, including: the reason the position exists is to perform that function; there are a limited number of employees available to perform the function; and/or the function is

highly specialized and the incumbent is hired due to his or her expertise or ability to perform that function. 29 C.F.R. § 1630.2(n).

The frequency of a particular function, however, does not necessarily affect whether the function is "essential." The EEOC regulations explain that a "function may be essential because the reason the position exists is to perform that function." 29 C.F.R. § 1630(n)(2)(i). The appendix to the EEOC's regulations provides an instructive example: "although a firefighter may not regularly have to carry an unconscious adult of a burning building, the consequence of failing to require the firefighter to perform this function would be serious." 29 C.F.R. Part 1630 Appendix.

1. Absenteeism. Disciplining an arguably disabled employee for excessive absenteeism can involve difficult decisions for an employer. Many courts will enforce absenteeism policies, even as applied to individuals who are disabled (as long as the absences are not protected under the FMLA). One court held that "common sense dictates that regular attendance is usually an essential function in most every employment setting; if one is not present, he is usually unable to perform his job." *EEOC v. Yellow Freight System*, 253 F.3d 943 (7th Cir. 2001) (*en banc*). *See also, e.g., Rask v. Fresenius Med. Care N. Am.*, 509 F.3d 466 (8th Cir. 2007) (affirming summary judgment against employee with depression who was fired for attendance problems; employee did not meet the essential job function of predictably showing up for work and therefore was not qualified; noting that regular predictable attendance is an essential function of most jobs). *But see Cehrs v. Northeast Ohio Alzheimer's Research Ctr.*, 155 F.3d 775 (6th Cir. 1998) (holding that regular, predictable, and uninterrupted attendance cannot necessarily be presumed to be an essential function of the job, but noting that the plaintiff nevertheless bears the burden of proving she was qualified for the position with the accommodation of medical leave).

Employers may now need to take the further step of justifying their attendance requirements in ADA cases. When the disabled employee exceeds either the employer-established level of absenteeism or the realm of reasonableness as perceived by the court, many courts disqualify the employee from ADA protection under one of two theories (or on occasion both):

a. The employee's excessive absenteeism renders him or her no longer qualified to perform the essential function of regular attendance. *See, e.g., Brenneman v. MedCentral Health Sys.*, 366 F.3d 412, 419 (pharmacy tech not qualified for his job due to his excessive absenteeism); *Amadio v. Ford Motor Company*, 238 F.3d 919 (7th Cir. 2001) (failure to meet minimum attendance requirements rendered chronically absent factory worker not "qualified"; attendance is an essential function of assembly line worker position, even though attendance may not be an essential function of every possible employment position); *Pickens v. Soo Line R.R. Co.*, 264 F.3d 773 (8th Cir. 2001) (railroad conductor's high absenteeism rate prevented him from performing essential functions of his job).

b. The employee's excessive absenteeism renders him or her no longer qualified to perform the essential function of regular attendance and any accommodation of such irregular attendance would result in "undue hardship" to the employer. *See Jackson v. Veterans Admin.*, 22 F.3d 277 (11th Cir. 1994) (V.A. did not have duty under Rehabilitation Act to accommodate employee's unpredictable absences attributable to service-connected disability caused by rheumatoid arthritis; requiring V.A. to accommodate such absences would place upon it the burden of making last minute provisions work as housekeeping aide be done by someone else, which would place undue hardship on V.A.). *But see Dutton v. Johnson County Bd. of County Comm'rs*, 859 F. Supp. 498 (D. Kan. 1994) (employer bears burden of showing that

proposed accommodation of allowing unscheduled absences is unreasonable and an undue hardship).

Of course, under the ADAAA, courts may reach conclusions differing from the above.

Notwithstanding the past trend in some courts of equating excessive absenteeism with an "unqualified" status, courts may apply a disparate treatment analysis to hold the employer liable for discrimination under the ADA when the employer condones a greater level of absences for nondisabled employees. Moreover, in view of *Cehrs* and similar cases, employers may need to be prepared to show why attendance is an essential function in the job in question.

2. Impact of the FMLA on Employee Attendance Issues. Before disciplining or discharging FMLA-eligible employees for excessive absenteeism, employers must analyze whether any absences underlying their decision are protected by the FMLA. When an employer is considering the discharge of an employee for excessive absenteeism, the employer should determine whether the employee's non-FMLA protected absences exceed the amount previously allowed by the employer to nondisabled employees. Leave in excess of the leave allowed under either the employer's policy or the FMLA may still be needed as a "reasonable accommodation," which will entail a fact-specific inquiry based on the employer's needs and practices. *See, e.g., Rogers v. New York University*, 250 F. Supp. 2d 310 (S.D.N.Y. 2002) (ADA allows indeterminate amount of leave, short of undue hardship, as a reasonable accommodation). *See also Smith v. Diffee Ford-Lincoln-Mercury, Inc.*, 298 F.3d 955 (10th Cir. 2002) (the court could not conclude that the plaintiff's requested leave was unreasonable or unduly burdened the employer where the employee requested and took no more leave than the FMLA permitted). See the discussion below on requests for indefinite leave. If the employer overcomes these hurdles, it must also consider the danger of a workers' compensation retaliation lawsuit if the employee's absences are due or partially due to an on-the-job injury.

B. Qualification Standards. In two separate sections (defining discrimination and defenses) the ADA explains that employers may apply qualification standards that tend to exclude individuals with disabilities so long as those qualifications are "shown to be job-related . . . and consistent with business necessity." 42 U.S.C. §§ 12112(b)(6) and 12113(a). *See also EEOC Fact Sheet on Employment Tests and Selection Procedures,* available at: http://www.eeoc.gov/policy/docs/ factemployment_procedures.html.

Many cases hold that the ADA plaintiff bears the initial burden of proving that he or she is "qualified." *EEOC v. Exxon Corp.*, 203 F.3d 871 (5th Cir. 2000); *Koshinski v. Decatur Foundry, Inc.*, 177 F.3d 599 (7th Cir. 1999). Some decisions, as discussed below, then require the employer to justify certain exclusionary qualification standards under the "job-related and consistent with business necessity" standard.

In *EEOC v. Exxon Corp.*, 203 F.3d 871 (5th Cir. 2000), the court held that employers may impose safety based qualification standards for safety-sensitive jobs, even if that standard barred persons who have undergone substance abuse treatment. The court further held, departing from EEOC Guidance asserting that safety requirements tending to screen out individuals with disabilities must be justified only with a showing of a "direct threat" to safety, that the qualification standards, if uniformly applied, could be justified as a business necessity and were not subject to the more restrictive and individualized "direct threat to safety" defense (discussed below). *See also EEOC v. J.B. Hunt Transport Inc.,* 321 F.3d 69 (2d Cir. 2003) (policy to reject truck driver applicants taking certain prescription medications does not violate ADA because bar is not based on individual's actual or perceived disability, and individuals are not perceived as unable to work or even work a broader class of truck

driving jobs) (this is a pre-ADAAA decision and the outcome might be different under the ADAAA); *Mathews v. Denver Post*, 263 F.3d 1164 (10th Cir. 2001) (grand mal seizures made it dangerous for employee to work with machinery, rendering him not qualified for his position); *Waddell v. Valley Forge Dental Associates, Inc.*, 276 F.3d 1275 (11th Cir. 2001) (dental hygienist with HIV was not "qualified" due to safety risk from on-the-job blood to blood contact from sticks or cuts during treatment; risk could not be eliminated by reasonable accommodation).

C. Effect of Claiming Social Security Disability Benefits on "Qualified" Status. The U.S. Supreme Court has clarified that a person who files for or receives Social Security Disability Insurance (SSDI), and certifies that he/she is totally "disabled," is not automatically disqualified from maintaining a suit for disability discrimination under the ADA. *See Cleveland v. Policy Mgmt. Sys. Corp.*, 523 U.S. 1070 (1998). According the Court, an individual receiving SSDI benefits and claiming to be a qualified individual with a disability under ADA must come forward with evidence to explain why receipt of SSDI benefits is consistent with being a qualified individual with a disability under ADA. *See also EEOC v. Stowe-Pharr Mills, Inc.*, 216 F.3d 373 (4th Cir. 2000) (reinstating suit by SSDI recipient, holding that the plaintiff "is required to proffer a sufficient explanation for any apparent contradiction between the two claims"). *But see Opsteen v. Keller Structures, Inc.*, 408 F.3d 390 (7th Cir. 2005) (plaintiff who provided medical documentation of a serious, disabling and permanent condition in support of his claim for Social Security benefits could not proceed with his ADA claim where he could not explain the inconsistencies between his assertions in the two cases).

The EEOC also provides in its Enforcement Guidance No. 915.002 that representations made in connection with an application for disability benefits should not be an automatic bar to an ADA claim. The EEOC maintains that the ADA definition of "qualified individual with a disability" differs from the definitions used in the SSA, state workers' compensation laws, disability insurance plans, and other disability benefits programs. *See* the EEOC's Enforcement Guidance at http://www.eeoc.gov/policy/docs/qidreps.html.

D. Impact of Safety Concerns on Qualification Determination. If a disability renders particular employment dangerous to the disabled employee or to others, is the disabled employee "qualified"? Although some cases allow for uniformly applied, safety-based qualification standards (*e.g.*, *EEOC v. Exxon Corp.*, 203 F.3d 871 (5th Cir. 2000), holding that employers may impose safety based qualification standards for safety-sensitive jobs without demonstrating "direct threat," even if that standard bars persons who may be protected under ADA), the decision to exclude an employee as a threat to safety must often be justified on an objective, *individualized* basis. *See Branham v. Snow*, 392 F.3d 896 (7th Cir. 2004) (insulin-dependent employee with diabetes may proceed with Rehabilitation Act claim based on exclusion from investigator position; employer's fear that employee would suffer incapacitation on job and place himself and others at risk was not supported with a showing of significant risk of harm), *opinion clarified* 2005 U.S. Dist. LEXIS 40540 (S.D. Ind Dec. 1, 2005); *Kapche v. San Antonio*, 304 F.3d 493 (5th Cir. 2002) (police department should evaluate independently, rather than as a *per se* rule, whether being insulin-dependent prevents a diabetic from performing the essential functions of his position safely).

To exclude an employee or applicant, the ADA requires proof of "direct threat," meaning:

> a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated by reasonable accommodation. The determination that an individual with a disability poses a direct threat should be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence.

29 C.F.R. § 1630.2(r). This is a difficult burden for an employer to meet. *See Rizzo v. Children's World Learning Ctrs., Inc.*, 213 F.3d 209 (5th Cir. 2000) (*en banc*) (child care center failed to prove that driver with hearing impairment and safe driving history posed a direct threat to the children in the van; burden of showing she could not safely transport the children rests on employer).

1. Safety Threats to Others and to the Individual With a Disability? EEOC guidance extended the "direct threat" defense to the safety of not only others, but also the individual with a disability. The U.S. Supreme Court has held that the ADA does not require that employees be placed in jobs that pose a threat to their own safety or health. *See Chevron U.S.A., Inc. v. Echazabal,* 536 U.S. 73 (2002). The Court's decision resolved a challenge to an EEOC regulation interpreting the ADA that requires that employees not pose a direct threat to their own safety or health or to the safety or health of others. An employer's judgment that an individual would be a threat to himself or others if placed in particular position must be based on specific medical findings.

On remand, however, the Ninth Circuit held that the employer may not have met the requirements for asserting a direct threat defense because the employer only consulted with "generalists," and did not consult with specialists specifically familiar with chemical exposure and its effect on the liver. *See Echazabal v. Chevron U.S.A., Inc.,* 336 F.3d 1023 (9th Cir. 2003). In other words, the employer, according to the Ninth Circuit, did not properly assess the nature of the potential harm. The dissent in the case commented that requiring awareness of cutting-edge medical research, rather than a sound medical analysis, placed too great of a burden on the employer. *See also Ollie v. Titan Tire Corp.,* 336 F.3d 680 (8th Cir. 2003) (employer cannot refuse to hire applicant with asthma based on assumption that exposure to dust and fumes would render individual unable to perform the job).

2. Significant Risk of Substantial Harm. There must be a "high probability" of substantial harm if the person was employed; the determination of the risk cannot be based on "mere speculation." *See The Americans with Disabilities Act: A Primer for Small Business*, http://www.eeoc.gov/eeoc/publications/adahandbook.cfm#safetyconcerns. The following four factors should be considered in identifying the risk: the duration of the risk; the nature and severity of the potential harm; the likelihood the potential harm will occur; and the imminence of the potential harm. *Id.* The assessment of the risk must be based on objective medical or other evidence related to a particular individual. This may include: input from the individual with a disability; the experience of this individual in previous jobs; or documentation from medical doctors or others who have expertise in the disability involved and/or direct knowledge of the individual with a disability.

3. Whether the Risk Can be Eliminated by Reasonable Accommodation. To exclude an applicant or employee on "safety" grounds, an employer must identify a specific risk that the individual with the disability poses. Making such a determination requires a fact-specific, individualized inquiry resulting in a well-informed judgment grounded in a careful and open-minded weighing of the risks and possible alternatives. *See Hall v. United States Postal Service*, 857 F.2d 1073 (6th Cir. 1988); *Waddell v. Valley Forge Dental Associates, Inc.*, 276 F.3d 1275 (11th Cir. 2001) (safety risk for dental hygienist with HIV stemming from on-the-job blood to blood contact from sticks or cuts during treatment could not be eliminated by reasonable accommodation).

4. Exclusion Due to Other Federal Safety Regulations. If the alleged discriminatory action was taken in compliance with another federal law or regulation, the employer may offer its obligation to comply with the conflicting standard as a defense. 29 C.F.R. Part 1630 Appendix, § 1630.15(e). The EEOC takes the position that the employer's defense

of a conflicting federal requirement or regulation may be rebutted by a showing of pretext, or by showing that the federal standard did not require the discriminatory action, or that there was a nonexclusionary means to comply with the standard that would not conflict with the ADA. *See Campbell v. Federal Express Corp.*, 918 F. Supp. 912 (D. Md. 1996) (plaintiff could not satisfy burden of proving he was "qualified individual with a disability" because he did not satisfy physical qualification standards in Department of Transportation (DOT) regulations; employer is entitled to rely on the DOT regulations as a complete defense). *See also Tate v. Farmland Industries, Inc.*, 268 F.3d 989 (10th Cir. 2001) (driver taking antiseizure medication was not "qualified" for position because employer relied on nonbinding U.S. DOT criteria regarding drivers taking antiseizure medication or with medical history of conditions causing loss of control or consciousness).

In October 2004, the EEOC offered specific guidance addressing Food and Drug Administration regulations regarding employees with certain illnesses handling food and the interaction with the ADA. The EEOC opined that employers may refuse to assign employees infected with certain pathogens transmitted through food (as enumerated by the Centers for Disease Control) if the risk of transmitting disease cannot be eliminated through a reasonable accommodation. Foodborne pathogens discussed in the guidance include salmonella typhi, shingella, shiga toxin producing Escherichia coli, and hepatitis A.

5. HIV/AIDS. Under the ADAAA and revised EEOC regulations, it is likely that individuals with HIV/AIDS will be considered to have a disability. The EEOC regulations state that under the regulations' revised analysis, it should easily be concluded that "the following types of impairments will, at a minimum, substantially limit the major life activities indicated: . . . Human Immunodeficiency Virus (HIV) infection substantially limits immune function." 29 C.F.R. 1630.2(j)(3)(iii). Additionally, the U.S. Supreme Court has held that one individual's asymptomatic HIV is a disability under the ADA. *See Bragdon v. Abbott*, 524 U.S. 624 (1998). In another case involving an HIV-positive plaintiff, an appeals court confirmed that the ADA permits an action for disability-based harassment under a hostile environment theory. *See Flowers v. Southern Regional Physician Servs., Inc.*, 247 F.3d 229 (5th Cir. 2001). Accordingly, litigation involving employees with HIV/AIDS will more likely address reasonable accommodation issues rather than whether the employee is disabled.

Employers should be aware that suspending or discharging an employee because the employee's HIV or AIDS infection poses a significant risk to the employee or co-workers is a difficult standard to meet. Courts are reluctant to find the risk of co-worker infection to be a legitimate, nondiscriminatory reason for discharge unless the employer can demonstrate from objective evidence that there is a clear risk that HIV or AIDS would be transmitted by one or more of the limited medically proven methods of transmission.

Cases allowing exclusions of employees with HIV/AIDS on safety-related grounds have generally been limited to jobs involving invasive surgery or blood-to-blood contact. *See, e.g., Waddell v. Valley Forge Dental Associates, Inc.*, 276 F.3d 1275 (11th Cir. 2001) (dental hygienist with HIV was risk to safety due to on-the-job blood to blood contact from sticks or cuts during treatment; risk could not be eliminated by reasonable accommodation). Any decision to exclude an employee must still be based on objective medical evidence. In addition, as with medical information on the person's condition itself, information on individual's medication must be kept confidential.

Other employees' (and customers') attitudes and concerns compound the problem of managing HIV/AIDS. Generally, "customer preference" is not a valid defense to denial of

a job under any employment discrimination laws. *See Diaz v. Pan American World Airways*, 442 F.2d 385 (5th Cir. 1971).

6. Analysis of Direct Threat Situations. Employers faced with an employee or applicant whose disability could pose an objective (not just imagined or suspected) danger to themselves in the workplace should take the following steps:

a. Evaluate all situations on a case-by-case basis.

b. Inform the employee of the health or safety risks of the job and get the employee's input on those risks.

c. Determine whether there are any reasonable accommodations that can be made to reduce the risks involved.

d. Make sure the individual can perform the essential functions of the job.

e. Consider whether the individual is a threat to others or only to himself or herself.

VI. THEORIES OF DISABILITY DISCRIMINATION

A. Disparate Treatment. The "burden shifting" method of proof in a disparate treatment case is applicable unless there is direct evidence of discrimination. Under the burden shifting method, ADA plaintiffs demonstrate disparate treatment by establishing a prima facie claim just as under Title VII cases. The claim survives if the plaintiff can successfully rebut the employer's legitimate business reason for the adverse employment action and show the explanation to be a pretext for discrimination.

B. Manner of Discrimination. Under the ADA, "no covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112.

The ADA's nondiscrimination prohibitions include disability-based harassment under a "hostile environment" theory. In *Shaver v. Independent Stave Co.*, 350 F.3d 716 (8th Cir. 2003), *Fox v. General Motors Corp.*, 247 F.3d 169 (4th Cir. 2001), and *Flowers v. Southern Regional Physician Services, Inc.*, 247 F.3d 229 (5th Cir. 2001), the Courts of Appeals, relying on case law interpreting Title VII, held that such claims are available under the ADA. *See also Mannie v. Potter,* 394 F.3d 977 (7th Cir. 2005) (assuming that hostile work environment is cognizable under ADA and that Title VII standards govern, court held that schizophrenic employee was not subjected to hostile work environment; allegations that supervisor made derogatory comments about her mental condition to others and that co-workers intentionally offended her by wearing tight-fitting clothing were minor and isolated; plaintiff failed to demonstrate that behavior of co-workers and supervisors altered the terms or conditions of her employment).

C. Limiting, Segregating, Classifying. ADA discrimination includes "limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee." 42 U.S.C. § 12112(b)(1). Under the ADA, discrimination also includes "excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association." 42 U.S.C. § 12112(b)(4).

Comparison with Others. Courts have rejected attempts to challenge employer conduct by comparing treatment of disabled employees with other disabled employees. For example, an employee cannot establish a claim under the ADA by comparing his or her treatment to similarly situated disabled employees. *See Myers v. Hose*, 50 F.3d 278 (4th Cir. 1995),

superceded by statute on other grounds as stated in Gile v. United Airlines, Inc., 95 F.3d 492 (7th Cir. 1996). Nothing in the ADA or the Rehabilitation Act requires that any benefit extended to one category of disabled individuals also be extended to all other categories of disabled individuals.

D. Medical Examinations and Inquiries. ADA discrimination includes requiring medical examinations or making inquiries about disabilities in certain circumstances. 42 U.S.C. § 12112(d). The ADA severely restricts medical examinations and mandates responsible and confidential treatment of employees' medical information. These obligations are outlined in the EEOC's Enforcement Guidance on Pre-Employment Medical Inquiries Under the ADA, http://www.eeoc.gov/policy/docs/preemp.html, and its Enforcement Guidance on Disability-Related Inquiries and Medical Examinations Of Employees Under the ADA (July 26, 2000), http://www.eeoc.gov/policy/docs/guidance-inquiries.html. As a practical matter, the fewer people who know about an employee's medical condition, the fewer the opportunities for improper disclosure and improper action based on the employee's medical condition. The ADA requires that any medical information be collected and maintained on separate forms and in separate medical files. 42 U.S.C. § 12112(d)(3)(B). Employers should not place any medical information in an employee's nonmedical personnel file.

In assessing the wisdom of medical inquiries of employees and applicants, employers therefore need to ask themselves: *Is it legal?* and *Is it worth it?*

Generally, the ADA (1) forbids pre-employment medical inquiries; (2) permits post-offer medical inquiries for all similarly situated employees; and (3) permits medical inquiries of employees incident to requests for reasonable accommodations or job-related inquiries to resolve objective concerns over workplace safety and health.

E. Disparate Impact. When a "facially neutral" practice has a disproportionate impact on a protected group and is not sufficiently job-related, it is said to have a disparate impact. *See Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

While not common, disparate impact claims are possible under ADA. Under the ADA, prohibited discrimination includes: "[U]tilizing standards, criteria, or methods of administration (a) that have the effect of discrimination on the basis of disability, or (b) that perpetuate the discrimination of others who are subject to common administrative control." 42 U.S.C. § 12112(b)(3). It also includes:

> [U]sing qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity.

42 U.S.C. § 12112(b)(6). It may be a defense to a charge of discrimination under the ADA that the use of standards, tests, or selection criteria that tend to screen out or otherwise deny a job or benefit to a disabled individual is job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation.

F. Retaliation. As with all nondiscrimination laws, persons may assert claims for retaliation for exercising rights under the ADA in good faith. *See Shellenberger v. Summit Bancorp Inc.*, 318 F.3d 183 (3d Cir. 2003) (absence of a disability does not translate into absence of protection from antiretaliation provisions of ADA).

For example, employees may claim retaliation for engaging in protected activity under ADA, such as requesting a reasonable accommodation, even if the requested accommodation was not reasonable. *See, e.g., Rhoads v. Federal Deposit Insurance Corp.*, 257 F.3d 373 (4th Cir. 2001). The Seventh Circuit, however, has held that compensatory and punitive

damages are not available for a retaliation claim under the ADA. *See Kramer v. Banc of America Securities, LLC,* 355 F.3d 961 (7th Cir. 2004). The court held that remedies for ADA retaliation are limited to those found in 42 U.S.C. § 2000e-5(g)(1) (equitable remedies of back pay, reinstatement, and injunctive relief). The court based its determination on the plain language of the 1991 Civil Rights Act and did not examine the legislative history of the Act. The court also held that because the plaintiff was not entitled to compensatory or punitive damages, she had no right to a jury trial on her retaliation claim, noting that "[t]here is no right to a jury where the only remedies sought (or available) are equitable."

G. Individual Liability under the ADA. Several federal courts have held that supervisors cannot be sued in their individual capacity under the ADA or the Rehabilitation Act of 1973. *See Butler v. City of Prairie Village*, 172 F.3d 736 (10th Cir. 1999); *Silk v. City of Chicago*, 9 Am. Dis. Cases (BNA) 1409 (7th Cir. 1999); *Reno v. Baird*, 957 P.2d 1333 (1998). *See also Albra v. Advan, Inc.,* 490 F.3d 826 (11th Cir. 2007) (Individuals are not subject to liability under the antiretaliation provisions of the ADA that address employment discrimination, even though earlier decisions held individuals could be sued for retaliation under the ADA's public services provision; the definition of employer is similar to that in Title VII which does not allow individual liability for retaliation.) Parallel state or local laws, however, may impose individual liability.

VII. THE "REASONABLE ACCOMMODATION" CONCEPT

A. General "Reasonable Accommodation" Principles. The ADA requires employers to make reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability, unless the employer can demonstrate that the accommodation would impose an undue hardship. 42 U.S.C. § 12112(b)(5)(A). The ADA also prohibits employers from denying employment opportunities to a job applicant who is an otherwise qualified individual with a disability if the denial is based on the need to provide a reasonable accommodation. 42 U.S.C. § 12112(b)(5)(B). Accommodations are not tantamount to paternalism or abandoning performance expectations to which other employees are held. Accommodations are steps designed to enable the otherwise qualified individual to perform the essential functions of the job. The accommodations obligation also means employers cannot choose a nondisabled applicant over a disabled applicant simply because the disabled applicant needs a reasonable accommodation to fulfill the requirements of the position. In fact, employers must notify applicants of the obligation to make reasonable accommodations. Refusal to attempt "reasonable accommodations" for an existing employee, if geared toward forcing the employee to quit, may constitute constructive discharge. Moreover, refusing to try in good faith to make a reasonable accommodation (or discuss reasonable accommodations) may allow an aggrieved employee to seek higher levels of damages in litigation.

Whether an accommodation is "reasonable" depends largely on: (1) whether it is effective (meaning it actually would enable the individual to perform the essential functions of the job); and (2) whether the employer can demonstrate that making the accommodation would create an undue hardship, in view of cost and degree of disruption associated with the accommodation, compared with the size and type of business, financial strength, and structure of operations. As discussed below, employers bear the burden of proving "undue hardship" with objective evidence and not speculation.

The EEOC has taken the position that an individual must merely show that an accommodation is "effective" (that it would enable the individual to perform the job) in order to be "reasonable." The court in *Reed v. Lepage Bakeries, Inc.*, 244 F.3d 254 (1st Cir. 2001) disagreed, holding:

> In order to prove "reasonable accommodation," a plaintiff needs to show not only that the proposed accommodation would enable her to perform the essential functions of her job, but also that, at least on the face of things, it is feasible for the employer under the circumstances. If the plaintiff succeeds in carrying this burden, the defendant then has the opportunity to show that the proposed accommodation is not as feasible as it appears, but rather that there are further costs to be considered, certain devils in the details.

See also, e.g., Hoskins v. Oakland County Sheriff's Department, 227 F.3d 719 (6th Cir. 2000); *Willis v. Conopco, Inc.*, 108 F.3d 282 (11th Cir. 1997).

The evolving nature of an individual's disability, job duties, and functional limitations requires ongoing evaluation, ideally in consultation with the disabled employee, of what accommodations are effective, needed, and reasonable. These changes, along with changes in both technology and the organization's ability to implement accommodations, are "moving targets" in need of constant re-evaluation.

It is incumbent on the disabled employee to raise the issue of disability and request a reasonable accommodation. The law does not require clairvoyance. This is a particularly salient issue in cases involving "hidden" disabilities that are not obvious unless disclosed. Although an employer may ask employees believed to be disabled whether they need a reasonable accommodation, the responsibility to request a reasonable accommodation, and to disclose information on the disability in order to obtain a reasonable accommodation, falls squarely on the employee (though courts are split on whether the employee must specify a particular accommodation). Encouraging communication (with appropriate confidentiality safeguards) often prevents disputes over what the employer knew and whether and how the employee requested a reasonable accommodation. Furthermore, even though employers are not obligated to offer accommodations until a disability is known and the employee initiates the accommodation dialogue, sound personnel practices following a risk management strategy warrant asking any employee with performance problems (particularly if they are suspected of having a disabling condition) whether the employee has any suggestions that could help improve his or her performance.

The EEOC has issued a comprehensive guidance on reasonable accommodations. *See* Revised Enforcement Guidance Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, http://www.eeoc.gov/policy/docs/accommodation.html.

The Guidance discusses the interactive process for arriving at an accommodation, choosing among accommodations, addressing the concerns and questions of others, the employer's duties, and the employee's duties. It also addresses hardship defense considerations and rejects such theories as cost-benefit analysis, meaning that the accommodations provided for an organization's most prized employee will become the standard for all employees requesting the accommodation. Finally, it discusses particular types of accommodations, such as leave, reassignments, altering policies, and making facilities and equipment accessible.

B. Knowledge of Condition. The ADA "does not require clairvoyance." *Hedberg v. Indiana Bell Tel. Co.*, 47 F.3d 928, 933 (7th Cir. 1995). An employer who is unaware of an employee's disability generally cannot be held liable for disability discrimination even when symptoms of a disabling condition may be present. *See, e.g., Amadio v. Ford Motor Co.*, 238 F.3d 919 (7th Cir. 2001) (employee cannot wait until time of termination to request accommodation and disclose disability); *Morisky v. Broward County*, 80 F.3d 445 (11th Cir. 1996) (employer cannot be liable under ADA for firing employee when it had no knowledge of the disability); *Hedberg v. Indiana Bell Tel. Co.*, 47 F.3d 928 (7th Cir. 1995); *Rogers v. CH2M Hill*, 18 F. Supp. 2d 1328 (M.D. Ala. 1998) ("[a]n employer would probably never be

held to have imputed knowledge of a depression or an anxiety disorder of its employee"). The EEOC Guidance on Reasonable Accommodations, discussed *infra*, also encourages individuals needing an accommodation to inform their employer of their disability.

C. Reasonable Accommodation Process.

1. Employee's Responsibility to Request Accommodation. Generally, it is incumbent on the individual with a disability to come forward and request a reasonable accommodation. This then triggers the "interactive" process between the employee and employer in developing and implementing a reasonable accommodation. To request a reasonable accommodation, the individual need not necessarily mention the ADA or the term "reasonable accommodation." *See, e.g., Taylor v. Phoenixville School District*, 184 F.3d 296 (3d Cir. 1999). *But see MacGovern v. Hamilton Sunstrand Corp.*, 50 Fed. Appx. 59 (2d Cir. 2002) (individual needing accommodation has duty to request accommodation or bring inadequacy of existing accommodation to employer's attention). EEOC regulations provide that "[t]o determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation." 29 C.F.R. § 1630.2(o)(3). In *Jakubowski v. Christ Hosp., Inc.*, 627 F.3d 195 (6th Cir. 2010), the Sixth Circuit affirmed summary judgment in favor of the employer on the former employee's claim the hospital failed to accommodate his disability (Asperger's Disorder). The court noted that the plaintiff has the burden of proposing an accommodation and proving that it is reasonable. Here, the court found the plaintiff's proposed accommodations of "knowledge and understanding" on the part of the medical staff did not address a key obstacle preventing him from performing a necessary function of a medical resident, that of effective communication. Thus, the court held that he failed to meet his burden under the Act of proving he is an otherwise qualified individual. In addressing the interactive process, the court noted that the employer is not required to make a counter proposal after rejecting the employee's proposed accommodation; however, doing so may be additional evidence of the employer's good faith efforts to accommodate the employee. "If an employer takes that step and offers a reasonable counter accommodation, the employee cannot demand a different accommodation." *Id.* at 203 (citing *Hedrick v. W. Reserve Care Sys.*, 355 F.3d 444, 457 (6th Cir. 2004)). The court rejected the plaintiff's argument that the employer did not act in good faith because it did not offer him a remediation program similar to the one offered to a previous, unnamed resident who exhibited similar deficiencies because he never requested a remediation program as part of the accommodation process and only raised it during the litigation. The court held that because the employer met with the plaintiff, considered his proposed accommodations, informed him why they were unreasonable, offered assistance in finding a new pathology residency, and never hindered the process along the way, there was no dispute that it participated in the interactive accommodation process in good faith.

2. Suggested Problem Solving Approach to Accommodation Request. When a qualified individual with a disability has requested a reasonable accommodation to assist in the performance of a job, the employer, using a problem solving approach, should:

- analyze the particular job involved and determine its purpose and essential functions;
- consult with the disabled individual to ascertain the precise job-related limitations imposed by the individual's disability and how those limitations could be overcome with a reasonable accommodation;

- in consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position; when necessary consult with medical or other experts; and
- consider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employee and the employer. Although the employee's preference for a type of accommodation should be considered, the employer is not required to implement the employee's preferred accommodation and may implement an alternative reasonable accommodation.

3. Interactive Process. Some courts have held that the ADA requires employers to engage in the interactive process. *See, e.g., Kratzer v. Rockwell Collins, Inc.*, 398 F.3d 1040 (8th Cir. 2005) ("If the employee needs an accommodation, the employer must engage in an interactive process"; finding that, in this case, employee, not employer impeded the interactive process because she failed to provide an updated evaluation to the employer after claiming she had additional restrictions and needed further accommodations). Others have rejected this conclusion. *See Lenker v. Methodist Hosp.*, 210 F.3d 792 (7th Cir. 2000) (ADA "says nothing about a directed versus an interactive process"); *Rehling v. City of Chicago*, 207 F.3d 1009 (7th Cir. 2000) ("the interactive process the ADA foresees is not an end in itself; rather it is a means for determining what reasonable accommodations are available" and plaintiff therefore must prove that employer actually engaged in behavior that resulted in failure to identify an appropriate accommodation). *See also Tobin v. Liberty Mutual Insurance Co.*, 433 F.3d 100 (1st Cir. 2005) (employer was not liable for failing to engage in the interactive process to determine an appropriate reasonable accommodation for the plaintiff where the employer offered the plaintiff several accommodations, but the plaintiff ultimately was unable to meet his sales goals and was discharged for poor performance).

The Seventh Circuit has also held that an employer is not required to include an employee's attorney or other person in the interactive process. *See Ammons v. Aramark Uniform Svs.*, 368 F.3d 809, 820 (7th Cir. 2004). Another court held that a claim based on failure to engage in the accommodations process depends in part on whether the employee can show that he or she *could* have been accommodated but for the employer's alleged lack of good faith in participating in the process. *Canny v. Dr. Pepper/Seven-Up Bottling Group, Inc.*, 439 F.3d 894 (8th Cir. 2006).

Employers should consider documenting the stages of the accommodation process, including requests and discussions, and tracking effectiveness of the accommodations. In situations where accommodations are being handled properly, this helps in creating a repository of knowledge on the particular case, and an institutional memory.

D. An Employer's Right to Inquire about an Employee's Medical Condition and Require Documentation Supporting a Claimed Disability. An employer "before providing reasonable accommodation, may require that the individual with a disability provide documentation of the need for accommodation." *Miller v. National Casualty Co.*, 61 F.3d 627 (8th Cir. 1995). Medical information acquired in this process must be kept confidential. In its July 2000 guidance on disability-related inquiries and medical exams directed toward current employees, the EEOC takes the position that the ADA does not prevent an employer from requiring an employee to go to an appropriate health care professional of the employer's choice if the employee provides insufficient documentation from his or her treating physician (or other health care professional) to substantiate that she or he has an ADA disability and needs a reasonable accommodation. *See* Guidance, at http://www.eeoc.gov/policy/docs/guidance-inquiries.html. The guidance also states that if an employee provides insufficient

documentation in response to the employer's initial request, the employer should explain why the documentation is insufficient and allow the employee an opportunity to provide the missing information in a timely manner. Further, the EEOC encourages the employer to consider consulting with the employee's doctor (with the employee's consent) before requiring the employee to go to a health care professional of its choice.

An employee's failure to respond to an employer's legitimate inquiries is a basis for barring recovery in an ADA suit. For example, in *Beck v. University of Wisconsin Board of Regents*, 75 F.3d 1130 (7th Cir. 1996), an employee's failure to provide medical information or to sign a medical release permitting the employer to evaluate what accommodations would allow her to perform the essential functions of her position precluded liability against the employer for failure to provide reasonable accommodation. *See also, e.g., Kratzer v. Rockwell Collins, Inc.*, 398 F.3d 1040, 1045 (8th Cir. 2005) (plaintiff's failure to obtain an updated physical evaluation precluded the employer from providing an appropriate accommodation).

E. Nature and Extent of the Obligation of "Reasonable Accommodation." Under the ADA, the term "reasonable accommodation" may include: making existing facilities used by employees readily accessible to and usable by individuals with disabilities; 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. 42 U.S.C. § 12111(9).

The EEOC's revised ADA regulations state that the term reasonable accommodation means:

- Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or
- Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable an individual with a disability who is qualified to perform the essential functions of that position; or
- Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.

29 C.F.R. § 1630.2(o)(1)(i-iii). Additionally the regulations provide that reasonable accommodation may include but is not limited to:

- Making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
- Job restructuring;
- Part-time or modified work schedules;
- Reassignment to a vacant position;
- Acquisition or modifications 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.

29 C.F.R. § 1630.2(o)(2)(i-ii). With regard to reassignment to vacant positions, at least one court has held that the employee with the disability must show that a vacant position exists for which he or she is qualified. *Ozlowski v. Henderson*, 237 F.3d 837 (7th Cir. 2001).

F. Defense: "Undue Hardship." Undue hardship is a defense to the failure to provide reasonable accommodation. The *de minimis* rule applied in religious accommodation cases is inapplicable. *Prewitt v. United States Postal Service*, 662 F.2d 292, n.22 (5th Cir. 1981). Undue hardship is described in the ADA as follows:

> (A) In general. The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).
>
> (B) Factors to be considered. In determining whether an accommodation would impose an undue hardship on a covered entity, the factors to be considered include –
>
> (i) the nature and cost of the accommodation needed under the [ADA];
>
> (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
>
> (iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities, and
>
> (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

42 U.S.C. § 12111(10). The statute forces employers to "look deeper and more creatively into the various possibilities suggested by an employee with a disability"; the burden for demonstrating an "undue hardship" is not satisfied with a mere showing that a proposed accommodation is "inconvenient." *Skerski v. Time Warner Cable Co.* 257 F.3d 273 (3d Cir. 2001).

1. Examples of Modification of Facilities/Making of Expenditures. Providing a voice-activated computer to a quadriplegic employee may be a reasonable accommodation. *Chirico v. Office of Vocational Educational Services for Individuals with Disabilities*, 1995 BNA DLR No. 118:A-1 (N.Y. Sup. Ct. 1995) (state court interpreting state law consistent with the federal ADA decisions). Providing a work atmosphere absolutely free of all allergens, however, is not reasonable. *See Cassidy v. Detroit Edison Co.*, 138 F.3d 629 (6th Cir. 1998) (the diagnosis "chemical bronchitis" was too vague; employee failed to identify an objectively reasonable accommodation by requesting an allergy-free workplace); *but see Burnley v. San Antonio*, 2004 WL 298709, 2004 U.S. Dist. LEXIS 421 (W.D. Tex. January 6, 2004) (reasonableness of request for mold-free office environment by individual with respiratory disorder and "sick building syndrome" is a fact question).

2. Modification of Policies. In some instances, employers may need to modify certain policies in order to accommodate an individual with a disability. In *Davidson v. America Online Inc.*, 337 F.3d 1179 (10th Cir. 2003), for example, the court held that a policy of reserving non-voicephone customer care positions to internal applicants may improperly

bar qualified outside applicants with disabilities, such as hearing impairments, from employment.

3. Job Restructuring and/or Light Duty. Transfer of a disabled employee to an identical job at a different facility of same employer would be a modest example of job restructuring as accommodation under the Rehabilitation Act. *Miller v. Runyon*, 77 F.3d 189 (7th Cir. 1996). *But see Watson v. Lithonia Lighting,* 304 F.3d 749 (7th Cir. 2002) (employer need not set aside positions for employees recovering from injuries and make those positions available indefinitely or create permanent light duty job); *DeVito v. Chicago Park District*, 270 F.3d 532 (7th Cir. 2001) (park laborer who could not return to his full time job was no longer qualified; employer was not required to keep employee indefinitely in temporary light duty position geared toward returning employee to full time work); *Hoskins v. Oakland County Sheriff's Dep't*, 227 F.3d 719 (6th Cir. 2000) (a permanent assignment to a relief position, with diminished or "light duty" responsibilities, is not a reasonable accommodation).

4. Examples of Modification of Work Schedule. A job applicant can be required to meet legitimate attendance requirements. *But see* the Attendance discussion above. An employer need not waive overtime work requirements if performing overtime is an essential function of the job. *Davis v. Florida Power & Light Co.*, 205 F.3d 1301 (11th Cir. 2000); *See also Rehrs v. Iams Co.*, 486 F.3d 353 (8th Cir. 2007) (diabetic warehouse worker had no right to an accommodation of straight shift work when all of his counterparts had rotating shifts; rotating shift is an essential job function; employer was not required to accommodate plaintiff if doing so would require other employees to work harder, longer, or be deprived of opportunities).

In *Breen v. Department of Transportation,* 282 F.3d 839 (D.C. Cir. 2002), however, the court held that an employee may have a Rehabilitation Act claim for her agency's failure to respond to her request for an alternative work schedule as an accommodation for her obsessive-compulsive disorder. Whether the job lends itself to this type of accommodation should be approached on an individual, case-by-case basis.

5. Transfers to Other Jobs. Most courts now agree that the ADA obligates employers to reassign disabled workers to a vacant job for which they are qualified if they cannot be accommodated in their current job. *Smith v. Midland Brake, Inc.*, 180 F.3d 1154 (10th Cir. 1999) (*en banc*); *EEOC v. United Parcel Service, Inc.*, 249 F.3d 557 (6th Cir. 2001) (transfer obligation is nationwide). However, in *Duvall v. Georgia Pacific Consumer Products,* 607 F.3d 1255 (10th Cir. 2010), the Tenth Circuit held that transferring an employee to a position held by a temporary employee is not a reasonable accommodation under the ADA because the position held by the temporary employee is not considered "vacant." Here, Duvall was transferred to another job after the GP outsourced his position. However, the new position aggravated Duvall's cystic fibrosis, so he requested a transfer to an area that was free from paper dust and eventually transferred to a lower-paying position in the storeroom. Subsequently Duvall sued GP under the ADA, claiming the company failed to reasonably accommodate him when it refused to transfer him to positions that were being filled by temporary employees, which would not have required him to take a cut in pay. The trial court ruled in favor of GP and the Tenth Circuit upheld this determination. Although the court held that the ADA imposes on employers a mandatory obligation to transfer a disabled employee to a vacant position, the court also acknowledged that this obligation is not without limit and it, like all accommodations under the ADA, must be reasonable. The court held that the positions to which Duvall sought to be transferred, which were filled by temporary employees at the time he requested the transfer, were not considered vacant because they were not available for similarly-situated nondisabled employees to apply for and

obtain. The court held that if "the term vacant meant anything other than 'available to a similarly-situated nondisabled employee,' we would run the risk of transforming the ADA from an antidiscrimination statute into a mandatory preference statute."

The EEOC Guidance on Accommodations asserts that reassignment must be considered on an organization-wide basis, which may prove challenging for large, national operations. Reassignment to a lower-paying position should only be considered, however, if the disabled individual requests it, or if reasonable accommodations cannot enable him or her to perform their higher paying job. Even if it may cost more to accommodate an employee in their existing job, the EEOC Guidance on Accommodations explains that reassignment is a "last resort" and is an inappropriate accommodation if the employee does not wish to be reassigned and can still perform his or her old job with the costlier accommodation. The Guidance also claims that employees with disabilities must be granted transfers or reassignments if the employee is minimally qualified for the new job, even if a more qualified applicant or employee bidding for the position exists. The EEOC has explained that this ADA accommodation preference takes precedence over affirmative action plans. *See* Daily Labor Report (BNA) (February 10, 2000), E-1. Some courts appear to support the EEOC's position, reasoning that the reassignment obligation must mean something more than merely allowing a disabled person to compete equally with the rest of the world. *See Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284 (D.C. Cir. 1998). *But see EEOC v. Humiston-Keeling, Inc.*, 227 F.3d 1024 (7th Cir. 2000) (rejecting the EEOC's approach, labeling it as "affirmative action with a vengeance," and as creating a "hierarchy of protections for groups deemed entitled to protection against discrimination.")

a. No Requirement to Create a Special Position. Employers are not required to create a position especially for employees with disabilities. *See, e.g., Graves v. Finch Pruyn & Co.*, 457 F.3d 181 (2d Cir. 2006); *Thompson v. E.I. DuPont de Nemours & Co.*, 2003 WL 21771959, 2003 U.S. App. LEXIS 14816 (6th Cir. 2003) (unpublished decision). *See also Lucas v. W.W. Grainger, Inc.*, 257 F.3d 1249 (11th Cir. 2001) (employers are not expected to promote or displace workers to accommodate disabled employees). The EEOC, however, takes the position that if the employee's return to his or her prior position is not feasible, the employer should make efforts to place the employee in another vacant position.

b. No Violation of Bona Fide Seniority System. The U.S. Supreme Court has held that an employer is not ordinarily required to violate the terms of a bona fide seniority system when faced with a request for reassignment as an accommodation under the ADA. *See US Airways v. Barnett*, 535 U.S. 391(2002) (plaintiff's requested accommodation was not reasonable because it violated the terms of the employer's bona fide seniority system; this would be the result in most cases, unless the employee can show the existence of special circumstances; this rule applies to both collectively bargained seniority systems and to seniority systems unilaterally imposed by management).

The significance of this case is that the tangible rights or expectations of other employees belong in the "reasonableness" equation rather than as part of an undue hardship defense. Making a "reasonable accommodation," therefore, is not simply an analysis in a vacuum, looking only to whether the accommodation could be "effective" for the employee with a disability. *See also Medrano v. City of San Antonio*, 179 Fed. Appx. 897 (5th Cir. 2006) (accommodation is not reasonable if it violates seniority system absent special circumstances, which were not shown in this case).

c. Promotion/Additional Training. An employer is not required to offer a promotion to an employee as a reasonable accommodation. *See, e.g., Hedrick v. W. Reserve Care Sys.*, 355 F.3d 444 (6th Cir. 2004); *Lucas v. W.W. Grainger, Inc.*, 257 F.3d 1249 (11th Cir. 2001). Additionally, at least one court has held that an employer is not required to offer a disabled employee special training to enable her to perform another job as a reasonable accommodation. *Williams v. United Insurance Co. of Am.*, 253 F.3d 280 (7th Cir. 2001). EEOC guidance also suggests that employees with disabilities are not entitled to any *more* training than afforded or available to other employees.

6. Leave As a Reasonable Accommodation. The EEOC Interpretive Guidance includes granting leave for receiving necessary treatment as a form of accommodation. In *Cehrs v. Northeast Ohio Alzheimer's Research Ctr.*, 155 F.3d 775 (6th Cir. 1998), the court held, "we are not sure that there should be a *per se* rule that an unpaid leave of indefinite duration (or a very lengthy period, such as one year) could never constitute a 'reasonable accommodation' under the ADA." *See also Dark v. Curry County,* 451 F.3d 1078 (9th Cir. 2006) (Extended leave or an extension of an existing leave period may be reasonable accommodation; finding factual issue regarding whether defendant could have allowed plaintiff, a heavy equipment operator who had an on-the-job seizure because of epilepsy, to use 89 days of accrued sick leave or unpaid medical leave while the levels of his anti-seizure medication were being adjusted).

In *Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 649-50 (1st Cir. 2000), the court noted that some employees, by the nature of their disability, are unable to provide an absolutely assured time for their return to employment, but that does not necessarily make their request for leave to a particular date indefinite. The court held that each case must be scrutinized on its own facts. Note that in *Garcia-Ayala*, the plaintiff requested leave until a particular date, so the request was not really a request for indefinite leave.

Indefinite Leave. Several appeals courts have held that indefinite medical leave could not be a reasonable accommodation. *See, e.g., Fogleman v. Greater Hazleton Health Alliance,* 2004 WL 2965392, 2004 U.S. App. LEXIS 26861 (3d Cir. Dec. 23, 2004) (unpublished decision) (indefinite leave is not reasonable when plaintiff could not show when she could perform essential job functions and eventually return to work); *Wood v. Green,* 323 F.3d 1309 (11th Cir. 2003) (the plaintiff's request for an indefinite leave of absence was a request to return to work at some point the future, not a request for an accommodation that would enable him to work in the present); *EEOC v. Yellow Freight System*, 253 F.3d 943 (7th Cir. 2001) (*en banc*) (noting that the Seventh Circuit has held that requests for unlimited sick days are not reasonable as a matter of law).

7. Providing Another Worker to Assist. In *LaMott v. Apple Valley Health Care Ctr.*, 465 N.W.2d 585 (Minn. App. 1991), the court specifically faulted a nursing home for failing to schedule a second housekeeper to assist a housekeeper who had suffered a stroke. However, a federal agency that had already accommodated an employee through a part-time assistant was not required to hire full-time assistant for the employee as an accommodation so that employee could receive a promotion, especially when there was evidence that the individual would not be qualified to perform in the promoted position even with such accommodation. *Adrain v. Alexander*, 792 F. Supp. 124 (D.D.C. 1992), *aff'd*, 28 F.3d 1295 (D.C. Cir. 1994).

8. Essential Job Functions. An employer is not required to eliminate essential job functions as a reasonable accommodation. For example, in *Durning v. Duffins Optical, Inc.*, 1996 BNA DLR No. 44:A-2 (E.D. La. 1996), the court held that an employer did not have to eliminate a salesman's outside sales calls when the employee was incapacitated after a stroke and wanted to make his calls via telephone on the grounds that such an

accommodation would substantially redefine his position and eliminate several essential functions of his job.

9. Working at Home. Requests to perform work in an employee's home may not be an unreasonable accommodation as a matter of law and employers should not summarily reject all telecommuting requests. *See Humphrey v. Memorial Hospitals Ass'n,* 239 F.3d 1128 (9th Cir. 2001); *Langon v. Department of Health and Human Services,* 959 F.2d 1053 (D.C. Cir. 1992); *Nanzalone v. Allstate Insurance Co.*, Case No. 93-2248, BNA DLR No. 19, p. A-1 (E.D. La. 1995).

Some courts have held that requests to work from home are not reasonable. *See, e.g., Mason v. Avaya Communications, Inc.*, 357 F.3d 1114 (10th Cir. 2004) (working from home for employee suffering from post-traumatic stress disorder is not reasonable accommodation if employee's physical presence in workplace – given requirement of job-related supervision and teamwork – is an essential job function); *Rauen v. U.S. Tobacco Mfg. Ltd. Partnership,* 319 F.3d 891 (7th Cir. 2003) (central aspects of employee's particular job required work on site; request to work entirely from home office therefore was not reasonable).

The EEOC recently issued guidance on telework as a reasonable accommodation, meant to supplement its Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under ADA. *See* http://www.eeoc.gov/facts/telework.html. These guidelines acknowledge that the ADA does not require employers to offer telework to all employees. In addition, even if telework is the employee's preferred or requested accommodation, the employer may still offer alternate accommodations as long as they are effective.

10. Providing a Flexible Schedule. Some courts have held that an employer is not required to provide a flexible schedule as an accommodation. *See Carr v. Reno,* 23 F.3d 525 (D.C. Cir. 1994) (The U.S. Attorney's Office was not required to grant a clerical employee a flexible schedule where the clerical position was a time-sensitive job, and granting the employee's request would stretch reasonable accommodation to absurd proportions and imperil the effectiveness of the employer's public enterprise); *Ezikovich v. Commission on Human Rights and Opportunities*, 750 A.2d 494 (Conn. App. Ct. 2000) (following ADA, rejecting disability discrimination claim of employee with chronic fatigue syndrome who wanted to begin work without a fixed starting time; employee was previously accommodated with a part-time schedule).

11. Separating Employees and Reducing Stress. The ADA does not require separation from a supervisor as an accommodation. *See* EEOC Guidelines; *MacKenzie v. Denver*, 414 F.3d 1266 (10th Cir. 2005) (city clerk whose coronary disease required her to avoid stressful situations is not substantially limited in the major life activity of working and therefore not covered by the ADA; employee claimed that working under a certain supervisor caused stress); *Gaul v. Lucent Techs.*, 134 F.3d 576, 581 (3d Cir. 1998) (clinically depressed employee's request for "stress free" work environment was not reasonable; employee could not even show that such an accommodation was possible).

VIII. SPECIFIC CONDITIONS UNDER THE ADA

A. Mental And Psychiatric Disabilities. As with any condition, a mental impairment must be sufficiently severe that it substantially limits a major life activity. *See, e.g., Reeves v. Johnson Controls World Servs*, 140 F.3d 144 (2d Cir. 1998) (panic disorder with agoraphobia did not rise to disability under ADA because it did not limit a major life activity; court refused to recognize "everyday mobility," such as moving around in crowds, as a major life activity).

However, the EEOC's revised regulations state that, applying the principles set forth in the regulations, it easily should be concluded that certain types of impairments will, at a minimum, substantially limit the major life activity indicated and lists the following: "an intellectual disability (formerly termed mental retardation) substantially limits brain function . . . autism substantially limits brain function . . . major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia substantially limit brain function." 29 C.F.R. § 1630.2(j)(3)(iii). Additionally, the EEOC regulations provide that interacting with others is a major life activity. 29 C.F.R. § 1630.2(i)(1)(i).

The EEOC's "Guidance on the Americans with Disabilities Act and Psychiatric Disabilities," http://www.eeoc.gov/policy/docs/psych.html, includes "interacting with others" as a major life activity. The EEOC also explains that certain behavioral traits, such as irritability, inability to handle stress, lateness, and poor judgment are not mental impairments, even though they may be linked to mental impairments.

Courts have held that an employer may discipline an employee with a mental disability, just as anyone else, for violating job-related workplace conduct standards. *See, e.g., Calef v. Gillette Co.*, 322 F.3d 75 (1st Cir. 2003) (anger and unacceptable behavior threatening safety of others attributable to attention deficit and hyperactivity disorder rendered individual not qualified, even if individual were substantially limited in any major life activities). Unacceptable job performance is not protected under the ADA, even though the unacceptable conduct or performance may be the manifestation of a disability. *Petzold v. Borman's, Inc. d/b/a Farmer Jack*, (No. 211567) (Mich. Ct. App. 2000) (firing grocery story "courtesy clerk" whose Tourette Syndrome resulted in employee's use of racial slurs and obscenities with customers was not disability discrimination); *Ray v. Kroger Co.*, 264 F. Supp. 2d 1221 (S.D. Ga. 2003) (offensive, racist outbursts by supermarket employee with Tourette's Syndrome rendered individual not qualified for job), *aff'd,* 2003 WL 23186025, 2003 U.S. App. LEXIS 27230 (11th Cir. Dec. 17, 2003).

In a similar vein, accommodations need to be tailored to the needs of the job, and not necessarily the perceptions of the mentally impaired individual. In *Tyler v. Ispat Inland, Inc.*, 245 F.3d 969 (7th Cir. 2001), an individual requested a transfer as an accommodation because he thought his co-workers were conspiring against him. The court held that if the individual's mental illness "manifests itself in the form of delusions or hallucinations, it is difficult to argue that an employer should have accommodated the disability by addressing working conditions that are the product of the employee's imagination."

Dangers occur when employers attempt to "diagnose" the underlying causes of workplace behavior and attach labels such as "paranoid." "Diagnosing" places individuals that might not otherwise be protected under the ADA into protected status. Following up with mental health related questions also raises issues of improper medical inquiries under ADA. *See, e.g., Kohn v. Lemmon Co.*, 1998 WL 67540, 1998 U.S. Dist. LEXIS 1737 (E.D. Pa. Feb. 18, 1998) (labeling employee as "paranoid" and referring her for psychological counseling placed employee in protected class of "regarded as disabled"). *But see Mundo v. Sanus Health Plan of Greater New York*, 966 F. Supp. 171 (E.D.N.Y. 1997) (regarding a person as having a common personality trait, such as inability to handle stress, does not mean that the employer regards the person as being disabled); *Cody v. CIGNA Healthcare*, 139 F.3d 595 (8th Cir. 1998) (requesting mental evaluation due to troubling behavior, including sprinkling salt at work area to keep "evil spirits" away, did not violate ADA or make employee "regarded as disabled").

Stereotypes regarding mental conditions also raise the "direct threat to safety" issue in cases of psychiatric disabilities. The EEOC emphasizes that, as with any other disability, an individual does not pose a direct threat simply because of having a history of psychiatric

illness. To prevail on a "direct threat" defense, the employer must show, with objective medical evidence, that the particular individual poses a threat to safety. In *Josephs v. Pac. Bell,* 443 F.3d 1050 (9th Cir. 2006) the court upheld a jury verdict in favor of an employee based on the employer's refusal to reinstate him. The employee worked as a home service technician job, which required unsupervised visits to customers' homes. The employer learned the employee lied on his job application when he stated that he had never been convicted of a felony. The employee had been convicted of battery on a peace officer and, in a separate incident, had been charged with attempted murder, but was found not guilty by reason of insanity and hospitalized for three years in a mental hospital. The employee claimed the employer violated the ADA by regarding him as disabled. A jury found that the employer did not violate the ADA by discharging the employee but it did violate the ADA by refusing to reinstate him. The Ninth Circuit affirmed the jury verdict based on statements made by the employer during grievance proceedings that it was concerned the employee had been in a mental hospital for three years, and fact that the employer in the context of union grievance proceedings had reinstated two other employees who lied on applications.

Violence and Misconduct. Unacceptable behavior, even if it is the manifestation of a disability, is not protected under ADA. *Jones v. American Postal Workers Union,* 192 F.3d 417, 429 (4th Cir. 1999) ("the law is well settled that the ADA is not violated when an employer discharges an individual based upon the employee's misconduct, even if the misconduct is related to a disability"). *See also Jones v. Potter*, 488 F.3d 397 (6th Cir. 2007) (affirming summary judgment against U.S. Postal Service employee discharged for fighting; Rehabilitation Act of 1973 requires a showing that employee was discharged "solely" because of a disability – at summary judgment stage, employee was required to show that the altercation did not actually motivate his discharge); *Sista v. CDC Ixis N. Am., Inc.*, 445 F.3d 161 (2d Cir. 2006) (no violation for discharging employee with depression who threatened a co-worker; employer has a right to protect itself from potentially violent employees); *Borgialli v. Thunder Basin Coal Co.*, 235 F.3d 1284 (10th Cir. 2000) (discharging mine blaster who threatened suicide and displayed symptoms of depression and anxiety that created unnecessary risks in inherently dangerous job did not violate ADA); *EEOC Guidance on the Americans with Disabilities Act and Psychiatric Disabilities,* available at: http://www.eeoc.gov/policy/docs/psych.html.

Additionally, the ADA is not violated when an employer discharges an employee because of a mistaken perception of misconduct, even if that misconduct would have been related to a disability. *Pence v. Tenneco Auto. Operating Co.,* 169 Fed. Appx. 808 (4th Cir. 2006).

B. The ADA and "Current Drug Users." The ADA does not protect any employee or applicant "who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use." 42 U.S.C. § 12114(a). The ADA contains other specific exclusions as well. Conditions specifically excluded from coverage by ADA nevertheless may be protected under state law.

The "currently engaging in the illegal use of drugs" language of the ADA has been construed to mean having used illegal drugs in the "weeks and months" prior to the adverse action. *See Shafer v. Preston Memorial Hosp. Corp.*, 6 A.D. Cas. (BNA) 682 (4th Cir. 1997) (nurse who was currently using Fentanyl was not "a qualified person with a disability" under the ADA because she was "currently engaging in the illegal use of drugs"). *See also McDaniel v. Mississippi Baptist Medical Ctr.*, 869 F. Supp. 445 (S.D. Miss. 1994) (noting that to be protected by the ADA, illegal drug users must show that they have remained drug-free for a long time, not merely a few weeks after leaving the program), *aff'd*, 74 F.3d 1238 (5th Cir. 1995); *Dovenmuehler v. St. Cloud Hosp.*, 509 F.3d 435 (8th Cir. 2007) (affirming summary judgment against nurse with history of drug abuse who did not have an impairment requiring accommodation, she was neither limited in a major life activity nor regarded as disabled;

requested accommodation was unreasonable; her discharge for stealing drugs was not pretextual, her drug dependency did not excuse this illicit conduct); *Brown v. Lucky Stores, Inc.*, 246 F.3d 1182 (9th Cir. 2001) (employee missing work due to court-ordered drug/alcohol rehabilitation is not protected under ADA "safe harbor" for recovering addicts because drug and alcohol use occurred too soon before termination).

The U.S. Supreme Court has held that the federal Controlled Substances Act prevents the local cultivation and use of marijuana even if the drug is used in accordance with the state's medical marijuana laws. *Gonzales v. Raich,* 545 U.S. 1 (2005). The Court's decision did not overturn state laws that permit the medical use of marijuana, but may strengthen an employer's argument that it is not required to accommodate the medical use of marijuana in the workplace because that conduct is illegal under federal law.

In *Ross v. RagingWire Telecommunications, Inc.*, 174 P.3d 200 (Cal. 2008), the California Supreme Court held that the California Fair Employment and Housing Act does not require an employer to accommodate the use of illegal drugs. The court also held that marijuana is an illegal drug under federal law, even though state law permits its use for certain medicinal purposes. According to the Court, "nothing in the text or history of the Compassionate Use Act suggests the voters intended the measure to address the respective rights and obligations of employers and employees." In addition to finding that the plaintiff's discharge did not violate the state antidiscrimination law, the Court held that the discharge did not violate public policy. The Court held that the Compassionate Use Act does not address employment and, therefore, does not articulate a public policy concerning marijuana use in the employment context.

An employer's mistaken perception that an employee is an alcoholic or illegal drug user may allow the employee to pursue an ADA claim. *See, e.g., Moorer v. Baptist Mem'l Health Care System,* 398 F.3d 469 (6th Cir. 2005).

An alcoholic or recovering alcoholic, however, can be held to the same standards as any employee with respect to alcohol use at work. *See Burch v. Coca-Cola Co.*, 119 F.3d 305 (5th Cir. 1997); *Roig v. Miami Federal Credit Union*, 353 F. Supp. 2d 1213 (S.D. Fla. 2005) (even if individual's alcoholism could constitute a disability – though this individual failed to show how his alcoholism substantially impaired any of his major life activities – the individual can be held accountable for his absenteeism even if it is related to alcoholism). Courts and the EEOC have also endorsed "last chance" agreements for employees violating workplace substance abuse rules. *See* EEOC Guidance on Reasonable Accommodations under ADA; *Longen v. Waterous Co.*, 347 F.3d 685 (8th Cir. 2003).

The U.S. Supreme Court has held that an employer's no-rehire policy was a legitimate, nondiscriminatory reason for refusing to rehire a former employee who was a recovered drug addict. *See Raytheon Co. v. Hernandez*, 540 U.S. 44 (2003). In reaching this decision, the Court overruled a decision by the Ninth Circuit, which had held that the employer's policy violated the ADA because it had a disparate impact on rehabilitated drug addicts. The Supreme Court held that the Ninth Circuit improperly combined the disparate impact and disparate treatment methods of analyzing discrimination claims in finding that the policy violated the ADA. The Court remanded the case to the Ninth Circuit, which held that there was an issue of fact to be resolved at trial regarding whether the employer failed to re-hire the plaintiff because of his past record of addiction rather than because of a company rule barring the re-hire of previously discharged employees. *See Hernandez v. Hughes Missile Systems Co.,* 362 F.3d 564 (9th Cir. 2004).

IX. THE ADA'S INFLUENCE ON HIRING CONSIDERATIONS

A. Employment Applications and Interviews. The ADA makes it unlawful to "make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or extent of such disability." 42 U.S.C. § 12112(d)(2)(A). An employer may, however, inquire "into the ability of an applicant to perform job-related functions." 42 U.S.C. § 12112(d)(2)(B). The EEOC has issued guidance regarding the types of pre-employment questions that may be asked of applicants. The text of this guidance can be found at http://www.eeoc.gov/policy/ docs/preemp.html.

The EEOC Guidance regarding pre-employment questions provides that an employer may not ask questions on an application or in an interview about whether an applicant will need reasonable accommodation for a job because such an inquiry is likely to elicit information about whether the applicant has a disability. The guidance, however, also provides that when an employer reasonably believes that an applicant will need reasonable accommodation to perform a job, the employer may ask the applicant certain limited questions. Specifically, "the employer may ask whether she or he needs reasonable accommodation and what type of reasonable accommodation will be needed to perform the functions of the job." The employer can ask these questions only if:

- The employer reasonably believes the applicant will need accommodation because of an obvious disability;
- The employer reasonably believes that the applicant will need reasonable accommodation because of a hidden disability that the applicant has voluntarily disclosed to the employer; or
- The applicant has voluntarily disclosed to the employer that she or he needs reasonable accommodation to perform the job.

At the interview stage of the hiring process, the employer may ask only if the employee is able to perform the job function with or without reasonable accommodation. For example, "this job requires an employee to transport twenty pound bags of frozen frog legs from a loading dock, down two flights of steps, to a processing machine. Can you perform this function with or without reasonable accommodation?" An employer may also request that the applicant describe or demonstrate how the applicant will perform job-related functions with or without reasonable accommodation, so long as it does this for all applicants for the job or class of jobs in question. If, in response to the employer's request to demonstrate performance, an applicant indicates that she or he will need a reasonable accommodation, the employer must either: (a) provide a reasonable accommodation that does not create an undue hardship so the applicant can demonstrate job performance; or (b) allow the applicant to simply describe how she or he would perform the function with the reasonable accommodation. The disability or medically related questions should then stop. In other words, the interviewer should not ask how the person became disabled.

Employers commonly ask how many times an employee was absent with his or her previous employer. This question raises concerns under the ADA, as well as the FMLA. To avoid problems that could result from this question, the employer could merely state its attendance requirements and ask if the applicant can meet them. An employer may ask questions about an applicant's poor attendance record and questions that elicit whether the employee abused leave in the past, for example: How many Mondays or Fridays were you absent last year on leave other than approved vacation leave?

Under the ADA, an employer may not ask about job-related injuries or workers' compensation history prior to making a conditional offer of employment. The workers' compensation laws of most states encourage the employment of the physically disabled by

protecting employers from excess liability for compensation and medical expenses where a pre-existing, permanent physical impairment is aggravated by a subsequent injury.

In *Armstrong v. Turner Indus.*, 141 F.3d 554 (5th Cir. 1998) (applicant not hired because he did not truthfully respond to unlawful medical inquiry in employment application), a court rejected the EEOC's position on pre-employment medical inquiries and held that a mere violation of the ADA's prohibitions against pre-employment inquiries, without an actual injury, is not actionable. It is not clear whether other courts will follow this "no harm, no foul" rule. In *Griffin v. Steeltek, Inc.*, 261 F.3d 1026 (10th Cir. 2001), after denying summary judgment on a nondisabled plaintiff's claim that employer violated the ADA by asking impermissible medical questions on its application form, the Eighth Circuit Court of Appeals affirmed a jury verdict in favor of the employer. The court held that absent proof of injury resulting from the impermissible questions, the plaintiff was not entitled to either nominal or punitive damages. *But see Harrison v. Benchmark Elecs. Huntsville Inc.*, 593 F.3d 1206 (11th Cir. 2010) (holding that a plaintiff need not be disabled under the ADA to sue an employer for making a prohibited, pre-offer medical inquiry. Accordingly, the court reversed a trial court's decision in favor of the employer and held that the plaintiff should be permitted to take his ADA claim to trial.)

B. Pre-Employment Testing. Under the ADA, it is unlawful to use any test or selection criteria that tends to screen out persons with disabilities unless the criteria is shown to be job related and "consistent with business necessity." It is also unlawful to "fail to select and administer tests . . . in the most effective manner to ensure that . . . such test results accurately reflect" the attributes being tested for, rather than the impairment. 42 U.S.C. § 12112(b)(6) and (7).

C. Pre-Employment Physicals and Other Medical Opinions.

1. Conditions of Requiring a Pre-Employment Physical. Under the ADA, employers are expressly prohibited from requiring medical examinations or making inquiries about disabilities in the pre-offer stage. 42 U.S.C. § 12112(d)(2)(A). The EEOC's Enforcement Guidance on Pre-Employment Disability-Related Inquiries and Medical Examinations Under the ADA identifies the following factors in determining what constitutes a "medical examination" under the ADA:

- Is it administered by a health care professional or someone trained by a health care professional?
- Are the results interpreted by a health care professional or someone trained by a health care professional?
- Is it designed to reveal an impairment or physical or mental health?
- Is the employer trying to determine the applicant's physical or mental health or impairments?
- Is it invasive (for example, does it require the drawing of blood, urine or breath)?

These require confidentiality of results except that: (a) supervisors may be informed regarding work restrictions or accommodations; and (b) first aid and safety personnel may be informed if the condition might require emergency treatment. Under § 504 of the Rehabilitation Act, pre-employment physicals may not be conducted except under circumstances described at 28 C.F.R. § 42.513: (a) all entering employees must be required to take the exam; and (b) results must be collected and maintained separately and kept confidential. The OFCCP's 1992 changes to Section 503 to comply with the ADA allow such physicals only postoffer, pre-employment, and only if it is required of all similarly situated applicants, consistent with the ADA.

2. Reliance on Medical Opinions. The cases vary as to the extent to which an employer can safely rely on a medical opinion in making its employment decisions. *See Walker v. Attorney Gen. of United States*, 572 F. Supp. 100 (D.D.C. 1983) (permissible to rely on medical opinion); *Bentivegna v. DOL*, 694 F.2d 619 (9th Cir. 1982) (risky – medical opinion must be sound).

3. Evidence Obtained after the Employment Decision is Made. Does evidence obtained after an employment decision is made affect the defensibility of action already taken? Again, the cases are in conflict. *See Treadwell v. Alexander*, 707 F.2d 473 (11th Cir. 1983) ("A finding of discrimination cannot be predicated on information the [employer] did not have before it at the time it made its decision."). *But see Mantolete v. Bolger*, 767 F.2d 1416 (9th Cir. 1985) (employer who rejected an epileptic job applicant could defend its decision with medical testimony obtained subsequent to the rejection), *amended by* 38 Fair Empl. Prac. Cas. (BNA) 1517 (9th Cir. 1985).

D. Post Conditional Offer Medical Inquiries and Examinations. The ADA allows a broad range of medical testing and inquiries once a conditional offer of employment is made – so long as all persons in the same job category are subject to the same medical inquiries or examinations, results are kept confidential, and the examination is not used to discriminate against persons with disabilities (unless the results render the individual unqualified for the offered job). 42 U.S.C. § 12112(d)(3). The inquiries need not even be job-related. 29 C.F.R. § 1630.14(b)(3).

Notwithstanding the broad rights accorded to employers at this stage, employers should be aware of their stringent confidentiality obligations once the employer obtains this information. Employers will be charged with knowledge of any disabilities discovered during this process. Moreover, employers must be prepared to defend any decision to revoke an employment offer in the aftermath of medical inquiries and examinations. Given these practical considerations, any post-conditional offer medical inquiries or examinations should be tailored to the particular needs of the position.

X. ADA AND MEDICAL INQUIRIES OF CURRENT EMPLOYEES

A. Medical Inquiries. Requiring medical exams of current employees is generally prohibited under the ADA, as is making inquiries as to the nature or extent of disabilities, unless such examinations are "shown to be job-related and consistent with business necessity." 42 U.S.C. § 12112(4)(A). The EEOC issued enforcement guidance on disability-related inquiries and medical examinations directed toward current employees on July 27, 2000. "EEOC Enforcement Guidance on Disability-related Inquiries and Medical Examinations of Employees Under the ADA." The guidance is available at http://www.eeoc.gov/policy/docs/guidance-inquiries.html.

In the EEOC's guidance on disability-related inquiries of employees, the agency takes the position that restrictions on disability-related inquiries apply to both individuals with as well as those without disabilities. The guidance provides the EEOC's interpretation on the types of questions and inquiries that constitute a disability-related or medical inquiry (questions dealing with medical conditions, genetic information, prior history of workers' compensation, identifying prescription medication, etc.).

The guidance also addresses when medical inquiries are allowed, or the meaning of "job-related and consistent with business necessity." For example, the EEOC permits inquiries when an employer has a "reasonable belief, based on objective evidence" that either of the following conditions exists: the employee's ability to perform their job will be impaired by a medical condition (or medical treatment); or the employee may pose a direct threat to the safety or health of others or of the employee. Under these conditions, certain "fitness for

duty" examinations may occur. In addition, medical examinations or testing required by regulatory authorities (i.e., for pilots under FAA regulations) are allowed, because the examinations pertain to the individual's continued qualifications. Finally, eliciting voluntary disclosure of conditions for affirmative action purposes (so long as the information is kept confidential and is only used for remedial actions or obligations in affirmative action efforts) is not barred by the ADA.

With regard to performance-related issues, employers should make medical inquiries only if the employer already knows that the employee has a condition that may be a disability, or if the employer knows or has reason to believe that the employee is going through a medical regimen or has a physical condition that may affect job performance. To avoid exposure and claims, employers should focus on performance and functional capacity related to the job. Employers should attempt to leave it up to the employee to disclose any possible medical causes affecting performance or resulting in functional limitations.

As discussed above, employees requesting reasonable accommodations may be required to furnish medical information. The EEOC Guidance on Disability-related Inquiries and Medical Examinations of Employees Under the ADA takes the position that the ADA does not prevent an employer from requiring an employee to go to an appropriate health care professional of the employer's choice if the employee provides insufficient documentation from his or her treating physician (or other health care professional) to substantiate that she or he has an ADA disability and needs a reasonable accommodation. The guidance also states that if an employee provides insufficient documentation in response to the employer's initial request, the employer should explain why the documentation is insufficient and allow the employee an opportunity to provide the missing information in a timely manner. Further, the EEOC encourages the employer to consider consulting with the employee's doctor (with the employee's consent) before requiring the employee to go to a health care professional of its choice.

In accommodations and other cases, the inquiries should be narrowly tailored to the condition at issue and should not prompt broader medical inquiries into the employee's full medical history or any unrelated health conditions. The guidance also prohibits employers from requiring employees to undergo periodic medical examinations unless the employee is in a position affecting public safety and the examination is narrowly tailored.

In an employer-friendly turn, the EEOC guidance states that employers can treat a current employee who applies for and is offered a new position within the company as a conditional-offeree instead of an employee. This means the person offered a new position can be required to take post-offer tests or medical exams that would not necessarily be "job-related and consistent with business necessity" if they were required of current employees. The tests or exams must occur after an offer is made but before the individual starts the new job. Of course, the questions or exams must meet the restrictions on pre-employment medical examinations. Those restrictions, however, are much more relaxed than the restrictions that normally apply to current employees. The guidance also prohibits current supervisors from disclosing medical information to the person interviewing the employee or to the new supervisor.

The guidance also permits medical inquiries of employees seeking to return to work (from leave for a medical condition) if the employer has a reasonable belief that the employee's present ability to perform the job will be impaired by the medical condition, or the employee may pose a threat to safety or health. *See Gajda v. Manhattan & Bronx Surface Transit Operating Auth.*, 396 F.3d 187 (2d Cir. 2005) (Transit authority's request for an HIV-positive bus driver's laboratory test results did not violate the ADA. In seeking a leave the driver had indicated he could not work due to his health condition, which this provided the transit authority with a legitimate reason to doubt his ability to perform his duties; requesting the test

results was a reasonable way of achieving the goal of determining whether he could safely drive a bus); *Harris v. Harris & Hart, Inc.*, 206 F.3d 838 (9th Cir. 2000) (requiring a former employee to provide a medical release before rehire did not violate the ADA; former employees with known disabilities (and who were out of work or impaired from performing due to the disability) could be treated the same as employees returning to work from leave).

The mere act of making a medical inquiry or requiring medical tests does not necessarily mean that the employer "regards" the employee as having a disability. *See, e.g., Tice v. Centre Area Transportation Authority*, 247 F.3d 506 (3d Cir. 2001) (request for medical examination of employee does not demonstrate that the employer "regards" the employee as disabled). *See also Pittari v. American Eagle Airlines, Inc.*, 468 F.3d 1056 (8th Cir. 2006) (an employer does not perceive an employee as disabled because it imposes restrictions based upon the recommendations of physicians. Such recommendations "are not based upon myths or stereotypes about the disabled and thus do not demonstrate a perception of disability."); *Thornton v. McClatchy Newspapers, Inc.*, 261 F.3d 789, 798 (9th Cir. 2001) (when an employer takes steps to accommodate an employee's restrictions, it is not thereby conceding that the employee is disabled under the ADA or that it regards the employee as disabled), *supplemented by* 292 F.3d 1045 (9th Cir. 2002). Finally, if medical inquiries are made, employers need to take care to ensure confidentiality and to keep medical information separate from other personnel information.

Employers should carefully review medical inquiries that occur after an individual begins employment to ensure that they do not violate the ADA. For example, a court has held that an employer's policy that required employees to disclose their use of prescription medicine violated the ADA because it would force employees to reveal their disabilities (or perceived disabilities) to their employer as part of the employer's drug and alcohol testing policy. *Roe v. Cheyenne Mt. Conf. Resort*, 124 F.3d 1221 (10th Cir. 1997). Requiring disclosure of harmful side effects, and not the medication or underlying condition itself, may be a safer alternative for safety-sensitive jobs. *See also Transport Workers Union v. New York City Transit Authority,* 341 F. Supp. 2d 432 (S.D.N.Y. 2004) (blanket requirement to provide medical diagnosis as precondition for approving sick leave may violate the ADA; requirement geared toward reducing sick leave abuse may apply to employees with chronic absentee problems or to safety-sensitive employees).

B. Genetic Testing. The EEOC has also taken the position that genetic testing is a prohibited medical inquiry under the ADA, and that taking adverse employment actions based on the results of genetic information is a form of disability discrimination under the ADA.

On May 21, 2008, the President signed into law the Genetic Information Nondiscrimination Act (GINA) (H.R. 493), which prohibits discrimination by employers and insurers based on genetic information. GINA prohibits employers (as well as employment agencies and labor unions) from discriminating against employees and applicants for employment on the basis of genetic information. The law also prohibits employers from requesting or acquiring genetic information regarding an employee or a family member of an employee. Additionally, the law prohibits discrimination based on genetic information with regard to participation in apprenticeship or training programs. It does not, however, create a disparate impact cause of action for genetic discrimination.

Additionally, the law prohibits genetic discrimination by group health plans and health insurance issuers offering insurance coverage in connection with a group health plan. It also prohibits genetic discrimination by issuers in the individual health insurance market and issuers of Medicare supplemental policies. Under GINA, group health plans cannot adjust premiums or contribution amounts for the group covered under the plan on the basis of genetic information. The law also prohibits group health plans from requiring genetic testing

and from collecting genetic information prior to an individual's enrollment in a plan. A health plan does not violate this provision if it obtains genetic information incidental to the collection of other information.

On November 9, 2010, the EEOC published final regulations implementing Title II of the federal Genetic Information Nondiscrimination Act (GINA). The regulations are available at: http://edocket.access.gpo.gov/2010/pdf/2010-28011.pdf. Some of the issues addressed in the new regulations include:

- Statements made during a casual conversation, such as a general health inquiry, do not violate GINA so long as the employer does not follow up with probing questions likely to elicit genetic information.
- An employer does not violate GINA by requesting information about the manifested disease or condition of an employee whose family member also works for the employer. For example, the employer does not violate GINA by asking someone whose sister also works for the employer to take a post-offer medical examination that does not include requests for genetic information.
- In some situations requests for medical documentation to provide a reasonable accommodation under the ADA or in connection with a request for leave under the FMLA could result in the disclosure of genetic information that would violate GINA. The EEOC has provided sample language that employers can use when requesting medical documentation from health care providers that warns the provider not to disclose genetic information. The receipt of genetic information would be considered inadvertent if such a warning is given or if the request for medical information was phrased in such a way that was not likely to result in the acquisition of genetic information.

XI. THE ADA AND OTHER WORKPLACE LAWS

A. State Laws on Disability Discrimination. The ADA is not the exclusive law or set of remedies protecting persons with disabilities. The ADA provides remedies such as back pay, attorneys' fees, reinstatement or injunctive relief, and additional damages available under the 1991 Civil Rights Act (varying by the number of employees). Many states, counties, and municipalities have laws that further restrict employment practices regarding individuals with disabilities. While many of these state statutes mirror the ADA, others create different substantive standards governing employers, different definitions of who is protected under the law, different remedies, and, in some cases, even the specter of individual liability. Some states also have differing interpretations of their definitions, such as whether to take mitigating measures into account.

B. Relationship of the ADA to Workers' Compensation Law. The EEOC has issued guidance regarding the relationship of the ADA to workers' compensation laws. The guidance provides assistance on several issues, including:

- Whether a person with an occupational injury has a disability as defined by the ADA;
- Disability-related questions and medical examinations relating to occupational injury and workers' compensation claims;
- Hiring of persons with a history of occupational injury, return to work, and application of the direct threat standard;
- Reasonable accommodations for persons with disability-related occupational injuries;
- Light duty issues; and

- Exclusive remedy provisions in workers' compensation laws.

These guidelines are available at: http://www.eeoc.gov/press/9-4-96.html. Some of the highlights are provided below:

- A person with an occupational injury is not necessarily disabled under the ADA.
- Employers may not make any inquiries or conduct any medical examinations to obtain information about prior occupational injuries prior to making a conditional offer of employment.
- Occupational injury information about an employee generally must be kept confidential except in limited circumstances.
- Employers may not refuse to hire a person with a disability merely because that person may pose some increased risk of occupational injury.
- An employer may not discharge an employee who is temporarily unable to work because of a disability-related occupational injury unless it would impose an undue hardship to provide leave as a reasonable accommodation.
- An employer that reserves light duty positions for employees with occupational illnesses must consider reassigning an employee with a nonoccupational injury disability to such positions.
- The exclusive remedy provisions in workers' compensation statutes do not bar an employee from pursuing ADA claims.

C. Preventive Measures for Employers. All leaves, including those necessitated by job injuries, should require written approval as to specific duration, subject to extension if necessary. Employers should uniformly enforce such rules requiring written leaves and keep records of enforcement. Additionally, employers may want to monitor the disability and send form "reminders" to employees' homes, even after a job-related injury. Keep all medical information confidential and separate from personnel files.

D. The National Labor Relations Act (NLRA) and the ADA. Possible conflicts between the goals of the ADA and considerations underlying the National Labor Relations Act (NLRA) and/or the Railway Labor Act (RLA) make negotiating and implementing reasonable accommodations in a unionized workplace more complicated. The potential areas of conflict include: (1) issues of direct dealing with a represented employee on accommodations; (2) restrictions on sharing employees' medical information with a union in negotiating a reasonable accommodation; (3) possible exceptions to seniority or other collective bargaining agreement provisions involving certain accommodations; and (4) addressing refusals to work over perceived unsafe working conditions (already discussed above). These potential conflicts are best addressed ahead of time rather than in litigation or grievances.

1. Collectively Bargained Seniority Systems vs. ADA Requirement of Reasonable Accommodation. The U.S. Supreme Court has held that an employer is not ordinarily required to violate the terms of a bona fide seniority system when faced with a request for reassignment as an accommodation under the ADA. *See US Airways v. Barnett*, 535 U.S. 391 (2002). *See* the discussion of this case above. *But see Lujan v. Pacific Maritime Ass'n,* 165 F.3d 738, 743 (9th Cir. 1999) (stating that if there is no violation of any seniority rights, it is not clear that the accommodation would be unreasonable and that the reasonableness of an accommodation is ordinarily a question of fact).

2. Duty to Bargain Regarding Reasonable Accommodation. Section 8(a)(5) of the NLRA requires an employer to bargain in good faith over wages, hours, and working conditions. Also, under § 8(d), an employer may not alter the terms and conditions of

employment expressed in a collective bargaining agreement while the agreement is in effect without the union's consent. Thus, an employer may violate the NLRA by its unintentional implementation of an accommodation even though such accommodation is arguably required by the ADA. In an August 7, 1992, memorandum, then NLRB General Counsel Jerry Hunter stated, "if an employer unilaterally implements a reasonable accommodation for a disabled employee, . . . its actions may give rise to an 8(a)(5) charge." However, Hunter opined that a violation will only occur if the accommodation effects a "material, substantial or significant change" in working conditions. Thus, accommodations that are contrary to or infringe upon an established employment practice or perhaps those that affect bargaining unit members other than the accommodated employee would likely require bargaining.

3. Direct Dealing and Confidentiality Issues. EEOC regulations call for direct negotiations with the disabled employee regarding reasonable accommodations and the individual's functional limitations. 29 C.F.R. § 1630.2(o)(3). However, the NLRA declares "direct dealing" with a union-represented employee over terms and conditions of employment to be an unfair labor practice. Even if a union becomes involved in the reasonable accommodation process, the ADA does not include union representatives in the circle of individuals with whom the employer may share otherwise confidential medical information (42 U.S.C. § 12112(d)(3); 29 C.F.R. § 1630.14(c)), unless, of course, the disabled employee consents or shares the medical information with the union. The EEOC has issued an opinion letter addressing whether the ADA permits an employer to provide medical information about an employee to a union assessing a grievance challenging the employer's providing a reasonable accommodation that conflicts with a union contract's seniority provisions. The EEOC stated that the ADA permits the employer to share this medical information with the union to the extent that the union is acting as a collective bargaining representative (on a "need to know" basis). It is not completely clear, however, that all courts will embrace this position should an individual who does not wish to share his or her medical information with the union bring an ADA claim. The NLRB has required an employer to give a union relevant medical information about an employee who was given a highly sought after job over at least ten co-workers with higher seniority. *Roseburg Forest Prods. Co.*, 331 N.L.R.B. No. 124 (August 9, 2000). In *Roseburg*, the NLRB ordered the employer to bargain in good faith with the union to determine the relevant information it would need to proceed with the grievance.

4. Right to Discuss Terms and Conditions of Employment. Notwithstanding the employer's obligation to (1) preserve confidentiality of medical information and (2) protect against hostile work environments based on disability, employers should be aware that an overly broad prohibition on employee discussions of a co-worker's medical restrictions or accommodations could be viewed by the NLRB as a violation of the NLRA.

5. Arbitration of Minor Disputes under the Railway Labor Act. In *Brown v. Illinois Central Railroad Co.*, 254 F.3d 654 (7th Cir. 2001), the court dismissed an ADA claim because the plaintiff's claim depended on the interpretation of a collective bargaining agreement (because the plaintiff sought an accommodation involving the creation of a new position subject to seniority bidding under the labor contract). The court held that the ADA did not override the Railway Labor Act's requirement that minor disputes involving interpretation of a collective bargaining agreement be resolved through arbitration in a system board of adjustment.

Chapter Nineteen

XII. THE REHABILITATION ACT OF 1973

A. Section 503. Section 503 of the Rehabilitation Act, 29 U.S.C. § 793, requires certain federal contractors and subcontractors to take affirmative action to employ qualified individuals with disabilities. Specifically, the statute provides that contracts with the federal government for the procurement of personal property and nonpersonal services in excess of $10,000 (including construction) entered into by federal government departments and agencies must contain a provision requiring that the contracting party take affirmative action to employ and advance in employment qualified individuals with disabilities. 29 U.S.C. § 793(a). This requirement also applies to subcontracts in excess of $10,000 entered into by a prime contractor in carrying out any contract for the procurement of personal property and nonpersonal services (including construction). *Id.* The Office of Federal Contract Compliance Programs (OFCCP) enforces this law. The OFCCP's interpreting regulations are found at 41 C.F.R. § 60-741.1, *et seq.* The OFCCP has issued an Advanced Notice of Proposed Rulemaking (ANPR) soliciting public input on how to ensure equal employment opportunity for people with disabilities by strengthening the affirmative action requirements of the regulations implementing Section 503. The ANPR is available at: http://www.regulations.gov/#!documentDetail;D=OFCCP-2010-0001-0001. For more information please see the *Significant Labor and Employment Law Requirements Pertaining to Federal Contractors* and the *Affirmative Action* Chapters of the SourceBook.

B. Section 504. Section 504 applies to federal executive agencies and to recipients of federal financial assistance and provides that no otherwise qualified individual with a disability shall "solely by reason of his or her disability be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service." 29 U.S.C. § 794(a). The law further provides that the "standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 *et seq.*) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201-12204 and 12210), as such sections relate to employment." 29 U.S.C. § 794(d).

The Eleventh Amendment bars application of § 504 to state government employees based on sovereign immunity, absent the state's consent to such suits. *Alabama v. Pugh*, 438 U.S. 781 (1978); *Patton v. Thomson*, 37 Fair Empl. Prac. Cas. (BNA) 1024 (M.D. Ala. 1983), *aff'd*, 742 F.2d 1465 (11th Cir. 1984).

Each agency that administers federal funds has its own regulations interpreting the Rehabilitation Act. Although this section does not specifically provide for the right to a jury trial, the Eleventh Circuit has held that a jury trial is available in appropriate § 504 cases, based on the right to a jury trial embodied in the Seventh Amendment. *Waldrop v. Southern Co. Servs.*, 24 F.3d 152 (11th Cir. 1994).

C. Definition of Disability: Rehabilitation Act. The Rehabilitation Act incorporates the definition of disability as set forth in the ADA. However, the Rehabilitation Act provides that for the "purposes of sections 503 and 504 [29 USCS §§ 793, 794] as such sections relate to employment, the term 'individual with a disability' does not include any individual who is an alcoholic whose current use of alcohol prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol abuse, would constitute a direct threat to property or the safety of others." 29 U.S.C. § 705(20). For the purpose of §§ 503 and 504, "disabled" does not include an individual who currently has a contagious disease or infection and who, by reason of such disease or infection, would

constitute a direct threat to the health or safety of other individuals or who, by reason of the currently contagious disease or infection, is unable to perform the duties of the job. 29 U.S.C. § 706(8)(c).

XIII. ENFORCEMENT UNDER THE ADA AND THE REHABILITATION ACT

A. The ADA. Enforcement of the ADA is governed by the same procedures as Title VII of the Civil Rights Act of 1964. *See* 42 U.S.C. § 12117. This includes EEOC investigations and individual lawsuits in federal court. (The OFCCP will investigate ADA charges made against federal contractors and subcontractors.)

B. Rehabilitation Act, § 503b. There is no private cause of action under § 503b of the Rehabilitation Act. *Howard v. Uniroyal, Inc.*, 719 F.2d 1552 (1983). The OFCCP conducts compliance reviews under § 503b. 41 C.F.R. §§ 60-741.60. A complaint must be filed with OFCCP within 300 days of the alleged violation. 41 C.F.R. §§ 60-741.61, *et seq.* The DOL will investigate a complaint made with the OFCCP. 41 C.F.R. § 60-741.61(e). Such investigation may culminate in a recommended order. *Id.* When the investigation indicates a violation, the OFCCP Director gives the contractor an opportunity for conciliation, then for a hearing if the case has not otherwise been resolved. 41 C.F.R. § 60-741.61(f)(4); 41 C.F.R. § 60-741.65.

For the process of charges filed against government contractors when the complaints fall within both the ADA and § 503, see 41 C.F.R. §§ 60-742.1, *et seq.*

Traditional Labor Law

By

Chelsie Flynn, Orlando

Chapter Twenty-Five

NLRA'S IMPACT ON THE WORKPLACE

(*CAMPAIGNS, PREVENATIVE MAINTENANCE AND UNFAIR LABOR PRACTICES*)

Chapter Twenty-Five

NLRA'S IMPACT ON THE WORKPLACE

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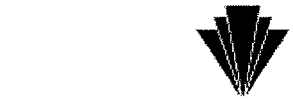

Chapter Twenty-Five

NLRA'S IMPACT ON THE WORKPLACE

(*CAMPAIGNS, PREVENATIVE MAINTENANCE AND UNFAIR LABOR PRACTICES*)

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I. RECENT LABOR LAW DEVELOPMENTS

Last year legislation was introduced in Congress that would have substantially amended federal labor laws. The so-called Employee Free Choice Act (EFCA) would have effectively eliminated secret ballot elections as the way for employees to decide whether to have union representation by permitting unions to opt for a "card check" procedure that would result in certification of the union if a majority of employees in an appropriate bargaining unit simply sign union cards. This would make it much easier for a union to become the collective bargaining representative of a group of employees at a company. In addition, EFCA would have significantly changed the process for negotiating a first contract. Changes would include mandatory government-run arbitration to establish the terms and conditions of employment in the initial contract if the parties cannot reach agreement during direct and mediated negotiations. Fortunately, the EFCA was not passed. However, National Labor Relations Board (NLRB) members appointed by President Obama have issued decisions demonstrating a clear pro-union trend, which may effectively result in implementation of many of the changes proposed by the EFCA. Although the term of controversial Board Member Craig Becker is set to expire at the end of 2011, the President re-nominated Becker in January 2011 for a term that would end on December 16, 2014. If he is confirmed, the Board's current pro-union stance likely will continue for several years.

Among the significant labor law developments that are likely to challenge employers in the upcoming year are:

- **Proposed Requirement to Post Notice of Employee Rights Under the NLRA.** The NLRB has published a proposed rule that would require all employers covered by the NLRA, including unions in their capacity as employers, to post a notice informing employees of their rights under the NLRA. The proposed rule does not apply to employers who are not covered by the NLRA such as the U.S. government, any wholly owned government corporation, any Federal Reserve Bank, any state or political subdivision and any employer covered by the Railway Labor Act. According to the Board, many employees are unaware of their rights under the NLRA and the NLRA's lack of notice requirement is an "anomaly" among major federal employment laws. Thus, the Board believes that informing employees of their statutory rights is central to advancing the NLRA's promise of "full freedom of association, self-organization, and designation of representatives of their own choosing." The proposed rule requires employers to post a notice informing employees of their NLRA rights, as well as Board contact information and information regarding basic enforcement procedures under the NLRA. The NLRB will make the notice available on its web site, http://www.nlrb.gov, and in print. The language of the proposed employee notice is included as Appendix A to the proposed rule and is available on the NLRB web site at: http://www.federalregister.gov/articles/2010/12/22/2010-32019/proposed-rules-governing-notification-of-employee-rights-under-the-national-labor-relations-act.

The Board took the language of the proposed rule from the Department of Labor's (DOL) rule requiring certain federal contractors to post a notice of employee rights. Instead of quoting the language of Section 7 of the NLRA, this rule provides a detailed description of employee rights derived from Board and court decisions and includes examples of conduct that may violate the NLRA. Because the language of the Board's proposed rule is the same as that of the DOL's final rule, federal contractors who have complied with the DOL rule will not be required to post a second notice under the Board's final rule. Employers will be required to post a hard copy of the employee notice in conspicuous places, including all places where employee notices customarily are posted. The proposed rule also requires employers to take steps to ensure that the notice is not altered, defaced, covered by other material or otherwise rendered unreadable. Employers who customarily communicate with their employees electronically must also provide the employee notice electronically, either by e-mail or posting on an intranet or internet site and/or by other electronic means. If the majority of employees speak a language other than English, the notice must be provided in that language.

The Board proposed the following sanctions for failure to post the notice: (1) finding the failure to post the required notices to be an unfair labor practice; (2) tolling the statute of limitations for filing unfair labor practice charges against employers who fail to post the notices; and (3) considering the knowing failure to post the notices as evidence of unlawful motive in unfair labor practice cases. Board Member Hayes, who did not participate in the decision to grant the rule-making petitions or in drafting the proposed rule, stated that he would have denied the petitions because he believes the Board lacks the statutory authority to promulgate or enforce this type of rule. He noted that the lack of express language in the NLRA requiring a posting of individual rights is a strong indicator, "if not dispositive," that the Board lacks the authority to impose such a requirement. Additionally, Member Hayes encouraged public comment addressing the issue of the Board's authority to impose or enforce such a rule.

- **Determination that Two-Member Board Lacked Authority.** On June 17, 2010, in a 5-4 decision, the U.S. Supreme Court held that the NLRB improperly delegated its authority to a two-member group after the expiration of two Board members' appointments in December 2007. *See New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010). Accordingly, the two-member Board did not have authority to issue decisions on unfair labor practice and representation cases. After the decision was issued, the Board posted on its web site a list of cases decided by the 2-member Board and provided information on the status of these cases. According to the NLRB web site, 343 of the cases are closed, meaning that the original Board decision resulted in some action that concluded the proceeding, such as settlement, withdrawal of charges, or full compliance. Additionally, 22 of the cases have been returned to the Board, meaning that the original decision has come back to the Board through a remand from a federal court, a filing by a party, or some other means. This also includes cases where the Board has requested remand. Another 91 are in process, meaning that the original Board order has not yet resulted in full compliance or resolution. The case may be in various stages of enforcement or compliance. The Board has issued a new decision in 92 of the cases, 2 were otherwise resolved (meaning the case was returned to the Board and was resolved by some means other than a Board decision, such as settlement, withdrawal or Board remand) and the status of 3 is unknown.
- **NLRB to Revisit Recognition Bar Doctrine.** The NLRB has granted Requests for Review in two consolidated cases, *Rite Aid Store #6473* and *Lamons Gasket Company*, 2010 NLRB LEXIS 337, 355 N.L.R.B. No. 157 (2010), which raise substantial issues concerning voluntary recognition under the Board's 2007 decision in *Dana Corp.*, 351

N.L.R.B. 434 (2007). Prior to *Dana Corp.*, when an employer voluntarily recognized a union based on signed authorization cards from a majority of employees, usually pursuant to a "card-check neutrality agreement," both decertification and rival union petitions challenging this representation could not be filed "for a reasonable time." In *Dana Corp.*, the NLRB modified this doctrine and held that a decertification petition or rival union petition could be filed within forty-five days of a company's voluntary recognition of a union. The NLRB also required the employer to post for the forty-five-day period a Notice informing the employees of their right to either file a decertification petition or a petition in favor of another union. If the notice is posted and no petition is filed within forty-five days, no decertification or rival union petitions can thereafter be filed "for a reasonable time." In granting the Requests for Review, the NLRB also invited interested parties to file briefs addressing, among other things, "whether the Board should modify or overrule *Dana*."

- **NLRB to Revisit Successor Bar Doctrine.** The NLRB has also granted a Request for Review in *UGL-UNICCO Serv. Co*, 2010 NLRB LEXIS 336, 355 NLRB No. 155 (Aug. 27, 2010), and other consolidated cases that raise substantial issues regarding whether the Board should modify or overrule *MV Transportation*, 337 N.L.R.B. 770 (2002), regarding the duration of a successor employer's obligation to negotiate with the predecessor's incumbent union. The Board has invited interested parties to file briefs addressing whether the Board should reconsider or modify that 2002 decision. In *MV Transportation*, the Board re-established its long-standing position that when a company buys another employer's unionized work force, the previously recognized union is only entitled to a rebuttable presumption of majority support among the workforce. 337 N.L.R.B. 770 (2002). This presumption can be rebutted by a decertification petition, an employer petition, or a rival union petition, and none of these efforts are barred by the presumption. *MV Transportation* overturned *St. Elizabeth Manor, Inc.*, 329 N.L.R.B. 341 (1999), and its "successor-bar doctrine," under which the successor employer "stands in the shoes" of the predecessor vis-à-vis the union and thus "incurs an obligation to bargain with the incumbent union for a reasonable period of time, during which the union's majority status is immune to challenge through a decertification effort, an employer petition, or a rival union petition." As a member of the NLRB, Chairman Liebman dissented in *MV Transportation* and voted with the majority in *St. Elizabeth Manor, Inc*. In concurring with the Request for Review, Liebman recognized that "My own prior views on the successor-bar doctrine are a matter of record" but "I am open to being persuaded either that my prior position was wrong or that even if *MV Transportation* was mistaken, it should nevertheless be left in place." However, she later wrote that "elimination of the successor-bar doctrine has made it possible for successor employers unilaterally to withdraw recognition from a union without ever engaging in bargaining and without employees ever having voted in a secret ballot election to decertify the union. How that result promotes either collective bargaining or employee free choice – much less strikes a balance between the two – is hard to see."
- **Board Decision Prohibiting "Preemptive Firing."** In a decision that significantly expands the scope of the NLRA's protection, the Board has held that an employer's discharge of an employee to prevent her from discussing her wages and conditions of employment with other employees was a "preemptive strike" that was unlawful under the NLRA, regardless of whether the employee had actually engaged in protected concerted activity. *See In re Parexel Int'l, LLC*, 2011 NLRB LEXIS 25, 356 N.L.R.B. No. 82 (January 28, 2011). Previous Board decisions held that an employee must have already engaged in protected concerted activity in order to find that she was unlawfully discharged to prevent protected concerted activity. In *Parexel*, the Board held that if an

employer acts to prevent protected concerted activity – to "nip it in the bud" – that action interferes with and restrains the exercise of Section 7 rights and "is unlawful without more." By imposing liability without a finding that the employee actually engaged in protected concerted activity, the Board's decision essentially creates a new unfair labor practice – the "preemptive strike."

II. OVERVIEW OF FEDERAL LABOR LAWS

A. The National Labor Relations Act (NLRA). The NLRA, 29 U.S.C. § 151, *et seq.*, is the primary federal law governing the relationship between employers and unions (other than employers who are carriers as defined by the Railway Labor Act (RLA) discussed below). The law was enacted in 1935. It established the NLRB and prohibited employer unfair labor practices. The Act was amended in 1947 by the Labor Management Relations Act (also known as the Taft-Hartley Act), which, among other things, established union unfair labor practices and prohibited payment of money and other things of value to representatives of employees, labor union officials, and labor organizations by employers, and persons acting in the interest of employers. The Act was amended again in 1959 by the Labor-Management Reporting and Disclosure Act (also known as the Landrum-Griffin Act). Among other things, this amendment required unions to make financial reports each year to the DOL disclosing a number of categories of income and disbursements. Although the NLRB enforces the NLRA, the LMRDA is enforced by the DOL.

1. NLRB Jurisdiction. The NLRB enforces the NLRA. In *Leedom v. Kyne*, 358 U.S. 184 (1958), the Court held that Board decisions in representation matters are not directly reviewable by courts until the employer has gone through the refusal to bargain mechanisms. In very limited circumstances, in which the Board has acted in excess of delegated powers and contrary to a specific prohibition in the Act, court review may be appropriate.

The Third Circuit held that the NLRA does not apply outside the territorial jurisdiction of the United States; therefore, the NLRB does not have jurisdiction over employees working outside of the United States. *See Asplundh Tree Expert Co. v. NLRB,* 365 F.3d 168 (3d Cir. 2004).

2. Important Principles of the NLRA.

a. Section 7. Section 7 gives employees the right to engage in protected concerted activity.

b. Employer Unfair Labor Practices. Section 8(a)(1) prohibits employers from interfering with employees' Section 7 rights. Sections 8(a)(2)-(5) cover other types of employer unfair labor practices. Violations can be independent or derivative, i.e., a violation of §§ 8(a)(2)-(5) also constitutes an automatic violation of § 8(a)(1). This chapter will discuss employer unfair labor practices in the context of union organizing campaigns, which are primarily § 8(a)(1) violations. Other types of employer unfair labor practices are discussed in the *Coping With Unions* Chapter of the SourceBook.

c. Union Unfair Labor Practices. Section 8(b)(1)(A) prohibits union restraint or coercion of employees' exercise of Section 7 rights in their relations with the union. The provision is aimed at union tactics involving violence, intimidation, reprisals, and threats to compel individual employees to join the union, but does not outlaw peaceful recognitional picketing by a minority union (which is subject only to the limitations in Sections 8(b)(4) and 8(b)(7)).

d. Collective Bargaining. It is an unfair labor practice for both employers and unions to refuse to bargain collectively once the duty to bargain has attached. Collective bargaining is discussed in more detail in the *Coping With Unions* Chapter of the SourceBook.

e. Strikes. The NLRA protects employees' right to strike and not to strike. Strikes are generally divided into two categories: (1) unfair labor practice (ULP) strikes (strikes in response to an employer's ULP); and (2) economic strikes (generally, most lawful strikes other than ULP strikes are considered economic strikes). Strikes are not protected by the NLRA if they are for unlawful purposes or involve unlawful actions such as violence or other types of unprotected conduct. Strikes are discussed in the *Coping With Unions* Chapter of the SourceBook.

f. Representation Elections. Section 9 of the NLRA deals with representation elections. The Act sets out strict standards designed to ensure employees have acted freely in determining whether they wish to be represented.

B. Railway Labor Act (RLA). The RLA was originally passed in 1926 and governs the relationship between carriers (railways and airlines) and their employees. It provides a completely different structure for the resolution of disputes than envisioned by the later NLRA. It provides machinery for settlement of major and minor disputes and imposes substantial limitations on the ability of the parties to resort to economic action prior to substantial mediation. It also provides for a presidential board with authority to mediate contract negotiations and provides for a cooling-off period if needed. The RLA also provides a basis for airline employees to seek to unionize. For more information regarding the RLA, see the *Railway Labor Act* and *Interaction Between the RLA and Other Laws* Chapters of the SourceBook.

C. Sherman Antitrust Act and Clayton Act. Enacted in 1890, the Sherman Act prohibits any contract in restraint of trade or commerce. Following its passage, courts found labor to be a commodity and cited the Sherman Act to invalidate collective bargaining agreements because they reduced competition in the labor market by establishing uniform wage scales and working conditions. Over time, Congress enacted various statutes including the Clayton Act and later the Norris-LaGuardia Act to exempt labor activities from antitrust lawsuits. Federal courts interpreting these laws recognize two distinct exemptions to the antitrust laws – a statutory exemption that covers specific conduct described in the Clayton or Norris-LaGuardia Acts, and a nonstatutory exemption.

The nonstatutory labor exemption to the antitrust laws generally protects agreements or activities between or among employers and unions in the collective bargaining process from the antitrust laws. The exemption is based on an accommodation between the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business markets.

The Ninth Circuit has granted an en banc rehearing of its decision that a revenue-sharing agreement among supermarket chains signed to counter an anticipated strike and picketing by union workers was anticompetitive in violation of § 1 of the Sherman Act. *See California ex rel. Brown v. Safeway, Inc.,* 615 F.3d 1171 (9th Cir. 2010), *rehearing granted,* 2011 U.S. App. LEXIS 2795 (9th Cir. Feb. 11, 2011).

Additionally, a federal court in Illinois held that a group of Chicago area hospitals could not invoke the nonstatutory labor exemption in an antitrust class action brought by a group of registered nurses who claimed the hospitals conspired to depress their wages in violation of the Sherman Act. *See Reed v. Advocate Health Care,* 2007 U.S. Dist. LEXIS 22816 (N.D. Ill March 28, 2007). The University of Chicago Hospitals sought to avoid the lawsuit, claiming

its conduct fell within the nonstatutory labor exemption to the antitrust laws because all wages, benefits, and conditions of employment for its registered nurses were determined by a series of collective bargaining agreements going back to 1969. The court rejected this motion, holding that the issue was not the collective bargaining activities or agreements with the nurses' union. Rather, the issue was whether there were agreements among the defendant hospitals – including nonunion hospitals – that affected the compensation of registered nurses. The court ruled that alleged multiemployer conduct occurring outside the context of any collective bargaining is not entitled to the nonstatutory labor exemption. Subsequently, the district court denied the plaintiffs' motion for class certification, although the individual claims are still pending. *Reed v. Advocate Health Care,* 268 F.R.D. 573 (N.D.Ill. 2009).

III. WHY EMPLOYEES SEEK UNIONIZATION AND HOW

A. Basis for Unionization. Unions are using increasingly sophisticated and aggressive techniques to attack employers on a broad range of fronts. Additionally, unions are targeting employers in virtually every industry and targeting all types of employees, with a special emphasis on women and immigrant workers.

Understanding the causes of unionization is essential to preventing union organizing drives. In many instances, the lead organizer among the employees is an employee with definite leadership and supervisory qualities whose talent management has failed to recognize. A program aimed at preventing or eliminating causes of unionization may also improve or eliminate other labor and employment problems.

Employees may seek unionization for any of the following reasons:

1. Poor Supervision. Characteristics and causes of poor supervision include: subjective methods of selecting supervisors; lack of training in human relations; supervisors who "play favorites"; and supervisors who are neglected by upper management and become bitter, passing that bitterness on to the employees. Supervisors with poor management skills may be inconsistent, reactionary, silent, or harassing. Any of these characteristics can easily lead to employee dissatisfaction. Additionally, a poor organizational structure can lead to employee dissatisfaction. Employers should clearly define who is the boss. Employees who feel they have been treated harshly or unfairly by supervisors may want to "get even" with management by seeking unionization.

2. Failure to Communicate. Improper responses to employee ideas, such as belittling the ideas, can create or add to employee dissatisfaction. Poor upward and downward communications can also lead to employee dissatisfaction. Communication barriers in upward and downward communication include: (a) a lack of a communication policy; (b) an authoritarian climate in the company; (c) a past record of failure to keep promises; (d) timid or indifferent management; (e) decentralization, i.e. multi-plant companies; (f) poorly described management responsibilities and authority; (g) multiple levels of management; (h) overloaded managers (i); fear of supervisors; (j) insufficient equipment; (k) use of the wrong media; (l) size of the company; (m) management mindset – jealousy, fears, and prejudice; (n) failure to understand employees' real interests; (o) lack of confidentiality of complaints, retaliation by supervisors and co-workers; (p) failure of supervisors to pass complaints upward due to fear of "losing face"; and (q) management that is not visible in the workplace.

3. Failure of Management to Keep Employees Informed. When appropriate, employees should be informed about changes in operations, new equipment obtained,

elimination of certain operations, or fluctuating sales or profitability. If management does not keep employees informed, a credibility gap may develop between the facts and employees' perceptions. Keeping employees informed gives employees the opportunity to become involved in management decisions where appropriate, which can help bolster employees' pride and sense of involvement in the workplace.

4. Retention of Poor Employees and Perceptions of Favoritism. Poor employees may be unqualified, marginal, or overqualified and their retention may cause resentment among their co-workers. In dealing with poor employees, the employer should train, improve, or terminate the employee. If an employee is overqualified for the position held, the employer should find the employee another position, give the employee more responsibility, or possibly discharge the employee. Perceptions of favoritism in discipline or promotions may also lead to employee dissatisfaction.

5. Wage and Benefits Structure and Rules or Policies. Employee dissatisfaction may stem from wages and benefits that are not competitive and from wage inequities. Unequal or inconsistent rules or policies leave employees frustrated because employees feel that management has broken an implied contract of fair dealing. Employers should implement a mechanism for listening to employee complaints.

6. Job Security. Employees who perceive they lack job security may be more likely to unionize.

B. Preventative Maintenance. Timing is key. An employer needs time to audit known problems and institute corrective action, institute a complaint/grievance procedure, train supervisors, and establish an open line of communication within the organization. Employers can gain time by instituting stop-gap measures to take care of immediate problems. These measures may include an education program, adoption of a position on unions, and security rules.

Institution of a comprehensive education program with front line supervisors is important because unions will exploit ignorance. Additionally, some managers never learned good management skills while others need to be reminded and need to have their management style retooled for consistency. It is important that managers and front-line supervisors know their rights and know how to react in certain situations. The key to defeating union organization is to take swift and decisive action. An employer can do this only if managers and supervisors already understand their rights. They need to know the areas to watch, the danger signs of union activity, the employer's position on unions, the employer's rights, key factors in treatment of personnel that create union interest, what they can and cannot do or say, and how the union organizer works so they can counter his or her sales techniques on a daily basis. Additionally, managers need to know about unions in general, how to dispel an employee's fear of rejecting unions, what to do if the union business agent demands recognition or offers authorization cards for examination, what constitutes protected concerted activity, and their stake in remaining nonunion.

C. Preventative Maintenance: Security Steps. Employers should safeguard employee lists and should not circulate lists of employees' names and addresses. Consider not putting names on time cards – instead use partial names or numbers. Employers should also safeguard Rolodex listings in offices and limit access to other such listings, safeguard waste materials, and ensure that all computer lists are password-protected.

1. No Solicitation/No Distribution Rules. A union organizing effort by employees usually takes place on the employer's premises. Union organizing can begin with union representatives or employees securing employee signatures on authorization cards. This activity is considered solicitation of signatures, not distribution of cards. It can only

be prohibited during an employee's working time. An employer may restrict organizing activities by employees on its property when it has a valid no solicitation/no distribution rule and no loitering rule. A no solicitation rule prohibits employees from soliciting, whether for the union, sick employees, football lotteries or other reasons, when they are supposed to be working or on the employees' "working time." *See Our Way, Inc.*, 268 N.L.R.B. 394 (1983).

A no solicitation/no distribution rule cannot prohibit employees from engaging in union solicitation during break periods, meal-time, and other specified periods during the work day when employees properly are not engaged in performing their work tasks, even if employees are paid during these periods. An employer may also implement a "no distribution rule" that prohibits employees from distributing literature or other material in working areas at any time. See the discussion below for more information on no solicitation/no distribution rules.

2. Management Parking. To enable an employer to become aware at the earliest possible moment of any union organizing activity, managers should park their cars in the same area as the employees. If managers park at a separate location, union literature that is passed out and placed on cars may not come to the employer's attention. Reserved management parking also sends an undesirable "we/they" message to employees.

3. No Trespass Rule. An employer may restrict solicitation by nonemployees on its property (no trespass rule); however, it may not enforce the no trespass rule only against union organizers. Such a rule must be enforced nondiscriminatorily. In certain retail and other businesses where the public has access to the employer's premises, other rules govern whether an employer may exclude union organizers from its property. For example, in a hospital setting, generally an employer may exclude nonemployee union organizers only from patient care areas.

4. Loitering/Access Rule. An employer may restrict access of off-duty employees to the employer's property. A no loitering/no access rule is also designed to keep employees from clocking in early or staying late after clocking out and therefore has a wage/hour preventive maintenance purpose as well. If the employer adopts such a rule, the rule must be limited to the interior of the facility and other working areas and must be clearly disseminated to all employees. Additionally, the rule must apply to all off-duty employees seeking access to the premises for any purpose and not just to those employees engaging in union activity.

A rule that denies off-duty employees entry to parking lots, gates, or other outside nonwork areas may be found invalid absent substantial business justification. *Tri-County Medical Center*, 222 N.L.R.B. 1089 (1976).

5. Supervisors' Breaks. Supervisors should be encouraged to take their breaks and eat their lunch with employees. If supervisors begin this practice before a union organizing drive starts, they may continue to do so during a union organizing drive even though it prevents employees from soliciting or distributing for the union. If started during an organizing drive, it could be viewed as illegal surveillance.

6. Labor Relations Education. The employer must conduct an educational program. All managers and supervisors should be brought in to one location for this program. Meeting at one location is essential to enable the employer to obtain input from different locations to determine its current status and to implement the program with the minimum number of problems. This method will also help establish the necessary security rules and provide information to management.

D. Preventative Maintenance: Bulletin Boards. If the employer allows employees to use its bulletin board for other purposes not related to work, it may have to allow employees to post notices of union meetings and other matters. *See NLRB v. V&S Schuler Engineering, Inc.*, 309 F.3d 362 (6th Cir. 2002) (employer committed a ULP when it removed employee postings from an employee bulletin board and refused permission to make similar postings); *but see Guardian Indus. Corp. v. NLRB*, 49 F.3d 317 (7th Cir. 1995) (prohibiting union-related posting on swap-and-shop bulletin board was not union-related discrimination). An employer may adopt a rule prohibiting any employee postings on its bulletin boards, but such a rule should be carefully considered weighing positive and negative employee-relations issues. A Republican Board majority, in *Register-Guard*, 351 N.L.R.B. 1110 (2007), *rehearing granted in part, remanded,* 571 F. 3d 53 (D.C. Cir. 2009), narrowed the scope of what constitutes discrimination under the Act. That holding, however, may not survive the current Board whose majority has been appointed by President Obama.

E. Preventative Maintenance: Short Range Action Generally. This step provides the means to uncover any problem that could lead to union interest and correct it before the employer becomes the target of a union organizer. This step also provides tangible results for employees, such as an internal, problem-seeking audit; a complaint procedure; the development of upward communications through a "sensing" program; and supervisory training to ensure fair treatment and adequate supervision of employees.

1. Internal Problem-Seeking Audit. An internal problem-seeking audit is the first positive step toward negating any need for a union. The employer should schedule individual meetings with employees, supervisors, and an additional meeting with a neutral third party such as labor and employment counsel to assess the company's union vulnerability. Assure confidentiality and ask the employees and supervisors what is wrong and right with management. Evaluate employees' perception of management and the workplace. Ask which employee needs are met and which are not. Focus on operational issues that employees raise or perceive. Review the results of the interviews for consistent themes in perceived employee problems. Present the results to higher management, while maintaining employee confidentiality. Management should then determine an immediate action plan designed to provide solutions to problems uncovered.

Inform employees about actions the company has or will take or why actions are being delayed. Seek solutions from employee workforce.

Note that any internal problem-seeking audit should not be initiated after the employer becomes the target of an organizing campaign because this could be viewed as an unlawful solicitation of grievances if there is a perception that a union is not necessary to resolve problems. *See NLRB v. V&S Schuler Engineering, Inc.*, 309 F.3d 362, 370-71 (6th Cir. 2002) (noting that the solicitation of grievances itself is not an unfair labor practice, but an employer who has not previously solicited grievances and begins to do so in the midst of an organizing campaign creates a compelling inference that the employer is implicitly promising to correct the problems, which may violate § 8(a)(1)); *Wal-Mart, Inc.*, 339 N.L.R.B. 1187 (2003) (Wal-Mart did not commit an unfair labor practice by sending higher level managers to spend time with employees to listen to and address their job-related concerns during a unionization effort because the company had a long-standing policy of doing this before the unionization drive began).

2. Complaint Procedures. Establish a complaint procedure that allows employees to air their complaints. Most union support flourishes in an environment that ignores employee complaints. Inform employees in writing of the philosophy underlying the complaint procedure. Employees should understand that there will be

misunderstandings and that management will make mistakes and that the complaint procedure policy is implemented out of dignity and respect for employees and so that there will be no impediments to their ability to perform their job. The policy should provide a standard procedure to review decisions with which employees disagree.

A complaint procedure should be simple and easy to use. The purpose of the policy is to solve problems, not prevent them from being raised. While it is important to support supervisors, it is also important to treat employees fairly. If supervisors make unwise decisions, these decisions should be reversed in a manner consistent with maintaining the credibility of the supervisor involved.

Steps of procedure should not be set in stone and should include an "open door" policy to top management. The purpose of the complaint program is to make sure employee complaints reach top management so the employer can take corrective action before the employees turn to a union.

IV. INITIAL UNIONIZATION ATTEMPT

A. Typical Union Strategy. A union must gather signatures from at least thirty percent of employees in an appropriate unit before it can file a representation petition with the NLRB requesting the agency order a representation election. However, unions rarely file petitions when only thirty percent of the employees have signed union cards, preferring that at least 60-70% sign before the union will file. In a right-to-work state in particular, if only a small number of employees are going to join the union and pay dues, it may make little economic sense to unionize that employer. Additionally unions rarely gain additional support after the petition is filed because that is when the employer implements its effective campaign strategy. Thus, unions try to garner support before filing a petition.

B. *"Salting."* Unions will attempt to find the natural leaders to spearhead their drive or covertly insert their own into the employer's workplace. "Salting" occurs when paid union organizers attempt to obtain jobs at a union free workplace so they can organize from within. In *NLRB v. Town & Country Elec.*, 516 U.S. 85 (1995), the U.S. Supreme Court held that an employer may not lawfully refuse to hire paid union organizers based solely on the inherent conflict of interest when a union official applies for a position only to further the union's objectives. Except for legitimate business reasons, employers may also not legally refuse to hire employees who designate themselves as union supporters during the application process.

1. Analytical Framework for Refusal-to-Hire Cases. In *FES (a Division of Thermo Power)*, 331 N.L.R.B. 9 (2000), *enf'd,* 301 F.3d 83 (3d Cir. 2002), the Board set forth an analytical framework to be used when an employer is accused of refusing to hire or consider applicants because of their union affiliation. In a refusal-to-hire case, the General Counsel must show that: (a) the employer was hiring or had plans to hire when it refused to hire the applicants; (b) the applicants had experience or training relevant to the requirements of the position, or the employer had not adhered to the requirements for the position, or the requirements were a pretext for discrimination; and (c) the employer's antiunion feelings contributed to the decision not to hire the applicants. If the General Counsel meets this burden, the employer must show that it would not have hired the applicants regardless of their union affiliation. *FES,* 331 N.L.R.B. 9, *NLRB v. FES,* 301 F.3d at 87. *See also Masiongale Electrical-Mechanical v. NLRB,* 323 F.3d 546 (7th Cir. 2003) (approving the NLRB's burden-shifting framework described in *FES* in refusal-to-hire cases).

2. Availability of Positions. In *Fluor Daniel, Inc. v. NLRB*, 332 F.3d 961, 968-69 (6th Cir. 2003), the Sixth Circuit upheld the NLRB's determination that the employer

committed an unfair labor practice by refusing to hire a number of paid union organizers, but held that the standard set forth in *FES* for refusal-to-consider claims, as applied in *Fluor Daniel* by the NLRB, conflicted with Sixth Circuit case law, which specifically held that violations of § 8(a)(3) an only occur when an employer is hiring for the position(s) at issue. The Sixth Circuit stated that "in order to prove a violation of § 8(a)(3), the General Counsel needs to show (1) that there is antiunion animus, and (2) the occurrence of a covered activity, for example a particular discharge or a particular failure to hire." *Id.* at 975 (citing *NLRB v. Fluor Daniel,* 161 F.3d 953 (6th Cir. 1998) (*Fluor Daniel II*)). Once the General Counsel proves these elements, the employer must show that the employees in question would not have been hired or considered even in the absence of their union affiliation. *Id.* The court restated dicta from *Fluor Daniel II,* "[t]here is no interference with, restraint, or coercion of applicants in the exercise of their protected rights when an employer, even with antiunion animus, rejects applicants who are in fact unqualified or for whose particular services the employer simply has no need," and remanded the case to the NLRB to determine whether, as required for a violation of § 8(a)(3), there were jobs available for the five applicants for whom the NLRB found failure to consider violations. *See also Kelly Construction of Indiana, Inc.*, 333 N.L.R.B. 1272 (2001) (the employer's reasons for refusing to hire twenty-seven union applicants, which included a preference for employees accustomed to earning the wages it would pay for the positions sought, were legitimate reasons for not hiring the applicants).

3. Analytical Framework for Salting Cases. The Board recently recognized that unions often submit batch applications by "salts" uninterested in actually working for the targeted employer, solely to generate meritless unfair labor practice charges. Accordingly, the Board held that such individuals are not protected by the NLRA's prohibition on discrimination. *See Toering Electric Co.*, 351 N.L.R.B. No. 18 (Sep. 29, 2007). "[O]nly those individuals genuinely interested in becoming employees can be discriminatorily denied that opportunity on the basis of their union affiliation or activity; one cannot be denied what one does not genuinely seek."

Thus, the Board modified the *FES* framework by requiring the General Counsel to prove, as part of the prima facie case, that: (1) there was an application for employment; and (2) the application reflected a genuine interest in becoming employed by the employer. *Id.* As to the first component, the General Counsel must introduce evidence that the individual applied for employment with the employer or that someone authorized by that individual did so on his or her behalf. As to the second component (genuine interest in becoming employed), the employer must put at issue the genuineness of the applicant's interest through evidence that creates a reasonable question as to the applicant's actual interest in going to work for the employer. *Id.* Such evidence could include, but is not limited to, evidence that the applicant:

- refused similar employment with the respondent employer in the recent past;
- incorporated belligerent or offensive comments on his or her application;
- engaged in disruptive, insulting, or antagonistic behavior during the application process; or
- engaged in other conduct inconsistent with a genuine interest in employment.

Similarly, evidence that the application is stale or incomplete may, depending on the circumstances, indicate that the applicant does not genuinely seek to establish an employment relationship with the employer. *Id.*

If the employer presents such evidence, the General Counsel must then prove by a preponderance of the evidence that the individual in question was genuinely interested in

seeking to establish an employment relationship with the employer. Thus, the ultimate burden of proof as to the § 8(a)(3) status of the alleged discriminatee-applicant rests with the General Counsel.

In *Toering,* the Board explained that if, at a hearing on the merits, the employer puts forward evidence reasonably calling into question the applicant's genuine interest in employment, the General Counsel must prove the applicant's genuine interest by a preponderance of the evidence in order to prove that the applicant is an employee within the meaning of § 8(a)(3). An employer's motivation for making an alleged discriminatory hiring decision does not become relevant until the General Counsel satisfies his burden of proof on the applicant's statutory employee status. "This is consistent with the extant *FES* test, under which proof of an employer's union animus in refusing to hire an applicant is irrelevant if the General Counsel fails to meet his initial burden of proving that the employer was hiring or had concrete plans to hire at relevant times, or that the alleged discriminatees had the relevant experience or training." *Id.*

4. Remedies for "Salts." The traditional remedy for a refusal to hire violation includes a backpay and reinstatement order. *Ferguson Electric Co.*, 330 N.L.R.B. 514 (2000) *enfd.*. 242 F.3d 426 (2d Cir. 2001) (salts/discriminatees are eligible for backpay), *overruled in part by Oil Capitol Sheet Metal, Inc.,* 349 N.L.R.B. 1348 (2007). The General Counsel has the burden of proving the reasonableness of the backpay amount, including the backpay period. Over time, the Board has developed a rebuttable presumption that the backpay period should continue indefinitely from the date of the discrimination until a valid offer of reinstatement has been made. *Id.* at *4. However, in *Oil Capitol,* the Board held that this presumption does not apply in "salting" cases and "creates undue tension with well-established precepts that a backpay remedy must be sufficiently tailored to expunge only actual, not speculative, consequences of an unfair labor practice." *Id.* Thus, in *Oil Capitol,* the Board held that in a salting case, the General Counsel must, as part of his existing burden of proof, present affirmative evidence that the salt/discriminatee would have worked for the employer for the backpay period claimed. Such evidence may include, but is not limited to, the salt/discriminatee's personal circumstances, contemporaneous union policies and practices with respect to salting campaigns, specific plans for the targeted employer, instructions or agreements between the salt/discriminatee and union concerning the anticipated duration of the assignment, and historical data regarding the duration of employment of the salt/discriminatee and other salts in similar salting campaigns. *Id.*

C. Other Strategies. In addition, unions are now using alternative tactics known as comprehensive campaigns, corporate campaigns, or strategic approaches to achieve their goals.

1. Corporate Campaigns. A corporate campaign is an attack by a union on the ability of a company or industry to conduct its routine business. The objective is to generate so much pressure on the targeted company that it will give in to the union's demands. *See* Jarol B. Manheim, *Trends in Union Corporate Campaigns, A Briefing Book,* The George Washington University, The U.S. Chamber of Commerce (2005); *Smithfield Foods, Inc. v United Food and Commercial Workers International Union,* 585 F. Supp. 2d 789 (E.D. Va. 2008) (Corporate campaigns include a "wide and indefinite range of legal and potentially illegal tactics used by unions to exert pressure on an employer . . . [including] litigation, political appeals, requests that regulatory agencies investigate and pursue employer violations of state and federal law, and negative publicity campaigns aimed at reducing the employer's goodwill with employees, investors, or the general public.") (citations omitted).

Typically, the role of a corporate campaign is to apply so much pressure on an organization that management accedes to union demands for card check and neutrality agreements – a process by which union certification procedures administered by the Board are effectively circumvented. *Id.* Modern corporate campaign tactics include:

- Increasing, strategic use of shareholder resolutions and proxy voting to pressure directors and senior management;
- Continued development of infrastructure to support corporate campaigns and a growing number of professionals whose primary job is to plan them;
- Increasing numbers of multi-union attacks on individual companies;
- Rapid expansion of networks and coalitions of nonunion allies that advance and legitimize union attacks on companies, both in the U.S. and internationally; and
- An increase in the use of corporate campaigns for political, policy, or ideological purposes, rather than for employment purposes.

Id.

Corporate campaigns essentially use what is known as a power structure analysis – that is, an attempt to polarize the entire corporate and financial community away from the primary target, putting ever increasing pressure on the target. *Manheim, supra.* Corporate campaigns will focus on the following relationships in the power structure analysis: employees; shareholders; boards of directors; regulators and legislators; community leaders; media and the public; customers; and bankers and creditors. *Id.* Similar tactics are also used after the union gains recognition to secure a favorable labor agreement. Unions consider these tactics less costly than a strike or walkout, in which case the union would be required to pay strike benefits.

In response to such campaigns, some employers have challenged the legality of the unions' actions. For example, in *Smithfield Foods, Inc., supra,* Smithfield sued the United Food and Commercial Workers (UFCW) union and Change to Win, among others, claiming the union engaged in a corporate campaign designed to force the company to recognize the UFCW as the collective bargaining representative at Smithfield's Tar Heel, North Carolina plant. Smithfield alleged violations of state law as well as the Racketeer Influenced and Corrupt Organizations Act (RICO), with violations of state extortion law as the predicate offense. In October 2008 the parties in *Smithfield Foods* settled the case under seal.

2. State Union Neutrality Laws. Union neutrality laws can be powerful tools in the union's hands during an organizing campaign because unions can file suit under these laws during a campaign, thus diverting the employer's attention and resources. They also hamper an employer's ability to provide important information to employees regarding the unions.

In 2008, the U.S. Supreme Court held that California law, which prohibits employers who receive state funds from using those funds to "assist, promote, or deter union organizing," is preempted by federal labor law. *See Chamber of Commerce v. Brown*, 554 U.S. 60 (2008). The Court held that the California law is preempted under the *Machinists* preemption analysis. *Machinists* preemption forbids states and the NLRB from regulating conduct that Congress intended to be left unregulated and controlled by the free play of economic forces. The Court found that the California law is preempted under *Machinists* because it regulates within a zone protected and reserved for market freedom.

In holding that the NLRA preempts the California law, the Court emphasized that both the First Amendment and § 8(c) of the NLRA protect noncoercive speech about unionization. According to the Court, this policy judgment, which suffuses the NLRA as a whole, favors "uninhibited, robust, and wide-open debate in labor disputes." Further, the Court held that "Congress' express protection of free debate [as set forth in § 8(c) of the NLRA] forcefully buttresses the preemption analysis in this case."

D. The Demand for Recognition. Once the union obtains what it believes is a majority of signatures in an appropriate bargaining unit, it will usually make a demand for recognition upon the employer. This process of the employer recognizing the union as the bargaining representative solely on the basis of signed cards is known as "card check" recognition. Most unions make a demand upon the employer and file a petition with the NLRB after they have secured a majority of the employees' signatures on union cards. Unions sometimes visit an unsuspecting employer in an attempt to gain voluntary recognition or to get the employer to make a mistake, such as looking through the cards.

Over the past decade, unions have signaled a major shift in organizing strategy by increasingly seeking card-check agreements and neutrality pledges from employers, thus avoiding the NLRB's traditional representation election process wherever possible. Unions claim (without hard evidence, of course) that the NLRB's election process is slow and gives the employer ample time to coerce employees into abandoning their union support. They claim that card check is a more "fair" method for employees to select union representation. The effect of card-check recognition on an employee's ability to file a subsequent decertification petition is discussed in the *Coping With Unions* Chapter of the Sourcebook.

1. Card Check. An employer may be bound to recognize and bargain with a union when it has agreed to forego its right to have an election. Such a finding can be made based upon a card check or a poll of employees. *Sullivan Electric Co.*, 199 N.L.R.B. 809 (1972), *enf'd*, 479 F.2d 1270 (6th Cir. 1973). An employer is not obligated to agree to a card check or a poll or any other alternative method of determining a union's majority status. *Linden Lumber, Div. Summer & Co. v. NLRB,* 419 U.S. 301 (1974). *See also International Union of Operating Engineers v. NLRB,* 361 F.3d 395 (7th Cir. 2004) (employer does not implicitly recognize a union by simply reviewing authorization cards and then stating that the union has collected them from all of the potential bargaining unit, where there is no clear agreement to waive the right to an election); *Jefferson Smurfit Corp.*, 331 N.L.R.B. 809 (2000) (employer did not waive the right to an election even though the company's employee relations manager read a letter from the union requesting recognition and examined and copied authorization cards presented by the union; an employer has the right to an election to resolve the issue of majority status and, absent a clear agreement to forego that right, does not violate § 8(a)(5) by insisting upon an election).

An employer should not examine union authorization cards since the Board could construe this as an agreement to a card check, or, at the very least, the employer will be construed to have knowledge of who has engaged in union activity. If any card signer is discharged, the card signer will have the ability to claim the discharge was because of having signed a union card. Additionally, some unions identify their in-plant organizers to the employer so that if these employees are discharged the employer cannot claim it was unaware that the employees were engaged in union activity.

As discussed in Part I above, if the Employee Free Choice Act becomes law, or if the Board makes rules effectively implementing portions of EFCA, card check could become the norm for unions seeking to represent workers, not the exception.

2. Neutrality Agreements. A neutrality agreement provides that an employer will essentially remain neutral and will not actively campaign against a union seeking to represent its employees. Neutrality agreements come in various shapes and sizes. Some employers agree to a total gag order when it comes to union-related discussion. Some employers agree that they will share only facts about the union, and will not disparage the union. Some agreements give the union special access rights to the employer's facility or require the employer to provide the union with employee contact information. Neutrality agreements often include an enforcement mechanism, such as an arbitration clause, and arbitrators have upheld the validity of neutrality agreements. *See Quebecor World, Inc.* (St. Antoine, Arb. 2006).

3. Why Not Agree to a Card Check/Neutrality Pact?

- Card checks do not accurately reflect the free will of the targeted employees.
- Unlike a secret ballot election, employees often sign union cards in the presence of a union organizer or another pro-union employee.
- Employees may sign a union card for reasons other than support for the union. For example, certain employees may sign cards because they believe the cards will be used only to obtain a NLRB election, when in fact, the union intends to use the cards to get a majority for a card check or in-person demand for recognition.
- A union may claim to represent employees in an appropriate bargaining unit based on evidence that the NLRB would deem insufficient to make such a showing.
- Without NLRB intervention, a union may seek to represent a group of employees who would not constitute an appropriate unit under traditional NLRB standards.

Corporate campaigns often have the goal of pressuring the employer into agreeing to a card check along with a neutrality provision because the union is significantly more likely to be successful in recruiting members than when using traditional NLRB election procedures. *See,* Jarol B. Manheim, *Trends in Union Corporate Campaigns, A Briefing Book,* The George Washington University, The U.S. Chamber of Commerce (2005).

4. Employer ULPs. If an employer has committed numerous ULPs during an organizing campaign, the NLRB may require it to recognize and bargain with the union. *See NLRB v. Gissel Packing Co.,* 395 U.S. 575 (1969). Even if a union decides to proceed with an election despite employer ULPs, it can still obtain a bargaining order if it files election objections, has the election set aside, and meets the standards necessary for a bargaining order. *Irving Air Chute Co., Inc.*, 149 N.L.R.B. 627 (1964), *enf'd*, 350 F.2d 176 (2d Cir. 1965). Generally, the Board will only issue a *Gissel* bargaining order where the employer has committed numerous unfair labor practices that render traditional remedies inadequate to ensure a fair representation election and where the union can show it has secured authorization cards from a majority of the bargaining unit employees. *See, e.g., United Scrap Metal, Inc.,* 344 N.L.R.B. 467 (2005) (rejecting employer's claim that the General Counsel failed to show that the union achieved majority status).

5. After Acquired Contract Clause. Some employers agree to union contracts that contain an "after acquired" or "additional stores" clause, which requires recognition of the union at future employer locations upon proof of majority status. Assuming such a clause is valid, an employer may be deemed to have waived the right to demand an election. The validity of an "after acquired" or "additional stores" clause turns in part on

whether the clause constitutes a mandatory subject of bargaining. If it is instead a permissive subject, then the employer does not violate § 8(a)(5) of the Act by ignoring it. *Supervalu, Inc.*, 351 N.L.R.B. No. 41 (Sept. 30, 2007). In *Supervalu*, the NLRB held that the "additional stores" clause at issue was not a mandatory subject of bargaining because it did not vitally effect the terms and conditions of existing unit employees. *Id.* at slip op. *6. *See also Shaw's Supermarkets,* 343 N.L.R.B. 963 (2004) (granting review and hearing regarding whether the employer clearly and unmistakably waived the right to a Board election by an after acquired clause and, if so, whether public policy reasons outweigh the employer's private agreement not to have an election).

E. Employer's Response to Union Strategy. It is critically important for an employer to establish lines of communications with employees so that its first knowledge of a union drive does not come by way of a union demand for recognition or an NLRB petition received in the mail. The earlier an employer finds out about union activity, the more likely it is that it can be stopped. Activity that predates a union's filing of a petition with the NLRB seeking an election cannot be used by the union as an election objection, i.e., only post-petition conduct is objectionable (absent very unusual circumstances). If the employer undertakes a vigorous campaign to educate its employees about the risks of card-signing, it may be able to keep the union from securing sufficient authorization cards or employee support to gain a bargaining order.

To remain union free, an employer's operations need to be as issue-free as possible before union activity starts.

F. Employer Campaign Against Card-Signing.

1. Intelligence First. In the majority of cases, some precipitating event that drives down employee morale precedes union representation. In all likelihood, the union will have made representations to affected employees as to how it will deal with that event or how it would prevent similar occurrences in the future. It is much better to build the pre-petition campaign around this narrow and real issue than to use a scattershot approach.

The employer should attempt to ascertain whether the union's support is general throughout the employee group or localized, and the approximate overall extent of it. In other words, take some "head counts" by polling supervisors. Generally, an employer should not poll employees directly to determine their union sympathies. *Blue Flash Express*, 109 N.L.R.B. 591 (1954).

The employer should also interview supervisory staff for information regarding recent unusual events or conditions. The employer should ensure that supervisors are prepared to fully and properly respond to questions that employees typically ask during the organizing drive. See the Appendix to this Chapter, available at Ford & Harrison LLP's web site, www.fordharrison.com/sourcebooks.aspx, for a list of such questions and suggested answers.

The employer should ensure that supervisors know all the legal "dos and don'ts" and should instruct them using the "TIPS" acronym ("threats, interrogation, promises, surveillance"). If an employer learns of union activity before a petition has been filed, this may mean that the union still has less than the thirty percent showing necessary to support a petition or less than a card majority. Swift counteraction may prevent or discourage the filing of a petition. Employers can post notices, hold employee meetings, or make other anti-card communications. An employer should have any such communications reviewed by labor counsel before disseminating.

2. Card-Signing Speeches. An effective card-signing speech should educate employee about the facts and risks of union authorization cards and signature petitions.

The speech should point out the negatives of signing a union card such as that the employee agrees to pay dues, initiation fees, and assessments as determined by the union without knowing whether the union can or will produce a satisfactory contract. Additionally, cards may be used to demand recognition without an election. The card is essentially a "blank check" to the union, in which the signer subjects her or himself to union rules and regulations that she or he may later find oppressive and unwelcome. The speech can also inform employees that the employer is firmly opposed to having this union or any union. It should inform employees that it is not necessary for anyone to belong to or join any labor union in order to get or keep a job at the company and should inform employees that those who join or support a union will not receive any advantage or preferential treatment over those who do not.

An employer may also educate employees on the negatives associated with unions. Such negatives include, among others, union dues, fines, union assessments, union rules in a union's constitution, loss of individual freedoms, how employees can lose wages and benefits during union negotiations, and strikes. However, employers must carefully weigh the effectiveness of using these communications during the pre-petition card-signing campaign against using these messages when the "war" is on during the campaign period preceding the election.

With proper safeguards, it is lawful to guide employees who may wish to revoke union authorization cards before or after hearing the employer's presentations. This, however, should be accomplished in close cooperation with labor counsel.

The employer generally should decline invitations to debate with union organizers. First, the employer is not out to help the union by providing it with an audience in an arena where the speech rights are more restrictive for the employer. Second, the employer is more interested in focusing on running its business successfully because in the long run that is what is best for the employer and its employees.

V. ELECTION CAMPAIGNS

A. Union Campaign Strategy. If the union did not obtain representation or an election through one of the methods discussed above, it will have to rely on success in a secret ballot election. Before the election, both the union and employer will campaign to encourage employees to vote either in favor of union representation or against it. During a campaign, unions may hold frequent meetings with employees to keep their spirits up. Unions will engage in as many home visits as they can. Unions may file ULP charges to try to get an employer to limit its campaign, for their own campaign purposes, and to cost the employer money. Unions may give away free drinks, free hats, free buttons, etc. Unions may hand out campaign propaganda attacking the employer. Smart unions will generally shy away from making unrealistic promises because they are too easy for the employer to rebut. Unions, particularly in right-to-work states, may tell employees that they will not ever have to join the union and will not even be asked to join until after the union has won the election and negotiated a contract, and, therefore, they have nothing to lose by voting for the union, a campaign technique that is particularly effective and must be anticipated.

B. Employer Campaign Strategy.

1. Education and Use of Supervisors. Front line supervisors play a crucial role in a union organizing campaign. Fairly or unfairly, employees often judge their employer by the relationships they have with their immediate supervisors. A wise employer will invest in its supervisors the time and resources necessary to train and educate them how to be good leaders, including how to conduct themselves during a union organizing campaign.

An employer should instruct supervisors about the law, making sure they are prepared to respond fully and properly to employee questions. See the Appendix to this Chapter, available at Ford & Harrison's web site, www.fordharrison.com/sourcebooks.aspx, for a list of typical questions asked by employees during an organizing drive, along with suggested answers to the questions. Make supervisors a part of the management campaign team. Make them invested in the employer's campaign by describing their individual stake in the outcome. Supervisors must understand that a union would attempt to limit supervisory decision-making and generally make life more difficult for the supervisor.

2. **Business Decisions During Campaign.** Adopt an attitude that it will be business as usual during an organizing campaign with the following exceptions:

   a. Instruct supervisors not to discharge any employee without top management approval.

   b. Do not, if possible, take actions that create uncertainty in the workforce.

   c. Do not, when possible, implement plans that would predictably be met with disfavor by the employees.

   d. Do enforce all rules fairly and consistently.

   e. Do not "tighten up" on rules.

Hold an Initial Strategy Session between top management and counsel. Select which member or members of management will serve as the employer's principal communicators.

3. **Theme to be Used During Campaign.**

   a. Positive. Emphasize the employer's good features and positive aspects of the present work environment. Note that all the success the organization has enjoyed to this point has been union-free. If the employer has a poor history, point to recent changes, such as new supervisors or a recent addition to the economic benefits package. Emphasize recent changes in top management and disassociate the current leadership from the past, if appropriate.

   b. Negative. Present the problems employees may face if the union wins. Emphasize the track record of the particular union involved based on sources such as financial statements, organizer salaries, constitution and bylaws, and strike history. Point out the union's record at other local employers, especially if the other employers have a contract providing less favorable terms than exist at company they are trying to organize. Point out other negatives, such as a company with a union contract that ceased doing business or a strike in the local area. Make employees aware of any record of the union in connection with any criminal conduct or pension fund problems. Make sure employees understand the collective bargaining process and how employees could end up with less. Point out the potential financial costs, loss of freedom, and strike issues.

   Recognize that one of the primary campaign issues is credibility. Be on the lookout for ways to point out the union's lack of credibility, being careful not to place the employer's own credibility in question.

   c. Speeches. Speeches should be in writing so employer can prove what was said. Some campaigns call for one to two speeches; others require more frequent group speeches and meetings. The employer should be aware that it cannot make

speeches within twenty-four hours of election. Attorneys should review and revise speeches and give legal advice.

4. One-On-One Contact. "Working the floor" is a good way to get the employer's message across but presents dangerous credibility problems. For example, the employee being addressed may misunderstand or not tell the truth or the supervisor may say something inappropriate during the discussion. *See Frito Lay, Inc.*, 341 N.L.R.B. 515 (2004) (supervisor "ride alongs" with unit employees prior to election were not coercive).

5. Polling. Poll the supervisors weekly to find out how employees stand. Take employee headcounts using criteria – for the union, against the union, neutral or don't know. Note that polling **employees** (as compared to supervisors) may violate the NLRA and should not be done without consulting experienced employment counsel.

6. Handouts. Use handouts, pay envelope enclosures, personalized letters to the homes, existing employee newsletters, bulletin board postings, and posters. Mailouts are effective as they get the spouse involved. Posters may also be used during campaign.

7. Gimmicks.

a. Raffles: In *Atlantic Limousine Inc.*, 331 N.L.R.B. 1025 (2000), the Board adopted a bright line rule prohibiting election-day raffles if: (i) eligibility to participate in the raffle is tied to either voting in the election or being at the election site on election day; or (ii) the raffle is conduced during a period from twenty-four hours before the opening of the polls until the closing of the polls.

b. Quizzes and contests may be used. But note that a "union truth quiz" conducted by an employer during an election campaign violated § 8(a)(1) in *Sea Breeze Health Care Center, Inc.*, 331 N.L.R.B. 1131 (2000). The quiz required employees to identify themselves and asked about their feelings about union.

c. Deduction of dues from paycheck, but must be done before the last week of the election.

d. Money in tank/large check.

e. Movies and videotapes of past television programs.

f. Some gimmicks may violate the Act. *See Fermont Division Dynamics Corp. of America*, 286 N.L.R.B. 920 (1987), in which the award of prizes for employees writing a pro-company or antiunion slogan was found to be a grant of benefit and thus violative of § 7 of the Act. *See also Eldorado Tool*, 325 N.L.R.B. 222 (1997) (tombstone display of UAW factories that closed was unlawful).

While the Board maintains its position that merely making antiunion T-shirts available is lawful, the Fourth U.S. Circuit Court of Appeals has affirmed a Board decision holding that when an employer required employees to "sign" for the T-shirts during a union organizing drive and refused to give the T-shirts to openly pro-union workers, the employer committed an unfair labor practice. *House of Raeford Farms v. NLRB*, 7 F.3d 223 (4th Cir. 1993). The employer may not set up a "Vote No" committee among employees. If employees choose to do so on their own, however, this can be very effective.

VI. NLRB REPRESENTATION PROCEDURE

A. Basis for Asserting Jurisdiction under the NLRA. There are two key standards for asserting jurisdiction under the NLRA. One is the retail standard. Under this standard, the employer must do some business across state lines and have gross annual volume of business of at least $500,000. Under the nonretail standard, the employer must have an annual outflow or inflow, directly or indirectly, across state lines of at least $50,000.

B. Stipulated Election vs. Hearing. A critical step in a labor union's attempt to unionize a group of employees is the determination of the voting unit. This is done in one of two ways. In a stipulated election agreement brokered by the Regional Office of the NLRB, the company and union agree to such things as which employees will be eligible to vote in the election and the time, date and place of the election. If the parties do not agree to a stipulated election, the Board will hold a hearing. In this hearing, the employer may litigate matters such as the supervisory status of individuals; the appropriateness of the petitioned-for unit, including expansion or contraction of the unit, unit placement issues, and multi-facility unit; managerial and confidential status of employees; eligibility of part-time employees; eligibility of certain classes of employees such as "plant clericals" and quality control employees; jurisdiction of the Board; whether the union is a labor organization; union conflict of interest; contract bar, and other issues. Strict rules of evidence do not apply.

1. Benefits of a Hearing. The benefits of a hearing include the possibility of getting the petition dismissed. Additionally, a hearing preserves issues to litigate before a court of appeals if the employer loses the election and elects not to bargain with the union. Since the eligibility date for voting in the election is the payroll period immediately preceding the Regional Director's decision and direction of election, the eligibility cutoff date for voting in the election is postponed until a decision is issued. This may make employees hired after the hearing eligible to vote. The employer may be able to wear the union down and possibly get it to withdraw its petition because of cost to the union of hiring an attorney and litigating at a hearing, as well as the knowledge that the employer may appeal an election loss to the courts. The employer may be able to successfully argue to the Regional Director that certain classifications should be included or excluded from the unit. Additionally, the employer may be able to obtain beneficial information on the union at a hearing.

2. Benefits of a Stipulated Election. The employer may be able to postpone the election date and/or may be able to get a postponed eligibility date, which will enable new hires to vote even though the traditional eligibility date is the payroll period immediately preceding the Regional Director's approval of the stipulation. Additionally, the employer can get the date it wants for an election, which enables the employer to know the date, while in directed elections following a hearing, the election date is twenty-five to thirty days after decision and direction of election, absent highly unusual circumstances. A stipulated election avoids the cost of a hearing, the brief to the Regional Director, and appeal to the Labor Board in Washington. Additionally, the union may be willing to include or exclude certain disputed classifications to avoid a hearing that otherwise might be determined adversely to employer's interest. The Board must rule on election objections filed by the employer if a stipulated election is agreed to. A stipulated election avoids the union politicizing the hearing.

3. *Excelsior* Lists. In *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236 (1966), the Board required employers to submit a list of all eligible voters' names and addresses to the Regional Director who is conducting the election so that the list could be supplied to all parties. In *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969), the U.S. Supreme Court upheld the NLRB's right to enter such an order. The Board has clarified the *Excelsior*

requirements, holding that the employer must provide full names. *See North Macon Health Care Facility*, 315 N.L.R.B. 359 (1994). The Board has further clarified this rule by stating that it will consider not only the percentage of omissions relative to the number of employees, but also other factors such as whether the number of omissions is determinative (i.e., whether it equals or exceeds the number of additional votes needed by the union to prevail in the election), and the employer's explanation for the omissions. *Woodman's Food Markets, Inc.*, 332 N.L.R.B. 503 (2000). Parties may agree to a list wherein agreement is reached as to the eligibility of voters by name, reducing the likelihood of challenges as to eligibility at election. *Norris-Thermador Corp.*, 119 N.L.R.B. 1301 (1958). A *Norris-Thermador* list, however, does not limit either party's opportunity to challenge the supervisory status of any voter.

4. Request for Review. If a hearing is held after the Regional Director issues a decision in which she or he either dismisses the petition or directs election, the parties are given an opportunity to file a request for review with the NLRB seeking to overturn the Regional Director's adverse holdings. The parties must file a request for review with Board in Washington within fourteen days after service of decision by the Regional Director (no extra days are added for mailing). Filing of a request for review does not operate as a stay of election. If the request for review is granted, the election may be canceled, but most likely it will be held and ballots will be impounded. The Region attempts to conduct the election within forty-five days from date petition is filed. The election is conducted by an NLRB agent and all parties are entitled to an equal number of election observers who must be nonsupervisory employees of employer.

Election Observers. Although the NLRB previously allowed unions to use low-level supervisors as election observers, the Board reversed its position in *Family Services Agency, San Francisco*, 331 N.L.R.B. 850 (2000). In *Family Services*, the Board held that "to avoid the possibility that voters may perceive the participation of a statutory supervisor in the actual balloting process, even in the limited role of an observer, as calling into question the integrity of the election process, we have decided to eliminate this exception and announce a rule prohibiting the use of supervisors as observers."

Observers may challenge voters at the election, but only before the challenged voter's ballot is placed in the ballot box. If challenged ballots are determinative of the election results, the Region will investigate and determine whether challenged voters are eligible to vote.

5. Off-Site Voting. On June 9, 2010, the NLRB issued a request for information (RFI) through the federal government's procurement website, in which the NLRB announced that it "is seeking industry solutions regarding the capacity, availability, methodology and interest of industry sources for procuring and implementing secure electronic voting services both for remote and on-site elections." More specifically, the NLRB has listed its requirements as "the acquisition of electronic voting services to support conducting secret-ballot elections to determine representation issues." The RFI goes on to note that the NLRB requires "a proven solution that supports mail, telephone, web-based and/or on-site electronic voting."

6. Election Objections. After the election, the parties have seven calendar days after the tally of the ballots to file election objections concerning conduct that occurred after the union filed its petition. NLRB Rules and Regulations 102.69(c)(2). Only under very limited circumstances may pre-petition conduct be a basis for setting aside results of election. In *Ensign Sonoma, LLC d/b/a Sonoma Health Care Center and Health Care Workers Union,* 342 N.L.R.B. 933 (2004), a majority of the Board held that an election must be set aside when the conduct of the Board election agent tends to destroy

confidence in the Board's election process or could reasonably be interpreted as impairing election standards. Under this standard, a majority of the Board concluded that statements of personal opinion by a Board agent may be sufficiently partisan to warrant setting aside the election even if the comments were made to a limited audience and were not accompanied by procedural irregularities or other actions that "reasonably create the appearance that the election procedures will not be fairly administered."

The NLRB will attempt to investigate election objections/challenges within thirty days and the Regional Director will attempt to issue a report on challenged ballots and/or objections within thirty-five days. The report can: (1) overrule any or all objections and/or challenges; (2) sustain any or all challenges and/or objections and recommend or direct a new election on the basis of objectionable conduct; or (3) send any or all objections and/or challenges to a hearing. Regardless of whether a post-election hearing is held pursuant to a stipulated election, the parties can appeal to the NLRB in Washington, which reviews the Regional Director's report upon a timely filing of exceptions or a request for review.

If the union prevails and is certified, the employer must decide whether to accept the certification and commence bargaining, or whether to litigate various issues before the NLRB and/or courts by way of a refusal to bargain charge, commonly referred to as a "technical refusal to bargain." (Section 8(a)(5)). Historically, the Board decides such a charge summarily against the employer, and the merits of the representational issues are reviewed only by a federal court of appeals. In *Sub-Zero Freezer Co.*, 271 N.L.R.B. 47 (1984), the Board departed from its normal practice and revoked the union's certification when the employer refused to bargain, based on the employer's objections to pre-election conduct by the union, which the Board had previously considered in the representation case.

There is no direct review by courts of NLRB representation matters (absent highly unusual circumstances); employers must refuse to bargain with the certified union in order to get review by the courts of an NLRB decision to certify a union.

C. Appropriate Bargaining Unit. The definition of an "appropriate" bargaining unit is a consideration in any representation proceeding. The NLRB will define a bargaining unit and in doing so looks not to the "most" appropriate unit but to "an" appropriate unit. A proposed unit is generally considered appropriate if the employees in the proposed unit share a "community of interest." In determining the appropriateness of multi-site bargaining units, a finding of a "community of interest" is based upon an assessment of five primary factors: (1) centralized control of labor relations and supervision; (2) similarity of wages and benefits; (3) degree of multi-site employee transfer; (4) similarity of skills, functions, and working conditions; and (5) the parties' bargaining history. *See Cleveland Constr. v. NLRB*, 44 F.3d 1010 (D.C. Cir. 1995). *See also Jerry's Chevrolet, Inc.*, 344 N.L.R.B. 689 (2005) (Board majority ruled that the employer overcame the strong presumption in favor of a single-facility bargaining unit and held that a unit of technicians at all four of the employer's dealerships was the appropriate unit for bargaining, based primarily on two factors: (1) the facilities in question were located next to each other; and (2) the technicians' immediate supervisors at each location had extremely limited authority over the employees; key employment-related decisions were made centrally by top management); *but see Catholic Healthcare West,* 344 N.L.R.B. 790 (2005) (In finding that the employer had not rebutted the single-facility presumption, the Board majority focused on the geographical separation (12-20 miles), the fact that temporary transfers between facilities "are the exception rather than the norm," and the local autonomy exercised by supervisors at each facility on "such matters as assignment

of work, discipline of employees, preparation of performance appraisals, scheduling, grievance handling, and hiring.")

1. Supervisors Under the NLRA. The Act defines "supervisor" as any individual having authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. 29 U.S.C. § 152(11).

This definition has three components. *See NLRB v. Health Care & Ret. Corp. of Am.*, 511 U.S. 571 (1994). First, the employee must hold the authority to engage in any one of the twelve listed supervisory functions; second, the employee's "exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment"; and third, the employee's authority is held "in the interest of the employer." *Id.* at 573-74. Note, in August 1999, the NLRB issued a forty-eight page guidance memo on the supervisory status of nurses, summarizing legal issues and including a checklist format. *NLRB Guideline Memorandum on Charge Nurse Supervisory Issues*, OM 99-44 (Aug 24, 1999).

In *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 714 (2001), the U.S. Supreme Court held that the Board could not find a lack of independent judgment merely because the judgment was based on "professional or technical judgment in directing less-skilled employees to deliver services." The Court held that "[t]he first five words of this interpretation insert a startling categorical exclusion into statutory text that does not suggest its existence." *Id.* Accordingly, the Court held that the Board erred when it determined that nurses were not "supervisors" within the meaning of the NLRA.

The "Kentucky River Trilogy." Following the Supreme Court's decisions in *Kentucky River,* the Board issued a trilogy of decisions providing long-awaited guidance for determining supervisory status under the NLRA. *See Oakwood Healthcare, Inc.*, 348 N.L.R.B. 686 (2006); *Golden Crest Healthcare Ctr.*, 348 N.L.R.B. 727 (2006); *Croft Metals Inc.*, 348 N.L.R.B. 717 (2006). In *Oakwood Healthcare*, the Board defined the terms "independent judgment," "assign," and "responsibly direct" as those terms are used in the NLRA's definition of supervisor. The Board revised its definition of the term "independent judgment" in light of the Supreme Court's decision in *Kentucky River* that the Board had defined that term too narrowly.

Consistent with the *Kentucky River* decision, the Board held that the term "independent judgment" applies regardless of whether the judgment is exercised using professional or technical expertise. "In short, professional or technical judgments involving the use of independent judgment are supervisory if they involve one of the 12 supervisory functions of Section 2(11)." *Oakwood Healthcare,* 348 N.L.R.B. 686. The Board held that judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective bargaining agreement.

The Board defined "assign" as the "act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee." *Id.* Assign refers to the designation of significant overall duties, not the discrete instruction to perform a specific task. In the healthcare setting, the Board held that "assign" encompasses the charge nurses' responsibility to assign nurses and aides to particular patients. *Id.*

In defining "responsibly direct" the Board held that the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, "such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly." *Id.* Thus, to establish accountability for the purposes of responsible direction, the Board held that the employer must show that it delegated to this person the authority to direct the work and take corrective action if needed. Additionally, it must be shown that there is a possibility of adverse consequences to the supervisor if he or she does not properly direct the work or take the necessary corrective action. The Board also noted that in directing others, this person is carrying out the interests of management. Excluding from the coverage of the Act individuals who are aligned with management is the heart of § 2(11). *Id.*

In *Oakwood Healthcare*, the Board held that permanent charge nurses employed by Oakwood Heritage Hospital exercised supervisory authority within the meaning of § 2(11) and, thus, should be excluded from the bargaining unit of RNs. The Board found that the permanent charge nurses met the definition of "assign" when they assigned nurses to specific patients for whom they would care during their shift. The permanent charge nurses also exercised independent judgment in making such assignments. However, rotating charge nurses did not exercise supervisory authority for a substantial part of their work time, thus they were not considered supervisors.

In *Golden Crest Health Care Center*, 348 N.L.R.B. 727 (2006), a three-member panel of the Board applied the terms "assign," "responsibly direct," and "independent judgment" as defined in *Oakwood Healthcare* and held that charge nurses employed by Golden Crest Health Care Center were not supervisors under § 2(11) of the Act.

In *Golden Crest*, which involved the status of charge nurses at a nursing home, the Board determined that the charge nurses did not have actual authority to assign employees; the assistant director of nursing (an undisputed supervisor) performed this duty. While there was evidence that charge nurses could request employees stay beyond the end of their shift, there was no evidence they could require an employee to do so. In some situations, the charge nurse could issue a "mandate" that an employee report to work, but only if the admitted supervisors authorized this. The penalty for refusing such a mandate was de minimis, which is another factor the Board considered in finding that the charge nurses did not exercise supervisory authority in assigning employees.

The Board also held that while the charge nurses had the authority to direct nursing assistants, they were not accountable for the job performance of the employees they directed. Thus, the charge nurses employed by Golden Crest were not supervisors under § 2(11). *Id.*

In *Croft Metals*, 348 N.L.R.B. 717 (2006), also a decision by a three-member panel, the Board held that the lead persons in a manufacturing facility were not supervisors under the standards articulated in *Oakwood Healthcare*. In this case, the Board determined that the lead persons did not have the authority to "assign" under the Act; however, the Board did find that they responsibly directed their line crew or members. This was not sufficient to establish supervisory status, however, because the Board found that the lead persons did not exercise independent judgment. This decision highlights the fact that even if the worker performs one of the twelve duties in the NLRA's definition of supervisor, he or she must also exercise independent judgment to be considered a supervisor under the Act.

Faculty Members of Academic Institutions. In a case handled by Ford & Harrison attorneys, the D.C. Circuit Court of Appeals held that Board failed adequately to explain its determination that faculty members of an academic institution are covered by the NLRA. *See Point Park University v. NLRB,* 457 F.3d 42 (D.C. Cir. 2006). The court held that the Board must, when applying the test set forth in *NLRB v. Yeshiva University,* 444 U.S. 672 (1980), explain "which factors are significant and which less so, and why . . . ." In *Point Park*, the D.C. Circuit noted that this determination requires an "exacting analysis" of the faculty member's duties in the context of the academic institution in question. Accordingly, the court remanded the case to the Board so that it can either explain its decision as required by applicable law or reconsider its determination.

2. Temporary and Nontemporary Employees. The Board has returned to its long-standing precedent that combined units of solely and jointly employed employees are multiemployer bargaining units and are statutorily permissible only with the consent of the parties. *See H.S. Care LLC, d/b/a/ Oakwood Care Center,* 343 N.L.R.B. 659 (2004). This decision overrules the Board's 2000 decision in *M.B. Sturgis,* 331 N.L.R.B. 1298 (2000), which held that bargaining units of solely and jointly employed employees are permissible under the NLRA. In overruling the prior decision, the Board held "the *Sturgis* Board's reinterpretation of the concept of an 'employer unit' severed that term from its statutory moorings." The Board further noted this "loss of direction" gave rise to such "anomalous decisions" as *Gourmet Award Foods,* 336 N.L.R.B. 872 (2001), which applied a collective bargaining agreement between an employer and its employees to employees supplied by a temporary agency.

In *Oakwood Care Center,* the Board returned to the precedent set in *Greenhoot, Inc.,* 205 N.L.R.B. 250 (1973), and *Lee Hospital,* 300 N.L.R.B. 947 (1990), and held that the NLRA does not authorize the Board to direct elections in units encompassing the employees of more than one employer absent the consent of the multiple employers. According to *Oakwood Care Center,* by ignoring the bright line between employers and multiemployer bargaining units, *Sturgis* departed from the directives of the NLRA and decades of Board precedent. The Board further stated, "[w]e find that the new approach adopted in *Sturgis*, however well intentioned, was misguided both as a matter of statutory interpretation and sound national labor policy."

3. Acute Care Hospitals. The Board has published rules defining eight appropriate bargaining units in acute care hospitals. The U.S. Supreme Court held these rules to be valid in 1991. *See American Hosp. Ass'n v. NLRB*, 499 U.S. 606 (1991). The rules apply to units of six or more employees (smaller units are decided on a case-by-case basis). The rules only apply to acute care hospitals. The eight presumptively appropriate collective bargaining units are: (1) physicians; (2) registered nurses; (3) other professional employees (i.e., pharmacists and occupational therapists); (4) medical technicians and LPN's; (5) skilled maintenance workers; (6) clerical workers; (7) guards; (8) other nonprofessional employees (i.e., housekeeping, food service). For nonacute care health care facilities, the Board applies a "pragmatic" or "empirical" community-of-interest test in determining unit appropriateness. *See, e.g., Virtua Health, Inc.,* 344 N.L.R.B. 604 (2005) (applying standard set forth in *Park Manor Care Center,* 305 N.L.R.B. 872 (1991), in which the Board considered traditional community-of-interest factors, as well as the factors considered relevant by the Board in the Rulemaking, and prior cases involving either the type of facility in dispute or the type of unit sought; finding that a state wide unit limited to paramedics, excluding other technical employees, was inappropriate).

VII. LEGAL CONSIDERATIONS IN ELECTION CAMPAIGNS

NLRB elections are conducted in accordance with strict standards designed to give the employee-voters an opportunity to indicate freely whether they wish to be represented for purposes of collective bargaining. These standards are violated if the employer disturbs the "laboratory conditions" under which NLRB elections are held. While conduct sufficient to constitute a ULP generally would be sufficient to set aside the results of the election, the test is whether the conduct is sufficient to upset the laboratory conditions necessary for a free and fair election, not whether the conduct violates the ULP aspects of the Act.

A. Typical Objections Filed by Employers.

- Altered sample ballots. Unions often distribute altered sample ballots to employees shortly before a union election. Frequently, the employer files an objection to the use of an altered sample ballot, claiming it misled employees. In the past, when an altered sample ballot did not identify the party that prepared it, the Board would determine, on a case-by-case basis, whether the document had a tendency to mislead employees into believing that the Board favored one party over another. In *Ryder Memorial Hospital*, 351 N.L.R.B. 214 (2007), the Board announced that it will not set aside a representation election based on a party's distribution of an altered sample ballot, provided the altered ballot is an actual reproduction of the Board's recently revised sample ballot, which includes newly added disclaimer language. In *Ryder*, the Board announced that it has revised the sample ballot included with a Notice of Election to include a disclaimer stating: "The National Labor Relations Board does not endorse any choice in this election. Any markings that you may see on any sample ballot have not been put there by the National Labor Relations Board." According to the Board, revising the sample ballot to include the full text of the disclaimer eliminates the need for a case-by-case consideration of election challenges based on altered sample ballots.
- Improper waiver of initiation fees by a union. The union cannot condition waiver of initiation fees upon joining a union or signing a union card prior to the election. *NLRB v. Savair Mfg. Co.*, 414 U.S. 270 (1973). A union does not, however, commit a ULP by offering a fee waiver if it wins the election, because the waiver is available to all and does not depend upon the employee's individual vote. *NLRB v. VSA, Inc.*, 24 F.3d 588 (4th Cir. 1994).
- A union may not photograph or videotape employees without a sufficient explanation for its conduct. *Randell Warehouse of Ariz.*, 347 N.L.R.B. 591 (2006), *on remand from* 252 F.3d 445 (D.C. Cir. 2001).
- An atmosphere of violence or threats of violence may be a sufficient basis to set aside an election even if a third party engaged in the conduct. *See, e.g., PPG Indus. Inc.*, 350 N.L.R.B. 225 (2007) (setting aside election in favor of union because threats by third parties created a "general atmosphere of fear and reprisal rendering a free election impossible").
- Interjection of race into the campaign. The union (or employer) cannot engage in inflammatory appeals to racial prejudice. *See M&M Supermarkets v. NLRB*, 818 F.2d 1567 (11th Cir. 1987) (setting aside a union election victory where an employee referred to the employer's owners as "damn Jews"); *KI (USA) Corp. v. NLRB*, 35 F.3d 256 (6th Cir. 1994) (overturning NLRB bargaining order after an election, holding that the election was "tainted" due to the distribution of an "anti-American letter" containing negative stereotyping of Japanese (the owners of the company) by the union); *but see Honeyville Grain v. NLRB,* 444 F.3d 1269 (10th Cir. 2006)

(upholding Board determination that comments by union regarding company owners' Mormon faith were not inflammatory and did not require setting aside union election victory; "[h]ere, the Union agents sought to tie the comments to a relevant employee issue – how the company distributes its profits – and we do not believe the remarks incited religious tension in the same way as a racial or religious slur intended solely for inflammatory appeal").

- An employer may not sue a union for defamation stemming from the union's picketing signs and handbills declaring the employer to be a "racist" or "unfair to African-American employees." *Beverly Hills Foodland, Inc. v. United Food and Commercial Workers Local 655*, 39 F.3d 191 (8th Cir. 1994). In *Beverly Hills,* the court explained that to prevail with a libel or slander claim in the context of a labor dispute, the employer would have to show by clear and convincing evidence that the defamatory publication was made with knowledge that it was false or with reckless disregard of whether it was false or not. In addition, the court noted that terms such as "unfair," "fascist," and "racist" are subjective in nature, cannot be proven false, and cannot form the basis of liability under state (Missouri) libel law.
- The conferring of pre-election benefits that are sufficiently valuable and desirable in the eyes of the employees to whom they are offered has a potential influence on the person's vote. *See Nestle Ice Cream Co. v. NLRB*, 46 F.3d 578 (6th Cir. 1995) (union's filing of a lawsuit against the employer the day before the election and its statements that employees were due approximately $35,000 materially affected the election results in favor of the union, rendering the election invalid); *but see Detroit Auto Auction v. NLRB*, 528 U.S. 1074 (2000) (lower court case reported at 1999 U.S. App. LEXIS 13987) (The U.S. Supreme Court let stand a union's pre-election promise to provide each employee $150 per week in the event of a strike. The lower court held that this was not impermissible vote buying.)

B. Typical Objections Filed by a Union.

- Soliciting grievances from employees, either individually or in meetings.
- Management or agents of management visiting employees at their homes to urge them to reject the union.
- Campaigning in the immediate vicinity of the polls while the polls are open.
- Maintenance of unlawful, overly broad no solicitation or no distribution rules during a union campaign. However, in *Delta Brands, Inc.*, 344 N.L.R.B. 252 (2005), the Board pointed out that an overbroad no solicitation or no distribution rule does not automatically set aside an election. The objecting party must demonstrate that the rule affected the "laboratory conditions" required for a fair election.

  The NLRB General Counsel has taken the position that requests to show union promotional videos in nonwork areas during nonwork time (on battery operated TV/VCR's) is the equivalent of the distribution of union literature in nonwork areas during nonwork time and may not be banned without showing it is necessary to maintain plant discipline or production. *NLRB Report of the General Counsel*, R-2310 (Sept. 1, 1998) ("We considered a union video to be a modern-day equivalent of campaign literature").

  In *Santa Fe Hotel, Inc.*, 331 N.L.R.B. 723 (2000), the Board held that the entrances outside a hotel-casino were not working areas for the enforcement of a no distribution rule because only work that was incidental to the hotel's main function of providing lodging and gambling was performed there. Accordingly, the hotel could

not enforce its no distribution rule to prevent hand billing at the entrances by off-duty employees.

- Supervisors present in voting area while balloting is occurring.
- Denying employees access to plant premises where polls are located.
- Passing out antiunion buttons under certain circumstances.
- Holding a massed meeting on paid company time within twenty-four hours of the election to campaign against the union. *See Peerless Plywood Co.*, 107 N.L.R.B. 427 (1953); *but see Chicagoland Television News, Inc.*, 328 N.L.R.B. 367 (1999) (twelve-hour long pre-election party the day before the election was not enough to set aside the election where employer had a history of hosting such events, electioneering was not permitted, and no speeches were given).
- Refusing to submit an *Excelsior* list of eligible voters including the employees' full name to the Board for use by the union. *Macon Health Care Facility*, 315 N.L.R.B. 359 (1994).
- Unequal enforcement of rules or policies.
- Discriminatory discipline to union supporters.
- Threats of discipline or plant closing.
- Enforcing rules and policies more strictly than before the union arrived on the scene.
- Prohibiting distribution of union leaflets in check-in, mixed use areas.
- Alteration of paycheck process less than twenty-four hours before a union vote.
- Offering off-duty employees two hours of pay if they would come in to vote linked to an antiunion message.
- Handling or collecting a voter's mail ballot in a representation election is objectionable and may be grounds for setting aside the election. *See Fessler & Bowman Inc.*, 341 N.L.R.B. 932 (2004).
- Misrepresentations about the union will no longer be a basis for setting aside the results of an election. Misrepresentations about the Board's processes have been such a basis. *Riveredge Hospital*, 264 N.L.R.B. 1094 (1982), *enf'd* 789 F.2d 524 (7th Cir. 1986). The Board has allowed an employer, in certain limited circumstances, to tell its employees that its customers have expressed disfavor with the possibility of the employer becoming unionized, and that this may cost the employer the customer's business.

C. Election Observers. Under the *Milchem* Rule (*Milchem Inc.*, 170 N.L.R.B. 362 (1968)), the Board prohibits parties from having sustained conversations with voters waiting to cast their ballots, regardless of the content of the remarks. The Board also prohibits election observers from maintaining a list of eligible voters. *Milwaukee Cheese Co.*, 112 N.L.R.B. 1383 (1955). The Board does, however, permit election observers to keep lists of persons they intend to challenge, as long as voters do not generally observe the lists.

VIII. UNFAIR LABOR PRACTICES - EMPLOYER

A. Interference with § 7 Rights (§ 8(a)(1)). Section 8(a)(1) of the NLRA prohibits interference, restraint, or coercion of employees from exercising rights guaranteed in § 7 of the NLRA. Violations can be independent or derivative, i.e., violation of §§ 8(a)(2)-(5) also constitutes automatic violation of § 8(a)(1).

The U.S. Supreme Court has held that filing a reasonably based but unsuccessful lawsuit is not unlawful retaliation under § 8(a)(1). *See BE&K Construction Co. v. NLRB,* 536 U.S. 516 (2002). In this case, BE&K Construction sued a group of unions, claiming, among other things, that the unions violated the antitrust laws by engaging in efforts to delay a construction project that had been awarded to BE&K (which is a union-free employer). The lawsuit was ultimately unsuccessful. After the lawsuit was dismissed, the Board found that BE&K violated Section 8(a)(1) of the Act by filing the lawsuit.

The U.S. Supreme Court invalidated the standard applied by the Board in determining that BE&K violated the Act. In doing so, the Court held that whether reasonably based but unsuccessful lawsuits fall outside the First Amendment's protection presents a difficult constitutional issue. Rather than resolve this difficult issue, the Court adopted a limiting construction of § 8(a)(1) so as to avoid the First Amendment issue. Thus, the Court found that there was nothing in the statutory text indicating that § 8(a)(1) must be read to reach all reasonably based but unsuccessful suits filed with a retaliatory purpose and declined to read § 8(a)(1) as doing so. The Court then held that the Board's standard, which covered all such suits, is invalid. The Court remanded the case to the Board for a decision consistent with its reasoning.

On remand the Board held that the filing and maintenance of a reasonably based lawsuit does not violate the Act, regardless of whether the lawsuit is ongoing or is completed, and regardless of the motive for initiating the lawsuit. *See BE&K Construction,* 351 N.L.R.B. 451 (2007).

The Board held that concerns regarding the potential chilling of the fundamental First Amendment right to petition the government exist whether the Board burdens a lawsuit in its initial phase or after its conclusion. "In sum, we see no logical basis for finding that an ongoing, reasonably-based lawsuit is protected by the First Amendment right to petition, but that the same lawsuit, once completed, loses that protection solely because the plaintiff failed to ultimately prevail. Nothing in the Constitution restricts the right to petition to winning litigants."

In determining whether a lawsuit is reasonably based, the Board applied the test articulated by the Supreme Court in the antitrust context: a lawsuit lacks a reasonable basis if "no reasonable litigant could realistically expect success on the merits." Applying this standard to the facts of this case, the Board held that the lawsuit was reasonably based.

B. Examples of Independent Violations.

1. Threats versus Freedom of Speech. An employer cannot threaten reprisals because employees engaged in union or protected activities. However, § 8(c) of Act gives the employer the right to free speech as long as the employer expression of free speech contains no threat of reprisal or force or promise of benefit. The U.S. Supreme Court has stated that an employer may, under limited circumstances, make a prediction, but "it must be carefully phrased on the basis of objective fact." *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). In *Gissel,* the Court stated:

> [a]n employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a "threat of reprisal or force or promise of benefit." He may even make a prediction as to the precise effect he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision

> already arrived at to close the plant in case of unionization. *See Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263, 274 n.20 (1965). If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment.

The Board has, in some cases, given employers a greater ability to make § 8(c) statements regarding unionization. *See Tri-Cast, Inc.*, 274 N.L.R.B. 377 (1985). Examples:

- Has allowed employers to tell employees bargaining starts from scratch, if explained in context.
- Has allowed employers to tell employees how to get their union cards back even when employees have not requested this information. This can be very effective if instituted during a card signing campaign, because unions seldom explain the real reasons they want the employees to sign the cards and what the cards mean. However, the employer may not "assist" employees in asking for cards back.
- Has allowed employers to inform employees that no union can get them more than they can get for themselves.
- Under certain circumstances, has allowed employers to inform employees that wage increases could be delayed as a result of negotiations with the union.
- Has allowed employers to inform employees that many employees have told the company of their support for the company and that the company appreciated their loyalty and it looked like the union would lose the election.
- Has allowed an employer to inform employees that the company can negotiate an agreement with the union that does not cost the company any more in wages and benefits than without the union presence and may even cost less but that experience has shown the company that the presence of a union results in a tense working relationship with extreme disharmony among employees that can result in loss of customers and loss of income to employees.
- Has permitted the employer to circulate a memorandum to employees giving a specific, concrete example of a negative outcome for employees who were represented by the same union seeking to represent the employer's employees, where the memorandum did not predict the same thing would happen to these employees but instead noted that "each set of negotiations is different." *See Manhattan Crowne Plaza Town Park Hotel Corp.*, 341 N.L.R.B. 619 (2004).

In *Medieval Knights, LLC,* 350 N.L.R.B. 194 (2007), the Board recognized that an employer has significant discretion when explaining the advantages and disadvantages of collective bargaining to employees during the course of a representation election. In this case, during the course of a representation campaign, the employer hired consultants to educate employees and management about the election process. A week before the election, the employer held a meeting to explain to employees the collective bargaining process, during which one of the consultants conducted a "mock bargaining session" with a hypothetical employer. During the mock bargaining session, the consultant stated that the hypothetical employer did not have to agree to any specific

union proposals, that all negotiations are different, and that the bargaining process could take weeks, months, or even more than a year. The consultant also stated "an employer, by giving in to lesser items or addendums on the contract, would be able to stall out the negotiations because they would still be bargaining in good faith but not really agreeing to anything." The union filed an objection to the hypothetical bargaining session, claiming it gave the impression that bargaining with the employer would be futile.

The Board overruled the objection, recognizing that, absent a threat or promise of benefits, an employer may lawfully explain the advantages and disadvantages of collective bargaining. Thus, the Board found the consultant's comments were reasonable.

In *Crown Cork & Seal Co. v. NLRB*, 36 F.3d 1130 (D.C. Cir. 1994), the court overturned a Board decision holding that a company's discussion of the possibility of closing the plant, laying off employees, and eliminating a retirement thrift plan if workers voted in favor of the union were illegal threats. The court noted that the employer's remarks were justified and in response to union flyers that were in anticipation of employer threats to close the plant and layoff workers. Furthermore, the letter spoke of "substantial risks" rather than "assertions of certainties," and to the extent they were predictions they were supported by objective facts. Interestingly, the court noted "if unions are free to use the rhetoric of Mark Antony while employers are limited to that of a Federal Reserve Board chairman, again, the employer's speech is not free in any practical sense." *Compare Federated Logistics and Operations,* 400 F.3d 920 (D.C. Cir. 2005) (statements that bargaining would start from zero, that work would be moved to another facility in the event of a strike, that employees could lose their pensions and 401(k) plans following unionization, and that the union "would strike," taken together amounted to a threat that the employer might take action on its own initiative to render unionization futile); *Gold Kist, Inc.,* 341 N.L.R.B. 1040 (2004) (employer violated § 8(a)(1) by showing a video and slide show on strike related violence during the course of a union organizing drive); *Noah's Bay Area Bagels, LLC*, 331 N.L.R.B. 188 (2000) (comments by a company's CEO that if the union was certified, the negotiations would "start from zero" and they would "start from the ground up" (while touching the floor with his hand) violated § 8(a)(1)).

An employer may note the possibility that there may be wage reductions, if it is emphasized that any such reduction could only be undertaken through collective bargaining with the union. *Int'l Paper Co.*, 273 N.L.R.B. 615 (1984). The Board has held, however, that a manager's statement that a profit-sharing program might not be available in the future to a group of workers if they voted for union representation was objectionable conduct warranting a second election. *See Cooper Tire & Rubber Co.*, 340 N.L.R.B. 958 (2003), *aff'd,* 156 Fed. Appx. 760 (6th Cir. 2005).

Even when there is a certified union, an employer may also advise employees of its opposition to their representation and its opposition to unionization generally. *Heck's, Inc.*, 293 N.L.R.B. 1111 (1989).

Dissemination of Threats. The Board has changed position on whether threats will presumed to be disseminated. Overruling *Springs Indus., Inc.*, 332 N.L.R.B. 40 (2000), the Board, in a 3-2 decision, held that an employer's threat to close its facility if employees voted for union representation will not be presumed disseminated throughout the bargaining unit. *Crown Bolt, Inc.*, 343 N.L.R.B. 776 (2004). In *Springs Industries,* the Board held that that threats of plant closing are presumed to be disseminated among employees even though the only evidence of dissemination was that the employee who

heard the threats "told everyone on break," which was one employee. In overruling *Springs Industries,* the Board held that *Kokomo Tube Co.*, 280 N.L.R.B. 357 (1986) (which *Springs Industries* overruled) represents the better evidentiary rule in requiring the party who seeks to rely on dissemination throughout the plant to show it. Thus, the Board returned to the rule set forth in *Kokomo Tube.* However, the Board's decision in *Crown Bolt* only applies prospectively. Thus, the presumption of dissemination set forth in *Springs Industries* applies to cases pending when *Crown Bolt* was decided.

2. Interrogation. It is a violation for an employer representative or its agent to question employees about their union activity or the union activity of others, if such questions would tend to interfere with, restrain, or coerce the employee. *Rossmore House*, 269 N.L.R.B. 1176 (1984) (rejecting a per se rule regarding interrogation and adopting an "under all the circumstances" standard for evaluating whether an interrogation is coercive; determining that interrogation of known union supporter about union sentiments, in the absence of threats or promises was not unlawful), *aff'd*, 760 F.2d 1006 (9th Cir. 1985).

When determining the coercive tendency of an interrogation, the Board considers several factors, including: (1) the employer's prior hostility to unionization; (2) the questioner's identity within the employer's organization; (3) the nature of the information sought; and (4) the place and methods of interrogation. *Observer & Eccentric Newspapers, Inc. v. NLRB*, 136 Fed. Appx. 720 (6th Cir. 2005) (unpublished decision) (under this analysis, the employer's questioning of employee regarding her union sentiments violated the Act) (citations omitted). *See also United Services Auto. Ass'n v. NLRB,* 387 F.3d 908 (D.C. Cir. 2004) (affirming Board's determination that employer unlawfully interrogated employee regarding the distribution of fliers critical of recent employee layoffs; employer failed to show a legitimate business reason for the interrogation where it admitted it interrogated the employee to determine who prepared the fliers. The court also affirmed the Board's determination that the employee's dishonest answers during the unlawful interrogation did not constitute a lawful reason to discharge her.); *Michigan Roads Maintenance Co. LLC*, 344 N.L.R.B. 617 (2005) (asking employee whether he had heard of the Teamsters' efforts to organize employees and saying that the employer would shut its doors and sell the equipment if the employees tried to bring the Teamsters in was a ULP).

Questions dealing with union activity on employment application forms or in the hiring process normally violate the Act. *Knickerbocker Plastic Co., Inc.*, 96 N.L.R.B. 586 (1951).

An isolated inquiry regarding what happened at a union meeting, devoid of coercive intent, was held lawful in *Herb Kohn Electric Co.*, 272 N.L.R.B. 815 (1984), *enf'd, NLRB v. Herb Kohn Electric Co.*, 774 F.2d 1169 (8th Cir. 1985). An employer who distributed a letter during a union organizing campaign asking employees to notify management of any "abusive treatment" by organizers, however, was held to be engaging in coercive behavior that violated the NLRA. *See Arcata Graphics/Fairfield, Inc.*, 304 N.L.R.B. 541 (1991); *see also Bloomington-Normal Seating Co.*, 339 N.L.R.B. 191 (2003) (holding that an employer's speech encouraging its employees to inform the company if the employees were threatened or harassed about signing a union card violated the NLRA because the only type of harassment for which the supervisor solicited reports was the protected activity of soliciting union authorization cards), *enforcement granted,* 357 F.3d 692 (7th Cir. 2004).

3. Promises of Benefits and/or Granting of Benefits. The U.S. Supreme Court analogized that promising benefits is like a "fist inside a velvet glove." An employer

cannot grant or promise benefits with intent of dissuading employees from voting for the union. *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964). Employers are required to proceed as they would have done had the union not been on scene. *Desert Aggregates*, 340 N.L.R.B. 289, 290 (2003), *amended* 340 N.L.R.B. 1389 (2003); *Duo-Fast Corp.*, 278 N.L.R.B. 52 (1986); *Gates Rubber Co., Inc.*, 182 N.L.R.B. 95 (1970). However, granting a pay increase during a critical period is not per se unlawful if an employer can show that its actions were governed by legitimate business considerations. *See VT Griffin Services, Inc.*, 2007 NLRB LEXIS 237 at 22 (June 27, 2007) (citing *Desert Aggregates,* 340 N.L.R.B. 289, 298) (setting aside election in favor of employer because promise of benefits during organizing campaign violated § 8(a)(1); subsequent wage increase was not justified by legitimate business reasons and violated §§ 8(a)(1) and (a)(3)).

Under limited circumstances, an employer can postpone a grant of a wage increase or other benefits to avoid the appearance of vote buying. *Uarco, Inc.*, 169 N.L.R.B. 1153 (1968). The postponement announcement must be carefully worded and cannot blame the union for the delay.

The Board has held that it was not objectionable for an employer to announce to its employees at a meeting two days before the election that it would have a dinner for the employees to celebrate the employer's victory in the upcoming election. *Raleigh County Comm'n on Aging, Inc.*, 331 N.L.R.B. 924 (2000).

4. Paycheck Distribution. The NLRB's rule is that changes in paycheck processes, for purposes of influencing a vote, within twenty-four hours of the scheduled opening of the polls and ending with the closing of the polls, are prohibited and, upon the filing of a valid objection, the election will be overturned, absent a showing that the change was not for political purposes. *Kalin Construction Co., Inc.,* 321 N.L.R.B. 649 (1996). According to the Board, changes in the "paycheck process" encompass four elements: (a) the paycheck itself; (b) the time of the paycheck distribution; (c) the location of the paycheck distribution; and (d) the method of paycheck distribution. In *Dallas & Mavis Specialized Carrier Co.,* 346 N.L.R.B. 253 (2006), the Board held that an employer's change of its method of paycheck distribution on the first payday after the employer heard about its employees' union activities violated § 8(a)(3).

5. Surveillance. Supervisors or agents of the employer cannot improperly watch the union activities of their employees. *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938). Supervisors and employer agents cannot go to where union meetings are being held to check on employees' union activities. Supervisors and employer agents cannot create an impression of surveillance or persuade employees to engage in surveillance of other employees' union activities for the employer. *See Rogers Electric, Inc.,* 346 N.L.R.B. 508 (2006) (holding up highlighted telephone bill created impression of surveillance; while the openness of protected activity may be a relevant fact, the "Board does not require employees to attempt to keep their activities secret before an employer can be found to have created an unlawful impression of surveillance"); *Gold Kist, Inc.,* 341 N.L.R.B. 1040 (2004) (finding employer violated § 8(a)(1) by more closely monitoring employees engaged in union activity, based on statement by supervisor to employee who had publicly distributed union material that he was watching every move she was making).

In *Local Joint Executive Board of Las Vegas v. NLRB,* 515 F.3d 942 (2008), the Ninth Circuit Court of Appeals upheld an NLRB decision holding that managers of the Aladdin Hotel and Casino did not engage in unlawful surveillance by interrupting employees who were asking other employees to sign union authorization cards. According to the court, the three-part test adopted by the Board for determining when surveillance becomes

coercive was rational and consistent with the statute and, therefore, entitled to deference. This three-part test considers: (1) the duration of the observation; (2) the employer's distance from its employees while observing them; and (3) whether the employer engaged in other coercive behavior during its observation. The court also noted that the Board "reasonably determined that where the duration of the observation was short and the employer's behavior was not out of the ordinary, verbally interrupting organizing activity does not necessarily violate § 8(a)1)."

Casual observation of union activities that are taking place out in the open generally does not violate the Act. *Schnadig Corp.*, 265 N.L.R.B. 147 (1982), *Tarrant Mfg. Co.*, 196 N.L.R.B. 794 (1972) ("t]he notion that it is unlawful for a representative of management to station himself at a point on management's property to observe what is taking place at the plant gate is too absurd to warrant comment.")

Videotaping. In *Allegheny Ludlum Corp.*, 333 N.L.R.B. 734 (2001), the Board held that an employer may not lawfully include the images of an employee in a campaign videotape, where the videotape reasonably tends to indicate the employee's position on union representation, unless the employee volunteers to participate in the videotape under noncoercive circumstances. The Board set forth the requirements that must be met for an employer to lawfully solicit participation in an antiunion campaign video:

a. The solicitation must be in the form of a general announcement that discloses that the purpose of the filming is to use the employee's picture in a campaign video, and includes assurances that participation is voluntary, that nonparticipation will not result in reprisals, and that participation will not result in rewards or benefits;

b. Employees are not pressured into making the decision in the presence of a supervisor;

c. There is no other coercive conduct connected with the employer's announcement such as threats of reprisal or grants or promises of benefits to employees who participate in the video;

d. The employer has not created a coercive atmosphere by engaging in serious or pervasive unfair labor practices or other comparable coercive conduct; and

e. The employer does not exceed the legitimate purpose of soliciting consent by seeking information concerning union matters or otherwise interfering with the statutory rights of employees.

The Third Circuit Court of Appeals affirmed and held that the Board's requirements are a "rational resolution of the tension between the employer's First Amendment Rights and the employee's right to organize freely." The court further held that the Board's five-factor test (it did not address the second portion of the Board's decision, discussed below) both protects employees from direct solicitations by employers and allows employers to create antiunion campaign videos within the constraints of *Sony Corp. of Am.*, 313 N.L.R.B. 420 (1993). *Allegheny Ludlum Corp. v. NLRB,* 301 F.3d 167, 178 (3d Cir. 2002).

If the employer wishes to include in a campaign videotape "stock" footage of employees filmed for another purpose and wishes to obtain employees' consent, including having the employees sign a written consent form, the safeguards set forth above must be observed, because a request that employees sign a consent form under those circumstances is equivalent to a request that employees participate in a campaign videotape. *Allegheny Ludlum Corp.*, 333 N.L.R.B. 734 (2001).

The Board further held that an employer may lawfully film employees, and present a campaign videotape including their images, without previously soliciting their consent to be filmed, only if the videotape, viewed as a whole, does not convey the message that the employees depicted therein either support or oppose union representation and the employer complies with the following requirements:

a. The employees were not affirmatively misled about the use of their images at the time of the filming;

b. The video contains a prominent disclaimer stating that the video is not intended to reflect the views of the employees appearing in it; and

c. Nothing in the video contradicts the disclaimer. When viewed as a whole, the video must not convey the message that employees depicted therein either support or oppose union representation.

While the employer is not required to obtain employees' consent to use their images in a video that does not convey a message that the employees either support or oppose the union, if the employer does chose to obtain employee consent for such videos, it may do so only in accordance with the requirements set forth for obtaining consent for use of employee images in antiunion videos. *Id.*

In *Robert Orr-Sysco Food Services*, 334 N.L.R.B. 977 (2001), *reversed on other grounds,* 338 N.L.R.B. 614 (2002), the Board held that the employer's practice of redirecting a security camera to videotape employees passing out pro-union literature in the period before a representation election was objectionable conduct meriting a new election. The Board held that the employer usually had the camera pointing in a different direction but redirected the camera to film the employees when they conducted handbilling every Friday for the eight weeks leading up to the election. The Board rejected the company's contention that it videotaped the handbilling because of safety concerns.

6. Polling. Polling employees concerning whether they want a union may or may not violate the Act. *Struksnes Constr. Co.*, 165 N.L.R.B. 1062 (1967). The purpose of the poll must be to determine the truth of a union's claim of majority status and this must be explained to employees. Employees must be told there will be no retaliation against them and the poll must be a secret ballot. The employer cannot have created a coercive environment. If the employer polls employees and discovers that the union does represent a majority of employees in an appropriate unit, the employer can be forced to collectively bargain with the union without an election.

Caveat. An employer that conducts a poll to determine whether the union enjoys majority support may commit a ULP if it does not have sufficient objective considerations to justify taking the poll. *Montgomery Ward & Co.*, 210 N.L.R.B. 717 (1974). This rule has been rejected by some courts, which would permit such a poll if the employer follows the *Struksnes* guidelines discussed above. *See Mingtree Restaurant v. NLRB*, 736 F.2d 1295 (9th Cir. 1984).

The Board has held that a "union truth quiz" conducted by an employer during an election campaign, which required employees to identify themselves and made a donation to the winner's favorite charity as a prize, was tantamount to a poll and violated § 8(a)(1). *See Sea Breeze Health Care Center, Inc.*, 331 N.L.R.B. 1131 (2000).

7. Restrictions on Union Activity: No Distribution/No Solicitation Rules. The employer may prohibit trespassing, soliciting, and distributing by its employees and outsiders if its rules are properly drafted and applied.

a. Employees.

(1) Verbal Solicitation. Under the NLRA, employees generally have the right to engage in verbal solicitation, so long as it is not during the working time of the solicitor or the employee being solicited. *See Stoddard-Quirk Mfg. Co.*, 138 N.L.R.B. 615 (1962). Thus, the Board typically holds that policies that prohibit employee solicitation at all times, or require employees to get a supervisor's permission to solicit during non-work times, are overbroad and violate the Act. Additionally, if a policy could reasonably be interpreted as being overbroad, the Board will likely find it to be presumptively unlawful, even if it could be subject to a differing interpretation that would make it appear to be facially valid. *See St. Joseph's Hospital*, 263 N.L.R.B. 375 (1982).

(2) Distribution of Written Material. An employer's no distribution policy may forbid employees from distributing literature during working time. Additionally, a no distribution rule can prohibit distribution of literature in working areas of the facility at all times. *See Santa Fe Hotel, Inc.*, 331 N.L.R.B. 723 (2000) (entrances outside a hotel-casino were not working areas for the enforcement of a no distribution rule because only work that was incidental to the hotel's main function of providing lodging and gambling was performed there; thus employer could not enforce no distribution rule there).

In *United Services Auto. Ass'n v. NLRB*, 387 F.3d 908 (D.C. Cir. 2004), the D.C. Circuit affirmed the Board's determination that an employer's policy prohibiting solicitation and distribution of noncompany materials "at any time in the work area and only during nonworking hours in nonwork areas" was invalid, noting that "under Board precedent, a nodistribution rule using the term 'working hours' (as opposed to 'working time') is presumptively invalid." The court also held that the rule was invalid because it had been interpreted by management as a blanket prohibition of employee solicitation and distribution of noncompany materials even during nonwork time and in nonwork areas.

b. Nonemployee Organizers.

(1) The Employer's Property. In *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), the U.S. Supreme Court held that an employer lawfully banned nonemployee union organizers from its parking lot. In an effort to unionize employees, the union organizers sought to pass out leaflets and place fliers on windshields of cars parked at the parking lot owned by the employer. The Court stated that the NLRA confers rights only on employees, not on unions or their nonemployee organizers. The Court held that "an employer need not accommodate nonemployee organizers unless the employees are otherwise inaccessible." Therefore, an employer cannot be compelled to allow distribution of literature by nonemployee organizers on its property, absent this very narrow exception regarding otherwise inaccessible employees. *See also Sparks Nugget Inc. v. NLRB*, 968 F.2d 991 (9th Cir. 1992) ("The only analysis we are allowed to make, under *Lechmere*, is to determine whether 'nonemployee union organizers have reasonable access to employees outside an employer's property.' However, this exception . . . only applies where 'the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them.'" Under *Lechmere*, an employer need not accommodate nonemployee picketers on private property if they are trying to reach customers – the inaccessibility exception for employees

does not apply to customers.) Note also the discussion of disparate enforcement in paragraph e, below.

In *Fashion Valley Shopping Center,* 343 N.L.R.B. 438 (2004), the Board held that a shopping center's rule prohibiting speech urging customers to boycott the shopping center's stores was an unlawful content-based restriction and not permitted under California law. Accordingly, the Board found that the shopping center violated § 8(a)(1) by maintaining this rule and when it excluded nonemployee union handbillers from the shopping center property. The California Supreme Court subsequently held that the shopping center's rule violated the right to free speech guaranteed by the California Constitution. 42 Cal. 4th 850, 172 P.3d 742 (2007). The mall argued that the California Supreme Court's interpretation violates its rights under the Fifth and Fourteenth Amendments to the U.S. Constitution. However, the D.C. Circuit held that the mall forfeited this argument by failing to raise it previously. *See Fashion Valley Mall, LLC v. NLRB,* 524 F.3d 1378 (D.C. Cir. 2008).

(2) Public Property. The Board has held that *Lechmere* does not control in the absence of a private property interest. *See Glendale Associates*, 335 N.L.R.B. 27 (2001), *enf'd* 347 F.3d 1145 (9th Cir. 2003) (noting that it will look to state law to determine if the employer has a sufficient property right to deny access to nonemployee union representatives). However, in *Wal-Mart Stores, Inc.*, 349 N.L.R.B. 1095 (2007), the Board permitted a shopping center lessee to exclude non-employee organizers from its parking lot even though the lessee did not have exclusive control or a sufficient property interest to exclude third-parties, because it had the lease right to use adjoining sidewalks and parking lots for a business purpose. The Board held that because the shopping center lease at issue authorized the tenant to use the parking lot and sidewalks "for commercial purposes of the type normally found in retail shopping centers," and granted reciprocal easements for common areas for access, parking, and "the type of facilities installed for the comfort and convenience of customers, invitees, licensees, tenants, and employees of all business and occupants of the buildings" on the property, store management had the right to impose and enforce reasonable time, place, and manner restrictions. The Board further found that because the Union had failed to comply with those restrictions, and because the tenant had uniformly enforced those restrictions, the tenant lawfully excluded the union organizers from the sidewalks and parking lots.

In *Venetian Casino Resort, L.L.C. v. NLRB*, 484 F.3d 601 (D.C. Cir. 2007), the D.C. Circuit upheld a Board determination that the Venetian Casino Resort violated the Act by broadcasting a message over loudspeakers warning nonemployee demonstrators that they were committing criminal trespass, attempting a "citizen's arrest" of a union official, and asking police to keep demonstrators off the temporary walkway on the resort's property, which was being used as a sidewalk during construction of the resort.

The conduct at issue in this case occurred while the resort was being constructed. Because of an anticipated increase in traffic due to the new resort, the City of Las Vegas widened the street on which the resort was being built. The widening of the street eliminated the old sidewalk and the resort agreed to build another sidewalk on its property. During construction, a temporary walkway

was built on the resort's property, where the new sidewalk would eventually run. The union demonstration occurred on this temporary walkway.[1]

In upholding the Board's determination that the resort's conduct was a ULP, the D.C. Circuit relied on the Ninth Circuit's determination that the Venetian had no property right to the sidewalk that would permit it to restrict the demonstrator's First Amendment rights. (See the discussion at fn 1). Thus, the D.C. Circuit held that *Lechmere, supra*, did not permit the resort to deny the demonstrators access to the sidewalk, because *Lechmere* "allows an employer the right to deny access to its premises only where it has a property right to do so." *Venetian Casino Resort, L.L.C. v. NLRB*, 484 F.3d at 609. Accordingly, the court affirmed the Board's ULP findings but remanded the case for a determination of whether the resort's action in summoning the police was protected activity under the First Amendment. A two-member panel of the Board subsequently, the Board withdrew its determination on this issue (354 NLRB No. 9 (April 29, 2009); however, after the U.S. Supreme Court decision in *New Process Steel* holding that the 2-member panel acted without authority, the Board withdrew the April 29 opinion and severed the First Amendment issue for further consideration. 2010 NLRB LEXIS 339 (Aug. 27, 2010), *appeal dismissed, dismissed as moot,* 2010 U.S. App. LEXIS 20227 (D.C. Cir. Sep. 29, 2010).

c. Temporary Employees or Subcontractors. On November 9, 2007, the Board heard oral argument in *New York New York Hotel & Casino* (Case 28-CA-14519) to determine whether employees of a contractor that does business on the contracting employer's property have rights to conduct organizing activities on that property. The Board initially answered this question in the affirmative, ruling that because the contractor employees worked "regularly and exclusively" on the property, it was a violation of § 8(a)(1) for the property-owner to treat them as trespassers. *New York New York Hotel & Casino*, 334 N.L.R.B. 762 (2001) and 334 N.L.R.B. 772 (2001). The U.S. Court of Appeals for the D.C. Circuit, however, refused to enforce the Board's orders. *New York New York v. NLRB*, 313 F.3d 585 (D.C. Cir. 2002). The court cited *Lechmere* for the proposition that an individual's § 7 rights turn on whether he is an employee or nonemployee of the property-owner. The court criticized the Board for ignoring this question and remanded the case to the Board for further consideration. The Board has not issued a decision as of this Sourcebook going to press.

d. Employees from Other Work Locations. In *First Healthcare Corp. v. NLRB,* 344 F.3d 523 (6th Cir. 2003), the Sixth Circuit upheld a Board decision that it was unlawful for a company to deny off-duty union-represented employees who worked at one of the company's other locations access to the company's nonunion facilities for organizing purposes. The Board found that off-site and on-site employees share common interests such as wages, benefits, and other workplace issues that can be addressed by concerted action and concluded that the organizational rights of off-site employees give them access to the outside, non-working areas of the employer's other properties except where limited by legitimate business reasons. The Sixth

[1] In a separate lawsuit, the resort filed a complaint in federal court seeking declaratory and injunctive relief against Clark County officials, the Las Vegas Police Department, and the union, claiming that their conduct converted the Venetian's private property into a public forum in violation of the Takings Clause of the Fifth Amendment. The Ninth Circuit rejected this argument, holding that the walkway performed an essential public function, thus the Venetian could not lawfully restrict the demonstrators' exercise of their First Amendment rights. *See Venetian Casino Resort v. Local Joint Executive Bd.*, 257 F.3d 937 (9th Cir. 2001).

Circuit upheld the Board's decision finding it had a reasonable basis in law and that substantial evidence supported the Board's conclusion that the employer violated § 8(a)(1) by denying offsite employees seeking to exercise their § 7 organizational rights access to its facilities. *See also ITT Indus. Inc. v. NLRB,* 413 F.3d 64 (D.C. Cir. 2005) (NLRB reasonably found that employer's denial of parking lot access to off-site employees seeking to engage in union organizational activities was ULP).

e. Disparate Enforcement. Employers may not enforce their no solicitation/no distribution policies more stringently against unions or employees engaged in protected activity under § 7 of the Act than other employees or organizations.

Charitable Solicitations. The Board will not find unlawful disparate treatment if the nonunion solicitation the employer condones amounts to no more than a small number of isolated beneficent acts. *Wal-Mart Stores, Inc.*, 2001 NLRB LEXIS 975 (NLRB, Dec. 14, 2001), *aff'd in part, modified in part,* 340 N.L.R.B. 1216 (2003), *enf'd,* 2005 U.S. App. LEXIS 5249 (6th Cir. 2005); *see also Hammary Mfg. Corp.*, 265 N.L.R.B. 57, fn. 4 (1982).

f. Adoption of No Solicitation Rule During Organizing Campaigns. In 1984, the Board ruled that the adoption of a no solicitation rule during a union organizing drive was not per se unlawful. *Brigadier Indus.*, 271 N.L.R.B. 656 (1984). This remains risky, however, and it may be better to implement a no solicitation policy prior to any organizing drive as long as it is uniformly enforced. *See Fairfax Hosp. v. NLRB*, 14 F.3d 594, (4th Cir. 1993) (unpublished decision) (hospital had unlawfully promulgated and disparately enforced new solicitation and distribution rules during an organizing drive; nurses were told not to distribute pro-union literature while hospital supervisors were permitted to hand out antiunion literature in the same area). *But see Delta Brands, Inc.,* 344 N.L.R.B. 252 (2005) (the mere presence of an overbroad no solicitation rule in a much larger document, with no showing that any employee was affected by the rule's existence, no showing of enforcement, and no showing of any mention of the rule was not sufficient to set aside a union election).

g. E-Mail Policies. In *Register-Guard*, 351 N.L.R.B. 1110 (2007), a three/two majority of the Board held that an employer did not violate the NLRA by maintaining an e-mail policy that prohibited employees from using its e-mail system to send "non-job-related solicitations." The Board majority held that although the e-mail policy was not unlawful as written, the employer discriminatorily enforced the policy by disciplining an employee for sending an e-mail that discussed union-related issues but did not solicit employees to take action. However, the Board majority held that the employer did not violate the Act by disciplining the employee for sending e-mails that solicited employee action in support of the union. The Board majority made the distinction in this case because, while the employer prohibited all non-job-related **solicitations**, it permitted employees to use its e-mail system for some non-work-related e-mails. Thus, the Board majority held that the employer may lawfully prohibit employees from using its e-mail system for non-work-related purposes, unless the employer acts in a manner that discriminates against Section 7 activity. *See also Media General Operations, Inc. v. NLRB*, 225 Fed. Appx. 144 (4th Cir. March 15, 2007) (unpublished decision) (affirming Board determination that an employer violated § 8(a)(1) by prohibiting employees from using the company's e-mail system for union related communications where the employer only enforced its e-mail policy with regard to union related communications).

8. Prohibitions on Wearing Union Insignia. In *NLRB v. Malta Constr. Co.*, 806 F.2d 1009 (11th Cir. 1986), the court held that firing an employee for wearing union insignia on a hard hat during a union campaign was a ULP. The dissent argued that NLRB gave "short shrift" to the employer's property interest argument and the fact that the employer had uniformly prohibited the wearing of decals or stickers on company equipment.

In *Hertz Corp.*, 305 N.L.R.B. 487 (1991), however, the Board upheld an employer's policy barring employees from wearing union pins on their uniforms. In *Hertz*, the employer had in place a policy that the only acceptable pins for employees to wear were nametags, company promotional tags, and award pins. Acknowledging that Hertz employees had been observed wearing Christmas and St. Patrick's day pins, the Board held that such lapses "in an otherwise consistent application of a detailed uniform policy do not persuade us that there was inconsistent and discriminatory enforcement." *See also Eastern Omni Constructors v. NLRB*, 170 F.3d 418 (4th Cir. 1999) (the Fourth Circuit reversed the NLRB and held that an employer legally restricted employees from wearing unauthorized union decals on their hard hats); *W San Diego,* 348 N.L.R.B. 372 (2006) (Board upheld a hotel's right to prohibit the wearing of 2"x2" HERE buttons in certain guest areas because it interfered with the employer's image and "special atmosphere." The Board also upheld the prohibition in the hotel's kitchen because of the employer's legitimate health and safety concerns (food contamination)).

Additionally, in *Communication Workers of America v. Ector County Hosp.,* 467 F.3d 427 (5th Cir. 2006), the Fifth Circuit held that under the balancing test in *Pickering v. Board of Education*, 391 U.S. 563 (1968), the interest of the employer (a county hospital district, which was also a political subdivision of the state of Texas) in promoting the efficiency of the public service it performs by means of its uniform non-adornment policy outweighs the interest of its employees in wearing a "Union Yes" button on their uniforms while on duty. The court found that wearing the "Union Yes" button while at work touched on a matter of public concern only "insubstantially" and "in a weak and attenuated" sense. The court also noted that the "speech" in this case occurred only while the employee was on duty and in uniform. The court further held that the employer has a significant interest in having a uniform non-adornment policy applicable to its employees, noting that "[t]o allow employees to adorn their uniforms with objects of their own choosing undermines the very purposes that uniforms serve." Further, the court found it "reasonable for the hospital to conclude that its service to patients and their families is enhanced by their not being involuntarily subjected to having messages on matters of public concern indiscriminately conveyed to them on the uniforms worn by on duty Hospital employees." The court found the employer's policy to be content and viewpoint neutral and noted that neither the Supreme Court nor the Fifth Circuit has ever invalidated a uniform anti-adornment policy such as the one in this case. The court concluded that as a matter of law, "the *Pickering* balance favors the Hospital, which may legitimately conclude that its uniform non-adornment policy furthers its mission by neutrally fostering a tranquil and peaceful, as well as a neat, clean and care focused, atmosphere for its patients and visitors."

9. Interference with Protected Concerted Activities. Section 8(a)(1) also prohibits acts against employees who engage in protected concerted activities. These activities need not be union related. Section 7 of the Act gives employees the right to "engage in other concerted activities [besides union activity] for the purpose of collective bargaining or other mutual aid or protection." Protected concerted activities involve employees joining in concert to affect wages, hours, and other terms and conditions of employment. Examples:

- Strikes (i.e., refusals to work) to protest wage rates. *NLRB v. Ridgeway Trucking Co.*, 622 F.2d 1222 (5th Cir. 1980).
- Refusal to work overtime on a particular occasion. *Polytech, Inc.*, 195 N.L.R.B. 695 (1972).
- Refusal to work because of heat or cold. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962).
- Complaints about dangerous working conditions. *Wray Electric Contracting, Inc.*, 210 N.L.R.B. 757 (1974).
- Refusal to cross a picket line at the facility of another employer. *Business Services by Manpower, Inc.*, 272 N.L.R.B. 827 (1984), *enforcement denied*, 784 F.2d 442 (2d Cir. 1986).
- Criticizing management and company policies during a group meeting. *NLRB v. Caval Tool Div., Chromalloy Gas Turbine Corp.*, 262 F.3d 184 (2d Cir. 2001) (employee engaged in protected concerted activity when she spoke up during a group meeting and challenged the employer's application of a new break policy).
- Posting messages on Facebook. *See In re American Medical Response of Connecticut, Inc.*, Case No. 34-CA-12576 (filed October 27, 2010). In this case the NLRB General Counsel issued a complaint against the employer, alleging it discharged an employee for making disparaging comments about her supervisor on her Facebook page, in violation of her right to engage in protected concerted activity. The General Counsel also alleged that the company's social media policy was overly broad and interfered with the employees' right to engage in protected concerted activity. The parties settled the case prior to hearing.
- In *Parexel Intl. LLC*, 356 N.L.R.B. No. 82 (Jan. 28, 2011), the Board held that an employer violated Section 8(a)(1) by terminating an employee in a "preemptive strike" to prevent her from engaging in protected concerted activity, even though she had not yet engaged in the protected concerted activity. Dissenting, Member Hayes noted that finding a violation in the absence of any actual concerted activity was unprecedented and in tension with Board precedent.

a. "Concerted" Activity. In *Meyers Industries, Inc.*, 281 N.L.R.B. 882 (1986), *aff'd*, 835 F.2d 1481 (D.C. Cir. 1987) (*Meyers II*), and 268 N.L.R.B. 493 (1984) (*Meyers I*), the Board reversed prior decisions holding that even activities of an individual employee may be protected under the Act if the employee's action directly involved the furtherance of rights that benefit fellow employees and reestablished that "concerted" activity requires that an employee be acting in concert with others, or on the authority of others, and not solely by and on behalf of the employee himself, to be protected by the Act. *See also Citizens Investment Services Corp. v. NLRB,* 430 F.3d 1195 (D.C. Cir. 2005) (employee engaged in protected concerted activity when he complained about the company's compensation of senior financial analysts; evidence showed he represented other employees' concerns about the compensation package, and not just his own concerns).

The mere assertion by an employee that others will join in a work stoppage is not enough to show actual authority on behalf of others. *Mannington Mills, Inc.*, 272 N.L.R.B. 176 (1984). Even when there has been concerted conduct with others, the employee's activity is not "protected" unless it is shown that the employer knew of the involvement of others. *Center Ridge Co.*, 276 N.L.R.B. 105 (1985); *compare with Every Woman's Place, Inc.*, 282 N.L.R.B. 413 (1986), *enf'd*, 833 F.2d 1012 (6th Cir.

1987) (social worker discharged after calling the Wage/Hour Division to question her employer's holiday practices was found to be engaged in protected concerted activity because her action "was a logical outgrowth of the original protest by three employees").

The U.S. Supreme Court held in *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984), that even an individual who acts alone in protesting a condition of employment is engaged in protected activity if she or he is reasonably invoking a right under a collective bargaining agreement. (This is the so-called "Interboro Doctrine.") As explained by the Board in *Meyers II,* this is because the individual's action is an extension of the "concerted" action that produced the agreement. *See Interboro Contractors*, 157 N.L.R.B. 1295 (1966), *enfd.* 388 F.2d 495 (2nd Cir. 1967). The invocation of the contract right must also be both reasonable and honest. *ABF Freight Sys., Inc.*, 271 N.L.R.B. 35 (1984).

Employees who refuse to work because of a protected concerted protest cannot be discharged; rather, they must be treated as economic strikers. While economic strikers may be permanently replaced when engaged in an economic strike, if a striking employee offers to return to work prior to being permanently replaced, the employee must be offered the job back.

b. Employee Conduct May Cause Loss of § 7 Protection. The Board has held that an employee who engages in otherwise protected activity loses the protection of the Act if he or she engages in opprobrious conduct. *See Atlantic Steel Co.*, 245 N.L.R.B. 814, 816-17 (1979) (setting forth four factors to be considered in determining when an employee has lost the protection of the Act: (a) the place of the discussion; (b) the subject matter of the discussion; (c) the nature of the outburst; and (d) whether the outburst was, in any way, provoked by the employer's unfair labor practice); *but see Datwyler Rubber and Plastics, Inc.,* 350 N.L.R.B. 669 (2007) (employee who called supervisor the devil and told him Jesus Christ would punish him and the employer for requiring employees to work seven days a week did not lose protection of the Act because, although it could be considered offensive, it did not contain profane language, and it was spontaneous, brief, and unaccompanied by physical contact or threat of physical harm; additionally, the Board found that the employee's comment was made in response to the supervisor's unlawful threat of discharge, which also weighed in favor of protection); *Beverly Health & Rehabilitation Services*, 346 N.L.R.B. 1319 (2006) (nature of outburst – where employee told another employee to "mind [her] f--king business" during discussion of grievance – weighed in favor of protection); *Stanford Hote*l, 344 N.L.R.B. 558 (2005) (employee did not lose § 7 protection because profane outburst was provoked by supervisor's unlawful threats to fire him if he did not declare himself ineligible for union representation); *Felix Indus., Inc.*, 339 N.L.R.B. 195 (2003) (employee who used obscene language toward his supervisor when discussing why he had not received a night-shift differential pay under the CBA did not lose the protection of the Act because of this outburst; employee was provoked by his supervisor's overt hostility toward the employee's protected conduct, which included the threat of termination for having engaged in protected conduct and outburst would not have occurred but for this hostility), *enf'd,* 2004 WL 1498151, 2004 U.S. App. LEXIS 13793 (July 2, 2004).

c. "Chilling" Employees' § 7 Rights. Under Board case law, where an employer promulgates work rules "likely to have a chilling effect on Section 7 rights, the Board may conclude that their maintenance is an unfair labor practice, even absent

evidence of enforcement." *Lafayette Park Hotel*, 326 N.L.R.B. 824, 825 (1998), *enf'd mem.*, No. 98-1625, 1999 WL 1215578, at *1 (D.C. Cir. Nov. 26, 1999). In making this assessment, the Board engages in a two-step inquiry. *See Guardsmark, LLC v. NLRB*, 374 U.S. App. D.C. 360, 374 (D.C. Cir. 2007) (citing *Martin Luther Memorial Home*, 343 N.L.R.B. 646, 646-47 (2004)). First, the Board examines whether the rule explicitly restricts § 7 activity. If so, the rule violates the Act. *Id.* However, if nothing in the rule explicitly restricts § 7 activity, the Board "moves to the inquiry's second step, under which the rule violates the Act if it satisfies any one of the following three conditions: '(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.'" *Id.* In *Guardsmark*, the court noted that if the rule explicitly restricts § 7 activity, it violates the Act regardless of whether it has been applied to restrict the exercise of § 7 rights. Following are some examples of conduct the Board has held chills an employee's § 7 rights:

- Prohibiting employees from discussing their paychecks with other employees. *Double Eagle Hotel & Casino*, 414 F.3d 1249 (10th Cir. 2005) (affirming Board order in part, to the extent it prohibited casino employees from discussing tip sharing rule around customers; also affirming order holding that employer's confidentiality policy, which prohibited employees from discussing wages and working conditions, violated employees' § 7 rights).
- Implementing overly broad confidentiality policies. *See Cintas Corp. v. NLRB*, 482 F.3d 463 (D.C. Cir. 2007) (employer's confidentiality rule violated federal labor law because it could be construed to prohibit employees from discussing the terms and conditions of their employment, even though it did not expressly prohibit employees from doing so and even though the employer never used it to prohibit § 7 activity because " 'mere maintenance' of a rule likely to chill § 7 activity" can amount to an unfair labor practice "even absent evidence of enforcement."); *NLRB v. Inter-Disciplinary Advantage, Inc.*, 312 Fed. Appx. 737 (6th Cir. 2008) (affirming the Board's conclusion that the employer's broad confidentiality rule prohibiting employee discussions about any all matters related to their employment violates § 8(a)(1) despite the fact that the rule was not enforced as to union activities) (unpublished decision).
- Prohibiting negative conversations. *See Claremont Resort and Spa,* 344 N.L.R.B. 832 (2005) (rule that prohibited negative conversations would reasonably be construed by employees to bar them from discussing with their coworkers complaints about their managers that affect working conditions, thereby causing employees to refrain from engaging in protected activities and was, therefore, illegal).
- Prohibiting employees from making complaints to employer's clients. *See Guardsmark, LLC v. NLRB*, 374 U.S. App. D.C. 360 (D.C. Cir. 2007) (affirming Board's determination that employer's rule prohibiting employees from registering complaints with any representative of the client "explicitly trenches 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"); *Bowling Transportation, Inc. v. NLRB*, 352 F.3d 274 (6th Cir. 2003) (employees engaged in protected concerted activity when

they complained to the company's only customer about the company's safety bonus program and complained about their discharges).

- Forbidding employees from opening their paychecks while at work. *Wilson Trophy Co. v. NLRB*, 989 F.2d 1502 (8th Cir. 1993).

10. Breaches of Confidentiality. Generally, an employee is entitled to use, for self-organizational purposes, information and knowledge that comes to his or her attention in the normal course of work. *Ridgely Mfg. Co.*, 207 N.L.R.B. 193 (1973), *enf'd*, 510 F.2d 185 (1975); *but see Asheville School, Inc.*, 347 N.L.R.B. 877 (2006) (payroll accountant's publication of wage information to other employees was unprotected because his job afforded access to confidential payroll information not otherwise accessible to employees). If the employer has established a workplace rule concerning confidentiality of some of this information, the employee's interest in using the information must be weighed against any legitimate business justification the employer has in keeping the information confidential. *Jeannette Corp. v. NLRB*, 532 F.2d 916 (3d Cir. 1976). If, however, an employer does not treat the information as confidential, an employee who comes across the information openly or in the regular course of work may use the information for self-organization purposes. *L.G. Williams Oil Co.*, 285 N.L.R.B. 418 (1987).

In contrast, if an employee steals or even "happens upon" information that the employer considers confidential, and that employees are prohibited from disclosing, the courts may not protect the employee's use of such information. *See, e.g., Texas Instruments v. NLRB*, 637 F.2d 822 (1st Cir. 1981); *Knuth Bros. v. NLRB*, 537 F.2d 950 (7th Cir. 1976). Furthermore, an employee who takes confidential wage information from the employer's private files and then lies about the source of the information could be lawfully terminated, despite the existence of an unlawful workplace rule forbidding employee discussion about wages. *NLRB v. Brookshire Grocery Co.*, 919 F.2d 359 (5th Cir. 1990).

11. Rules Prohibiting Harassment. In *Martin Luther King Memorial Home, Inc. d/b/a/ Lutheran Heritage Village-Livonia,* 343 N.L.R.B. 646 (2004), the Board held, in a three/two decision, that an employer's rules prohibiting "abusive and profane language," "harassment," and "verbal, mental, and physical abuse" were lawful because they were intended to maintain order in the employer's workplace and did not explicitly or implicitly prohibit § 7 activity. In reaching this conclusion, the Board agreed with the Court of Appeals for the District of Columbia's decision in *Adtranz ABB Daimler-Benz Transportation, N.A., Inc. v. NLRB,* 253 F.3d 19 (D.C. Cir. 2001), which held that a rule prohibiting "abusive language" is not unlawful on its face.

The Board noted that in *Adtranz*, the court recognized that an employer has a legitimate right to establish a "civil and decent work place" and to adopt rules banning profane language because employers are subject to civil liability under federal and state law should they fail to maintain a workplace fee of harassment. The Board further noted that the court recognized that abusive language can constitute verbal harassment triggering liability under state or federal law. The Board agreed with the *Adtranz* court that there is no basis for a finding that a reasonable employee would interpret a rule prohibiting abusive language as prohibiting § 7 activity. *Id.* Further, the Board held that verbal abuse and profane language are not an inherent part of § 7 activity. *Id.* The Board also held that the question of whether particular employee activity involving verbal abuse or profanity is protected by § 7 turns on the specific facts of each case and that, absent the application of a rule prohibiting abusive language to an employee's protected activity, the

Board will not presume the rule is unlawful. For the same reasons, the Board found the employer's rule prohibiting harassment to be lawful.

In *Lutheran Heritage,* the Board applied the standard set out in *Lafayette Park Hotel*, 326 N.L.R.B. 824 (1998), *enf'd,* 203 F.3d 52 (D.C. Cir. 1999), in which the Board held that to determine whether the mere maintenance of certain work rules violates the NLRA, the appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their § 7 rights. *See also Community Hospitals of Central California v. NLRB,* 335 F.3d 1079 (3d Cir. 2003) (overruling a Board determination that provisions in an employee handbook, which prohibited, among other things, insubordination and disrespectful conduct, were an unfair labor practice. The court rejected the Board's argument that the term "other disrespectful conduct" could be interpreted to apply to union organizing activity. The court held that the term applied to incivility and outright insubordination.)

C. ULP Charges Barred by Releases Contained in Termination Agreement. The Board has held that waivers signed by a group of terminated employees in exchange for enhanced severance benefits barred ULP charges filed by a union on behalf of the employees. *See BP Amoco Chemical-Chocolate Bayou*, 351 NLRB 614 (2007). In its 2-1 decision, the Board majority applied the factors it considers in determining whether a private settlement of a ULP is valid. The Board majority rejected the dissenting member's opinion that these factors should not apply where no ULP charge has been filed at the time the release is executed, noting that whether charges have been filed may be relevant to the analysis but is not dispositive.

In this case, a group of employees was selected for termination as part of a reduction in force. At the time they were selected, the employees were not represented by the union and there was no active union organizing campaign. In exchange for enhanced severance benefits, the employees all signed termination agreements in which they agreed to release all claims arising out of their employment or termination. The employees were given forty-five days to consider whether to sign the agreements and had seven days after signing to revoke them. The employer encouraged all of the employees to consult with legal counsel before signing the agreements.

Subsequently, the union filed a ULP charge on behalf of the employees, claiming they were selected for termination because of their support for the union. The Administrative Law Judge recommended dismissal of the charges based on the waivers signed by the employees. The Board majority agreed with the ALJ.

In finding that the employees validly waived their right to file unfair labor practice charges arising from their terminations, the Board considered several factors, including:

- Whether the parties to the Board case have agreed to be bound, and the position taken by the General Counsel with regard to settlement;
- Whether the settlement is reasonable in light of the violations alleged, the risks inherent in litigation, and the stage of litigation;
- Whether there has been any fraud, coercion or duress by any party in reaching settlement; and
- Whether the employer has a history of violating the Act or has previously breached settlement agreements.

In this case, the Board found that the standards set forth above were met. The employees were all advised that they should consult legal counsel before signing the releases, and many did so. The Board held that the employees were aware of the content of the

agreements, advised as to the meaning, and knew that they were releasing claims against the employer. Thus, the Board found that the employees intended to be bound by the agreement.

Next, the Board held that the agreements were reasonable in light of the violations alleged and the litigation risks presented. When the agreements were signed, no ULP charges had been filed and the prospect of litigation was not obvious. Additionally, the Board found that there was a significant risk that a charge alleging discriminatory selection would not be meritorious because:

- Little or no union activity was occurring at the time of the downsizing;
- The record did not show that all of the employees selected for termination had engaged in protected activity or that the employer was aware of this;
- The selection process was a careful and lengthy one supported by business justifications;
- Many of the employees presented by the General Counsel as witnesses at the hearing were not supportive of the position of the General Counsel or the union; and
- Many of the terminated employees had work histories that were "less than pristine."

Thus, the Board found "the termination agreements and attendant enhanced benefits were a reasonable adjustment in light of the litigation risks."

Further, the Board found no evidence that the agreements were fraudulent, that they were signed under duress or the threat of coercion, or that the employees attempted to revoke the agreements. The Board pointed out that the employer had encouraged the employees to consult attorneys, given them time to review and assess the agreements, and provided them with an opportunity to revoke the agreements after execution.

The Board also found that the employer did not have a history of violating the NLRA.

The Board majority distinguished this situation from prior cases in which the Board has refused to give effect to private settlement agreements. In one case, the employer's history of serious violations of the Act, as well as the opposition of the charging party and General Counsel to the waiver, weighed against enforcing the waiver provisions. The Board found that such concerns were not present in this case. Additionally, the Board has refused to enforce waivers that include provisions prohibiting employees from providing evidence to the Board in cases involving other employees. However, the agreements in this case did not contain such provisions – they only precluded the claims of the employees who entered into the agreements.

In consideration of all of these factors, the Board held that the waivers barred the filing of ULPs on behalf of the employees by the union.

D. Domination or Interference with Labor Organization (§ 8(a)(2)). An employer cannot dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it.

1. Recognition of Union Representing Minority of Employees. An employer cannot recognize and deal with a union representing a minority of the employer's employees even if it does so in good faith (an exception is created for the construction industry). *International Ladies' Garment Workers' Union, AFL-CIO v. NLRB*, 366 U.S. 731 (1961).

2. Dues Check-Off Authorization. An employer cannot check off union dues to a union without an employee having signed a valid check-off authorization. *Western Auto Associate Store*, 143 N.L.R.B. 703 (1963).

3. Closed Shops. It is unlawful to enter into a closed shop agreement or illegal hiring hall in which an employer requires all employees to be union members when they are hired. *Meat Cutters Local 421 (Great Atlantic & Pacific Tea Co.)*, 81 N.L.R.B. 1052 (1949).

4. Employee Involvement Committees. It is illegal for an employer to dominate or interfere with the formation or administration of any labor organization or to contribute financial or other support to it. A labor organization is any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and that exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. § 2(5) of the Act.

In *Electromation, Inc.*, 309 N.L.R.B. 990 (1992), *aff'd*, *Electromation, Inc. v. NLRB*, 35 F.3d 1148 (7th Cir. 1994), the NLRB upheld an administrative law judge's decision that the employer unlawfully dominated employee action committees by proposing them, organizing them, providing a place for them to meet, paying the employees for time lost from work, and providing them with pens, paper, and a calculator. The employer had set up the employee committees as a communications device to address serious morale problems arising out of a change of the employer's absentee and attendance program. The employer had a lengthy history of meeting with employees face-to-face to address work-related issues. The committees were advisory only and were formed without any knowledge of union organizing activities. Nevertheless, the Board held that the employer imposed on the employees its own unilateral form of bargaining. The Board ordered Electromation to "immediately disestablish" the committees and stop assisting and/or supporting them.

However, all hope is not lost for employers desiring to work directly with their employees in voluntary employee action committees. The Board's decision indicated that such violations of the NLRA will be determined based on each case's particular facts and circumstances, and that this decision does not reflect a holding that labor-management "employee involvement committees" are per se unlawful. *See also Ead Motors Eastern Air Devices, Inc.*, 346 N.L.R.B. 1060 (2006) ("Have Your Say" committee was unlawful because it dealt with employer was dominated by management); *E.I. DuPont de Nemours & Company*, 311 N.L.R.B. 893 (1993) (employer unlawfully dominated an employee committee by retaining veto power over any action the committee might wish to take and on who could serve on each committee, and by retaining the power to abolish the committee at will) *corrected by E.I. Du Pont de Nemours & Co.*, 143 L.R.R..M. (BNA) 1268 (NLRB July 15, 1993); *Keeler Brass Automotive Group*, 317 N.L.R.B. 1110 (1995) (employer unlawfully controlled and dominated an employee grievance committee, thus rendering it a "labor organization" under the Act). *But see NLRB v. Peninsula General Hospital*, 36 F.3d 1262 (4th Cir. 1994) (reversing the Board's order to disband an employee participation committee, noting that the critical question is whether the committee exists to deal with the employer over matters affecting employment and that the employer does not necessarily deal with committees by communicating with them, even about working conditions).

In *Crown Cork & Seal Co.*, 334 N.L.R.B. 699 (2001), the NLRB held that an employer's use of a management system that delegates substantial authority to employees did not involve unlawful management domination of an employee committee. The Board found that the committees in this case were not labor organizations because they essentially had supervisory authority that is traditionally given to an individual supervisor. Thus the committees made decisions that were reviewed by higher levels of management, as

individual supervisors would do in a more traditional setting. The Board found that this type of decision-making, subject only to review by higher levels of management, did not constitute "dealing with" management. Accordingly, the committees were not labor organizations within the meaning of the NLRA.

An employer should consider whether the following factors are present in any employee involvement committees in existence:

a. Is the purpose of the committee to deal with the company? An employer may not be dealing with a committee when the purpose of the committee is to investigate facts, generate ideas, and elicit suggestions for transmission to management. *Airstream v. NLRB*, 877 F.2d 1291 (6th Cir. 1989), *order entered by Airstream v. NLRB,* 914 F.2d 255 (6th Cir. 1999); *NLRB v. Streamway*, 691 F.2d 288 (6th Cir. 1982).

b. The subject matter of the dealings must concern grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. Therefore, issues relating to product quality, customer satisfaction, and production efficiency may not be considered terms and conditions of work.

c. Some courts have held that the employees serving on an employee involvement committee must be acting in a representational capacity in order for the committee to be a labor organization.

Until there is further Board or court guidance, employers may consider the following actions short of ceasing all employee involvement committees:

a. Deal with employees as a whole, rather than through representational committees.

b. Deal with specific employees on an individual, or perhaps committee basis, because of the specific talents of the selected individuals, with specific instructions that the employees are not acting as representatives of other employees.

c. Make certain that any committees established are only for the purpose of facilitating upward and downward communication of information on ideas without any "negotiation" or dealing with the employees in regard to the ideas.

d. Employee groups may discuss quality, production, or efficiency issues, but they may not discuss terms or conditions of employment, i.e., wages, hours, and working conditions.

e. Deal with employees in brainstorming sessions.

f. If the employee group has authority to make the decision as opposed to recommendations to management, this is arguably not illegal.

E. Discrimination Against Employees Based on Union Membership (§ 8(a)(3)). An employer cannot discriminate against employees (or prospective employees) in order to encourage or discourage membership in a labor organization. An employee cannot be discharged because of lawfully engaging in union activity – i.e., signing a union card, properly soliciting other employees to sign a union card, engaging in a lawful strike. *Radio Officers' Union v. NLRB*, 347 U.S. 17 (1954).

Additionally, the Fourth Circuit has enforced a Board order finding that the employer violated the Act by discharging a union salt for alleged dishonesty. *See Integrated Elec. Svs. d/b/a Primo Elec.*, 217 Fed. Appx. 248 (4th Cir. 2007) (unpublished decision). In this case, the salt distributed a CD during working hours, which contained information about union wages and benefits. An employee gave a copy of the disc to Integrated's management and agreed to

sign a statement saying that the salt had given him the disc during work time. Management asked the salt whether he had distributed the disc during work time and, when he responded in the negative, terminated him for "dishonesty." The Board filed a ULP and the company argued it discharged the salt because he lied about distributing union material during working time, and that such a lie amounted to "dishonesty" under the company's work rules. The company supported its position by presenting evidence of a previous situation in which an employee was terminated for dishonesty in the form of lying. In response, the salt claimed that he did not distribute any union material during working time, and supported his assertion by producing a daily log that detailed his organizing activity. The Board credited the salt's testimony over that of the company witnesses, distinguished the situation involving the other employee terminated for dishonesty, and found the reason for his termination to be pretextual. The Board found that the company had violated Sections 8(a)(1) and (3) of the NLRA, and ordered it to offer the "salt" reinstatement, with back pay and benefits. The Fourth Circuit found that the Board's decision was supported by "substantial evidence" and therefore enforced the Order.

***Wright Line* Test.** The Board utilizes the following test in discharge cases: first the General Counsel (prosecutor) is required to make a prima facie showing of sufficient evidence to support the inference that protected conduct was a motivating factor in the employer's decision. If this is established, the burden shifts to the employer to show that the same action would have taken place even in the absence of the protected conduct. *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), *overruled in part by Department of Labor v. Greenwich Collieries,* 512 U.S. 267 (1994); *Wright Line, Inc.*, 251 N.L.R.B. 1083 (1980), *enf'd by* 662 F.2d 899 (1st Cir. 1981). *See also Citizen Investment Services Corp. v. NLRB,* 430 F.3d 1195 (D.C. Cir. 2005) (affirming determination under *Wright Line* analysis that employee was discharged for protected concerted activity when he complained about compensation package of employees in his job category); *NLRB v. Rockline Indus., Inc.,* 412 F.3d 962 (8th Cir. 2005) (enforcing NLRB determination that employer's suspension and termination of employee was ULP; disparate treatment of employee in discipline and termination compared to treatment of employees who did not support union was substantial evidence that discipline and termination were motivated by anti-union animus); *but see Framan Mechanical Inc.,* 343 N.L.R.B. 408 (2004) (reversing the ALJ's decision and finding that the employer met its burden of showing that it would have laid off the employees in question even in the absence of their union activities; recognizing the employer's right to adjust its workforce to attempt to recoup losses on a construction project).

F. Discrimination Based on Employee Charge or Testimony (§ 8(a)(4)). Section 8(a)(4) prohibits an employer from discharging or otherwise discriminating against an employee because the employee filed charges or gave testimony under the Act. Retaliation against an employee because employee gave an affidavit to the NLRB is also prohibited. *Rock Hill Convalescent Center*, 226 N.L.R.B. 881 (1976), *enf'd*, 585 F.2d 700 (4th Cir. 1978). At one time the Board held that the burden is on the employer to show compelling reasons why employees should not be given time off from work to attend an NLRB hearing. *E.H. Ltd.*, 227 N.L.R.B. 1107 (1977), *rev'd*, 600 F.2d 930 (D.C. Cir. 1979). The Board subsequently overruled *E.H. Ltd.* and returned to its decision in *Standard Packaging*, 140 N.L.R.B. 628 (1963), which placed the burden of proof on the General Counsel. *Ohmite Mfg. Co.*, 290 N.L.R.B. No. 130 (1988).

IX. UNFAIR LABOR PRACTICES - UNION

A. Restraint or Coercion of Employees in Exercising § 7 Rights (§ 8(b)(1)(A)). Section 8(b)(1)(A) prohibits restraint or coercion against employees in the exercise of their § 7 rights.

This is the equivalent of an employer § 8(a)(1) violation, except that interference is not prohibited, only restraint and coercion. There is also no derivative § 8(b)(1)(A) violation. *National Maritime Union of America*, 78 N.L.R.B. 971 (1948), *enf'd*, 175 F.2d 686 (2d Cir. 1949).

Examples:

1. Fining an employee who has resigned from the union. *NLRB v. Textile Workers, Local 1029, Granite State Joint Board*, 409 U.S. 213 (1972).

2. Fining a member who refused to recognize an illegal strike. *Retail Clerks Union, Local 1179*, 211 N.L.R.B. 84 (1974), *enf'd*, 526 F.2d 142 (9th Cir. 1975); *Communications Workers of America (Verizon Communications)*, 340 N.L.R.B. 18 (2003) (finding union committed unfair labor practice when it fined members for refusing to work mandatory overtime), *enf'd*, 114 Fed. Appx. 493 (3d Cir. 2004).

3. Engaging in violent acts on a picket line. *Union Nacional de Trabajadores*, 219 N.L.R.B. 405 (1975), *aff'd*, 540 F.2d 1 (1st Cir. 1976).

4. Preventing ingress and egress from a picketed facility. *Union Nacional de Trabajadores*, 219 N.L.R.B. 414 (1975), *enf'd*, 540 F.2d 1 (1st Cir. 1976).

5. Threats of bodily harm because of union considerations. *Rockville Nursing Center*, 193 N.L.R.B. No. 149 (1971), *overruled on other grounds, Beverly Enterprises*, 313 N.L.R.B. 491 (1993).

6. Processing only union members' grievances when a union is the collective bargaining representative of an employer's employees. *Peerless Tool and Engineering Co.*, 111 N.L.R.B. 853 (1955), *enf'd, NLRB v. Die & Tool Makers Lodge No. 113*, 231 F.2d 298 (1956).

7. Superseniority for stewards can be unlawful if goes beyond layoff and recall. *Dairylea Cooperative, Inc.*, 219 N.L.R.B. 656 (1975), *enf'd, NLRB v. Milk Drivers and Dairy Employees Local 338*, 531 F.2d 1162 (2d Cir. 1976).

8. Photographing employees during the union's distribution of campaign literature. *See Randell Warehouse of Arizona, Inc.*, 347 N.L.R.B. 591 (2006) ("In the absence of a valid explanation conveyed to employees in a timely manner, photographing employees engaged in Section 7 activity constitutes objectionable conduct whether engaged in by a union or an employer.")

B. Restraining or Coercing Employer (§ 8(b)(1)(B)). Section 8(b)(1)(B) prohibits a union from restraining or coercing an employer in the selection of representatives for purpose of collective bargaining or adjustment of grievances. A union cannot fine a supervisor/member for his or her actions in enforcing a contract on behalf of the employer. Additionally, the union cannot fine a supervisor/member for crossing a picket line to perform normal supervisory functions. *Florida Power & Light Co. v. IBEW*, 417 U.S. 790 (1974). The union can, however, fine a supervisor/member who crosses picket line and performs unit work during a lawful strike.

C. Causing Employer to Violate § 8(a)(3) (§ 8(b)(2)). Section 8(b)(2) prohibits a union from attempting to or causing an employer to violate § 8(a)(3) of Act. A union cannot force an employer in a right-to-work state to discharge nonunion employees because they are not union members. A union cannot operate an exclusive hiring hall giving preference to union members in referral. *Plumbers and Pipe Fitters Local 32 v. NLRB*, 50 F.3d 29 (D.C. Cir. 1995); *J. Willis & Son Masonry*, 191 N.L.R.B. 872 (1971). A union cannot cause an employer to discharge an employee because that employee opposed the union during a union organizing attempt or because she or he opposed an incumbent union official. *Local*

294, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, 204 N.L.R.B. 700 (1973), *enf'd*, 506 F.2d 1321 (D.C. Cir. 1974).

D. Secondary Boycott (§ 8(b)(4)). Section 8(b)(4) covers a union's "secondary boycott" and prohibits a labor organization from engaging in, inducing, or encouraging employees and from threatening, coercing, and restraining any person (includes employers, private or public) for a proscribed object. Even though this is the so-called secondary boycott section of the Act, primary action can violate § 8(b)(4)(A), (C), or (D). However, secondary action is needed to violate § 8(b)(4)(B). To be secondary, the action must be directed against an entity (the "neutral") other than the one with whom the labor organization has the dispute (the "primary").

An employer may prevent "affinity group shopping" by union members. *See Pye v. Teamsters Local Union No. 122*, 875 F. Supp. 921 (D. Mass. 1995), *aff'd*, 61 F.3d 1013 (1st Cir 1995) (rejecting union members' claim that they were "just shopping" when they entered the mall for mass shopping sprees of small ticket items and holding that this practice, known as "affinity group shopping," may constitute an unlawful secondary boycott under the NLRA).

A single asset purchase may satisfy "doing business" for purposes of § 8(b)(4)(ii)(B). *See Taylor Milk v. International Brotherhood of Teamsters*, 248 F.3d 239 (3d Cir. 2001) ("a continuing long-term negotiation over the purchase of a new asset from a neutral third party meets the 'doing business' requirements" of § 8(b)(4)(ii)(B)).

Actions that might be unlawful if taken through picketing may be lawful if no picketing occurs and handbilling takes place instead. *See Edward J. DeBartolo Corp. v. Bldg. and Constr. Trades Council (Florida Gulf Coast)*, 485 U.S. 568 (1988).

Common Situs Picketing. Common situs picketing may be lawfully accomplished if the picketing is strictly limited to times when the situs of dispute is located on the secondary employer's premises; at the time of the picketing, the primary employer (that is, the employer with whom the labor organization has the dispute) is engaged in its normal business at the situs; the picketing is limited to places reasonably close to the location of the situs; the picketing discloses clearly that the dispute is with the primary employer. *Sailors Union of the Pacific (Moore Dry Dock Company)*, 92 N.L.R.B. 547 (1950).

A union cannot violate reserved gates that are properly established and utilized at a common situs because this shows that its dispute is not with the primary employer but rather to embroil neutral or secondary employers in the dispute between the primary employer and the union. A union may picket an employer that has allied itself with a struck employer by performing work that would normally be performed by the striking employees. *Teamsters Local 560 (Curtis Matheson Scientific)*, 248 N.L.R.B. 1212 (1980); *NLRB v. Business Machine and Office Appliance Mechanics Conference Board, Local 459*, 228 F.2d 553 (2d Cir. 1955).

Jurisdictional disputes need not involve two unions. This applies when the union is seeking to assign work that the employer has assigned to nonunion employees. *Teamsters Local 175*, 107 N.L.R.B. 223 (1953), *enf'd,* 506 F.2d 1321 (D.C. Cir. 1974). A union cannot enmesh neutrals in a dispute between the primary employer and the union by way of prohibited conduct. *NLRB v. Denver Building and Construction Trades Council*, 341 U.S. 675 (1951).

In *Carpenters & Joiners of Am. (Eliason & Knuth of Ariz. Inc.)*, 355 N.L.R.B. No. 159 (Aug. 27, 2010), the Board held that a union did not violate the prohibition on secondary boycotts by displaying "shame on" banners attacking neutral employers who were doing business with companies with whom the union had a labor dispute. In finding that the display of stationary banners does not violate the Act, the Board held that the language of the Act and its

legislative history "do not suggest that Congress intended Section 8(b)(4)(ii)(B) to prohibit the peaceful stationary display of a banner."

In this case, the union was involved in a labor dispute with four employers in the construction industry. As part of this dispute, the union displayed large banners at the facilities of three companies who did business with the primary employers. The union did not have a labor dispute with any of these secondary employers. The banners were 3 or 4 feet high and 15 to 20 feet long and read "SHAME ON [secondary employer]" in large letters, flanked on either side by "Labor Dispute" in smaller letters. At one of the locations, a restaurant called RA Tempe, the middle section of the banner read, "DON'T EAT 'RA' SUSHI." At each location, the banners were held stationary by union representatives. The union representatives also handed out fliers that explained that the dispute was with the primary employers and that the union believed by using one of the contractors, the secondary employers were contributing to the undermining of area labor standards.

Subsequently, one of the primary employers and two of the secondary employers filed unfair labor practice charges with the NLRB, arguing that the union violated the NLRA by displaying banners at the secondary employers' facilities. The Board held that the text of the Act and its legislative history establish that Congress did not intend to bar displays of stationary banners. According to the Board, to be illegal under the secondary boycott provision, the activity must "threaten, coerce or restrain." In this case, the Board found no evidence that the union threatened, coerced or restrained the secondary employers or anyone else. The Board held that Supreme Court precedence interprets the words "coerce" or "restrain" to require "more than mere persuasion" and held that "here, however, there is nothing more."

In the past, the Board has interpreted this provision to prohibit picketing and disruptive or otherwise coercive nonpicketing conduct by a union directed toward a neutral employer. However, the Board has found that peaceful handbilling does not violate the secondary boycott provision. According to the Board, the display of stationary banners in this case is more like handbilling and is noncoercive conduct falling outside the proscriptions of the secondary boycott provisions. "Nothing in the legislative history suggests that Congress intended to prohibit the peaceful, stationary display of a banner on a public sidewalk."

The Board found that the banner displays in this case did not constitute such proscribed picketing because they did not create a confrontation. The Board noted that the union representatives did not hold the banners in a way that blocked the entrance to the secondary sites or required those wishing to enter or exit the sites to confront the banner holders. "Banners are not picket signs. Furthermore, the union representatives held the banners stationary, without any form of patrolling."

The dissent argued that the majority opinion puts neutral employers "right back into the fray" by allowing unions to target secondary employers with large banners and predicted that the decision will foster an increase in secondary boycott activity. *See also Carpenters Locals 184 & 1498 (New Star)*, 356 N.L.R.B. No. 88 (Feb 3, 2011).

E. Excessive Membership Fees (§ 8(b)(5)). Section 8(b)(5) prohibits excessive or discriminatory membership fees when employees are subject to a union security agreement. This section tends to prohibit union's use of initiation fees as a weapon to limit membership. Even if a membership fee is not excessive it can still be unlawful.

F. Featherbedding (§ 8(b)(6)). Section 8(b)(6) prohibits a union from causing or attempting to cause an employer to pay for services that are not performed (i.e., featherbedding). This section has been emasculated by Board and court decisions, and if any work at all is performed, it is likely no violation will be found. *NLRB v. Gamble*

Enterprises, 345 U.S. 117 (1953); *American Newspaper Publishers Association v. NLRB*, 345 U.S. 100 (1953).

G. Unlawful Picketing (§ 8(b)(7)). Prohibits a union from picketing or threatening to picket any employer when the object is forcing or requiring an employer to recognize or bargain with a labor organization under the following circumstances:

1. Picketing for recognition is prohibited by § 8(b)(7)(A) when an employer has lawfully recognized another labor organization, and, therefore, no question concerning representation can be raised.

2. Picketing for recognition is prohibited by § 8(b)(7)(B) when a valid election has been held within one year among the employees for whom the union is attempting to become the bargaining representative.

3. Picketing is unlawful pursuant to § 8(b)(7)(C) when picketing for recognition has been conducted, without a petition being filed with the Board, in excess of a reasonable period of time, not to exceed thirty days.

A union can picket with language stating that an employer "does not employ members of" or "have a contract with" a labor organization for more than thirty days unless an effect of such picketing is to induce any individual employed by any other person in the course of his or her employment not to pick up, deliver, or transport any goods or not to perform any services. *Local Joint Executive Board of Hotel and Restaurant Employees and Bartenders International Union of Long Beach and Orange County*, 135 N.L.R.B. 1183 (1962).

If a representation petition is filed within a reasonable time under § 8(b)(7)(C) and a ULP charge has been filed against the picketing union, an expedited election is held without consideration of the union's showing of interest.

H. Section 8(e). Section 8(e) prohibits a labor organization and any employer from entering into any contract or agreement in which the employer agrees to cease doing business with any other person or refrain from dealing in the products of another employer. Exceptions are created for the apparel and clothing industry. Exceptions are also created for the construction industry involving contracting or subcontracting of work to be done at the site of the construction. The Board will closely scrutinize what constitutes "on site" work. A ULP charge may be filed against both unions and employers under § 8(e).

In *Glen Falls Building and Construction Trades Council (Indeck Energy Services, Inc.)*, 350 N.L.R.B. 417 (2007), the Board held that project labor agreements (PLA's) between a company and a building trades union in which the company agreed that its four new plants would be constructed only with building trades union labor violated § 8(e)'s prohibition on secondary boycotts. The Board also held that the PLAs were not preserved by the construction industry exception. In this case, the company entered into the agreements in response to pressure from various trades unions, such as objections by the unions to the environmental impact statements filed by the company for the plant construction projects and threats by union representatives that the union would "stop every Indeck project in New York unless it went union." Although the company's original subcontractor entered into a PLA with the trades unions, it later cancelled this contract and selected a non-union subcontractor for construction of certain plants. The trades unions filed a breach of contract action against Indeck which, in response, filed a charge with the Board, claiming the agreement with the trades unions violated § 8(e) and was unenforceable.

The Board held that Indeck's promise that its construction contractor would deal only with subcontractors who had or would enter into a collective-bargaining agreement with the trades unions was an implicit promise not to do business with another in violation of the Act.

The Board then held that agreements did not fall within the construction industry exception to § 8(e). However, the Board did not make this determination based upon whether Indeck was in the construction industry, but instead held that the trades unions failed to establish the second and third prongs of their defense, which relate to the "nonstatutory test for proviso coverage" set forth by the Supreme Court in *Connell Construction Co. v. Plumbers Local 100,* 421 U.S. 616 (1975) (although *Connell* was decided under the antitrust laws, an essential element of its decision was the application of Section 8(e) to the agreement between the building trades union and a construction contractor that was alleged to be part of the anticompetitive behavior).

The Board held that the construction proviso applies only to: (1) agreements in the context of collective-bargaining relationships; and (2) "possibly to common situs relationships on particular jobsites as well." The Board determined that the collective bargaining prong of the test was not met because "the sole purpose of these agreements was to bind Indeck to select a contractor who, in turn, would subcontract work only to employers who signed the . . . PLA." Indeck and its construction contractor did not sign the PLAs. Additionally, the Board noted that in *Connell* the Supreme Court suggested that "secondary union-signatory clauses might be protected by the proviso even without a collective-bargaining relationship if they were directed toward the reduction of friction that may be caused when union and nonunion employees of different employers are required to work together at the same jobsite." However, the Board did not determine whether this language actually created an alternative basis for proviso coverage because the trades unions failed to prove that the agreements with Indeck and its construction contractor were executed to avoid such disputes. "On the contrary, the record shows that Indeck's purpose was to remove the threat of union opposition to Indeck's efforts to secure regulatory approval of its cogen construction plans, and secondarily, to provide a steady labor source for jobsite subcontractors. The Respondents, for their part, wanted a labor monopoly at a major construction site to provide employment for their out-of-work members." *Id.* at 5, 21.

X. UNFAIR LABOR PRACTICE PROCEDURES AND PENALTIES

A. Unfair Labor Practice Procedure. Sections 10 and 11 of the NLRA establishes the powers of the Board and the Regional offices with respect to hearings and investigations. An employer or a labor organization or the agents of either file a charge with the NLRB alleging a violation of Act. The section has a six-month statute of limitations. (In 1984, the Board ruled that in a discharge case, the six-month period begins to run on the date employee was notified, rather than the date the discharge took effect. *U.S. Postal Service Marina Mail Processing Center*, 271 N.L.R.B. 397 (1984)). The case is assigned to a Regional field examiner or field attorney to investigate. The Board agent first takes evidence offered by the charging party, and interviews and takes affidavits from all witnesses who support the charging party's charge. If a prima facie case is made, a Board agent contacts the respondent to see if the charged party wishes to present evidence. The respondent must decide whether it is in its best interest to present evidence at this time, or to wait and see if complaint issues and then present evidence at trial.

The respondent must decide whether to present evidence by permitting the Board agent to take affidavits of the employee's witnesses, having an attorney for the respondent take affidavits and submit them to the Board, permitting a Board agent to interview witnesses but take no affidavits, submitting a written position statement, or some combination of above. After the Board agent completes the investigation, she or he reports findings to his or her superiors, and the Regional Director decides whether to prosecute. If the Region decides

that no violation of the Act exists, it will seek a withdrawal of the charge and, absent withdrawal of the charge, will dismiss it.

If the charge is dismissed, an appeal may be filed with General Counsel Division of Appeals in Washington, D.C. No appeal may be filed if the charge is withdrawn. Section 3(d) places in the General Counsel "final authority," on behalf of the Board, with respect to the investigation of charges and issuance of complaints. If the Region believes the charge has merit, it will issue a complaint absent settlement. The Region will seek posting of the Board notice and affirmative action such as reinstatement, back pay, and good faith bargaining, where appropriate. The respondent may be able to enter into non-Board settlement outside of the Board processes without posting a notice and without reinstatement of the alleged discriminatee. In a non-Board settlement, the charging party withdraws the charge with the Board's approval.

If no settlement is reached, the complaint generally issues, and the case is litigated before a NLRB administrative law judge. The complaint cannot be broader than the underlying charges. *Drug Plastics & Glass Co., Inc. v. NLRB*, 44 F.3d 1017 (D.C. Cir. 1995).

Cases are usually set for trial about three to six months after the complaint issues. After the trial, both sides usually write briefs to the judge. In the usual case, an administrative law judge issues a decision approximately three to ten months after case is tried. The decision of the administrative law judge may be appealed by the losing party or parties to the Board. The Board has initiated "bench decisions" in certain cases. In a "bench decision" the administrative law judge rules at the close of the hearing, usually without giving the parties the opportunity to file briefs.

If the respondent loses before the Board, it can refuse to comply with the Board order and can litigate the case before a federal appeals court. Section 10(f) of the Act provides that any person aggrieved by a final order of the Board granting or denying, in whole or in part, the relief sought may obtain a review of such order in any appropriate court of appeals. Litigation to decision before a court of appeals takes approximately six months to two years or more.

B. Deferral to Arbitration. In *Olin Corp.*, 268 N.L.R.B. 573 (1984), the Board stated that it will defer resolving the unfair labor practice case to arbitration award if: (1) the contractual issue is factually parallel to the unfair labor practice issue; and (2) the arbitrator was presented generally with the facts relevant to resolve any unfair labor practice. The Board also stated that unless the award was "palpably wrong"; that is, unless the arbitrator's decision is not susceptible to an interpretation consistent with the Act, the Board will defer.

C. Remedies. If the respondent ultimately loses, and the case involves back pay, the charged party owes the discriminatee back pay plus interest less interim earnings. The employer may also be ordered to reinstate the discriminatee – even if she or he was merely a casual laborer on a temporary construction project. *Dean General Contractors*, 285 N.L.R.B. 573 (1987). Additionally, the Board has held that respondents who have been found to have committed unfair labor practices must post remedial notices electronically if they regularly communicate with their employees and members electronically. *See J Picini Flooring,* 352 NLRB No. 9 (October 22, 2010). Accordingly, the Board revised its current notice-posting language, which requires posting in all places where notices to employees or members are customarily posted, to expressly encompass electronic communication formats. Generally, when the Board finds that an employer or union has committed an unfair labor practice, it requires the respondent (i.e. the employer or union) to post a notice informing employees/union members of their rights under the Act, the violations found by the Board, the respondent's obligation to cease and desist from such unlawful conduct in the future, and the affirmative action to be taken by the respondent to redress the violations. The

Board's standard practice is to require respondents to post remedial notices for a period of 60 days "in conspicuous places including all places where notices to employees [members] are customarily posted." This provision has traditionally been applied to require posting of paper copies at fixed locations, usually on bulletin boards as well as at time clocks, department entrances, meeting hall entrances, and dues payment windows.

In *J Picini Flooring*, the Board noted that e-mail, postings on internal and external web sites, and other electronic communication tools are overtaking, if they have not already overtaken, bulletin boards as the primary means of communicating a uniform message to employees and union members. Thus, given the increasing reliance on electronic communications and decreasing reliance on paper communications such as bulletin boards, the Board determined that in addition to physical posting, notices should be posted electronically, on a respondent's intranet or internet site, if the respondent customarily uses such electronic posting to communicate with its employees or members. Similarly, notices should be distributed by e-mail or other electronic means if the respondent customarily uses e-mail or other electronic means to communicate with its employees or members. The Board also held that "a policy concerning communication of remedial notices should apply equally to union and employer respondents. The policy we announce today, by its terms, applies to all respondents, employer and union, without differentiation." *Id.* at fn. 11. The determination of whether electronic posting will be required in a particular case will be made in compliance proceedings. The new rule will apply to all currently pending cases as well as future cases

Bargaining Orders. The Board can require an employer to collectively bargain with a labor organization even though no election has been held or in spite of the fact that a union lost an election. A bargaining order may be warranted when the ULPs have a tendency to undermine majority strength and impede the election processes. The Board has stated that "under no circumstances" will it issue such a bargaining order if the union has not, at some point, had majority support. *Gourmet Foods, Inc.*, 270 N.L.R.B. 578 (1984). There is a "running feud" between the appeals courts and the NLRB over changes in the employee complement, such as employee turnover or the passage of time, and how that affects the decision to order bargaining. The Board has consistently deemed such changes irrelevant but, as the Eighth Circuit noted, almost all of the appeals courts have disagreed. *NLRB v. Cell Agricultural Manufacturing Co.*, 41 F.3d 389 (8th Cir. 1994); *J.L.M., Inc. v. NLRB*, 31 F.3d 79 (2d Cir. 1994). *See also NLRB v. U.S.A. Polymer Corp.,* 272 F.3d 289, 293 (5th Cir. 2001) ("The Federal Circuit Courts are almost unanimous in holding that the NLRB must take current conditions into account when it determines whether to issue a bargaining order" under *Gissel*). *See also NLRB v. Goya Foods,* 525 F.3d 1117 (11th Cir. 2008) (assuming, but not deciding, that the passage of time and changed circumstances are relevant when evaluating the justifications for imposing an affirmative bargaining order, in this case the employer's failure to inform the NLRB of changes occurring during the nearly six years between an administrative law judge's finding of a widespread and unrelenting pattern of unlawful conduct culminating in an unlawful withdrawal of recognition and the NLRB's entry of an affirmative bargaining order was fatal to the employer's argument that the bargaining order should be denied or at least re-evaluated in light of employee turnover, technological and management changes, and private settlements with affected employees).

Section 10(j) Injunctions. Section 10(j) of the Act empowers the Board to seek injunctive relief in the federal district courts. The Board has recently announced it will more aggressively seek such relief in "nip in the bud" cases, where the employer is accused of discharging one or more employees allegedly to halt an organizing campaign before it can gain momentum. *See* NLRB GC Memorandum 10-07 "Effective Section 10(j) Remedies for Unlawful Discharges in Organizing Campaigns," (Sept. 30, 2010).

Restoration of the Status Quo. Where an employer closes a facility or subcontracts work with a purely anti-union motive, the Board has the authority to order restoration of operations, except where it would be too financially burdensome on the employer to do so. *Coronet Foods, Inc.*, 305 N.L.R.B. 79 (1991), *enfd.* 981 F.2d 1284 (D.C. Cir. 1993); *Lear Siegler, Inc.*, 295 N.L.R.B. 857 (1989). Restoration is generally considered an extraordinary remedy.

XI. SUPERVISORS AND MANAGEMENT LABOR ATTORNEYS NOT SUBJECT TO PERSUADER REPORTING REQUIREMENTS

The Landrum-Griffin Act (LMRDA) requires that employers and consultants report any arrangement in which the consultant "undertakes activities where an object thereof is, directly or indirectly . . . to persuade employees . . . or . . . to supply an employer with information concerning the activities of employees or a labor organization." The Act provides an exemption for the "giving or agreement to give advice" and also exempts "expenditures made to any regular officer, supervisor, or employee of an employer as compensation for a service . . . ." *See United Auto Workers v. Dole*, 869 F.2d 616 (D.C. Cir. 1989) (approving the DOL's determination that reporting is not required with regard to "payments to consultants to devise for the employer's use personnel policies to discourage unionization" nor for "antiunion activities engaged in by supervisors for which the supervisors receive no pay beyond their regular salaries." The DOL concluded that a "consultant law firm does not engage in reportable activity under the LMRDA when it devises personnel policies to discourage unionization, so long as the work product, whether written or oral, 'is submitted . . . to the employer for his use, and the employer is free to accept or reject [the submission].'") The court noted that where the attorney consultant had direct contact with employees or engages directly in persuader activity, that contact would not constitute exempt advice. The DOL later revised its interpretation of the advice exemption to require that when a consultant or lawyer prepares or provides a persuasive script, letter, videotape, or other material for use by an employer in communicating with employees, no exemption applies and the duty to report is triggered. However, on April 11, 2001, the DOL rescinded this interpretation and reinstated the prior interpretation of the term "advice" under § 203(c). In its 2009 Regulatory Plan, available at http://www.reginfo.gov, the DOL has stated that it will propose a regulatory initiative "to better implement the public disclosure objectives of the LMRDA regarding employer-consultant agreements to persuade employees concerning their rights to organize and bargain collectively." According to the Regulatory Plan, the DOL believes that "current policy concerning the scope of the 'advice exemption' is over-broad and that a narrower construction would better allow for the employer and consultant reporting intended by the LMRDA." Accordingly, the DOL plans to publish notice and comment rulemaking seeking consideration of a revised interpretation of the "advice" exemption that would narrow the scope of the exemption.

XII. APPENDIX

Typical Questions Asked By Employees, *see* www.fordharrison.com/sourcebooks.aspx.

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COPING WITH UNIONS

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Chapter Twenty-Six

COPING WITH UNIONS

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I. RECENT DEVELOPMENTS IN FEDERAL LABOR LAW

Last year legislation was introduced in Congress that would have substantially amended federal labor laws. The so-called Employee Free Choice Act (EFCA) would have effectively eliminated secret ballot elections as the way for employees to decide whether to have union representation by permitting unions to opt for a "card check" procedure that would result in certification of the union if a majority of employees in an appropriate bargaining unit simply sign union cards. This would make it much easier for a union to become the collective bargaining representative of a group of employees at a company. In addition, the EFCA would have significantly changed the process for negotiating a first contract. Changes would have included mandatory government-run arbitration to establish the terms and conditions of employment in the initial contract if the parties did not reach agreement during their direct negotiations and the EFCA required mediation process. Fortunately, the EFCA was not passed. However, National Labor Relations Board (NLRB) members appointed by President Obama have issued decisions demonstrating a clear pro-union trend, which may effectively result in implementation of many of the changes proposed by the EFCA.

Other labor law developments likely to challenge employers in the upcoming year include the NLRB's proposed rule requiring employers to post a notice of employee rights under the National Labor Relations Act (NLRA); the status of hundreds of Board decisions issued by a two-member panel between January 2008 and March 2010 in the wake of the U.S. Supreme Court's determination that the two-member panel had no authority to issue these decisions; the Board's upcoming review of two consolidated decisions that raise substantial issues concerning voluntary recognition under *Dana Corp.* and the possible modification or overruling of that decision; the Board's determination to revisit the successor bar doctrine by granting review in *UGL-UNICCO Service Company*, 2010 NLRB LEXIS 336, 355 N.L.R.B. No. 155 (August 27, 2010), and other consolidated cases; and the Board's expansion of unfair labor practices to include "preemptive strikes," in *Parexel Int'l, LLC*, 2011 NLRB LEXIS 25, 356 N.L.R.B. No. 82 (January 28, 2011). These issues are discussed in detail in the *NLRA's Impact on the Workplace* Chapter of the SourceBook.

II. HOW A UNION GAINS BARGAINING RIGHTS WITH AN EMPLOYER

A. NLRB Representation Elections. NLRB representation elections are the most common manner in which a union gains the right to bargain. Generally speaking, a union will ask employees to sign authorization cards stating that they would like to be represented by the union. The union will then offer to present the cards to the employer, and when, as is usually the case, the employer refuses to voluntarily recognize the union as the exclusive collective bargaining representative of the employees the union will present the cards to the Board and demand an election. Unions must present cards for at least thirty percent of the employees for there to be a valid "showing of interest" significant enough to warrant an election, but they usually aim for a far higher percentage before filing their petition for an election. The Board will then usually order an election for a defined unit of employees. If the union obtains a total of 50% plus 1 of the votes of the employees voting, it has the right to then represent the entire defined bargaining unit in collective bargaining.

B. Voluntary Recognition. The employer may also voluntarily recognize the union when the union presents the employer with cards establishing that a majority of the employees

would like a union. In *Dana Corp.*, 351 N.L.R.B. No. 28 (2007), the Board stated that it will not impose an election bar after a card-based recognition unless: (1) employees in the bargaining unit receive notice of the recognition and of their right, within forty-five days of the notice, to file a decertification petition or to support the filing of a petition by a rival union; and (2) forty-five days pass from the date of notice without the filing of a valid petition. Additionally, the Board held that if a valid petition supported by thirty percent or more of the unit employees is filed within forty-five days of the notice, the petition will be processed. The requisite showing of interest in support of a petition may include employee signatures obtained before as well as after the recognition. This standard applies regardless of whether a card-check and/or neutrality agreement preceded the union's recognition.

The Board also modified the contract-bar doctrine to provide that a collective bargaining agreement executed on or after the date of voluntary recognition will not bar a decertification or rival union petition unless notice of recognition has been given and forty-five days have passed without a valid petition being filed.

If both conditions are satisfied, the recognized union's majority status will be irrebuttably presumed for a reasonable period of time to enable the parties to engage in negotiations for a first collective-bargaining agreement. Under the contract-bar doctrine, any agreement reached during this forty-five-day window period will further bar an electoral challenge for up to three years of the contract term, once the window period elapses without the filing of a decertification or rival union petition. These changes to the recognition-bar and contract-bar doctrines in the card-based recognition setting apply only to voluntary recognition agreements that occur after the date of this decision (Sept. 29, 2007).

The Board also held that the employer/and or the union must promptly notify the Regional Office of the Board, in writing, of the grant of voluntary recognition. The Board will then send an official NLRB notice to be posted in conspicuous places at the workplace throughout the forty-five-day period alerting employees to the recognition and using uniform language. The NLRB has granted Requests for Review in two consolidated cases, *Rite Aid Store #6473* and *Lamons Gasket Company*, 355 N.L.R.B. No. 157 (2010), which raise substantial issues concerning voluntary recognition under *Dana Corp.* and has invited interested parties to file briefs addressing, among other things, "whether the Board should modify or overrule Dana."

C. Unfair Labor Practices. In limited cases, the Board may remedy an employer's unfair labor practices by ordering the employer to bargain with the union even though an election has not been held or has been held and lost by the union. Generally this remedy will be available where the employer commits serious unfair labor practices that interfere with the selection process and tend to preclude the holding of a fair election. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). In *Audubon Reg'l Med. Ctr.*, 331 N.L.R.B. 374 (2000), the Board refused to issue a *Gissel* order after the union lost an election, even though the employer hospital was guilty of serious unfair labor practices, because there had been a change of ownership in the hospital that included a 100% turnover in management personnel and because the election was held more than six years prior. The Board stated that a *Gissel* order would likely be unenforceable in court because of the management change. The Board did, however, issue "special remedies" to ensure a fair election would be held in the future.

D. Successorship. When a unionized employer sells its business, the employer succeeding the unionized employer may have a duty to bargain with the union. *See, e.g., Cmty. Hosp. of Cent. Cal. v. NLRB,* 335 F.3d 1079 (D.C. Cir. 2003) (a private, nonprofit company taking over a California public hospital and instituting a new management structure was a successor employer for purposes of the NLRA where the nurses continued to do the same jobs, in the same location, using the same equipment, and treating the same patients

and the nature of the business – an acute care facility – did not change); *Midwest Precision Heating & Cooling, Inc. v. NLRB,* 408 F.3d 450 (8th Cir. 2005) (successor company that was alter ego of predecessor company violated NLRA by bypassing union and dealing directly with employees over the terms and conditions of their employment). See the *Corporate Restructuring* Chapter of the SourceBook for a more in-depth analysis of this and other issues surrounding successorship and corporate reorganizations and realignments.

1. Analytical Framework for Establishing Refusal to Hire in Successorship Context. In *Planned Bldg. Servs., Inc.*, 347 N.L.R.B. 670 (2006), the Board clarified the legal framework for analyzing whether a successor employer has unlawfully refused to hire some or all of its predecessor's employees. In analyzing this issue, the Board held that the ALJ erred in applying the analytical framework set forth in *FES*, 331 N.L.R.B. 9 (2000), which generally applies in cases involving a discriminatory failure to hire or refusal to consider for hire. The Board held instead that the appropriate analysis is that set forth in *Wright Line*, 251 N.L.R.B. 1083 (1980), *enf'd*, 662 F.2d 899 (1st Cir. 1981).

To establish a violation under *Wright Line*, the General Counsel has the burden to prove that an employer's actions were the result of its animus toward union or protected activity. Once the General Counsel has met this burden, the Board will find a violation unless the employer proves that it would have taken the same action even in the absence of the protected activity. In *Planned Building Services*, the Board held that in the successorship context, the General Counsel does not have to establish that the employer was hiring or had concrete plans to hire (as it must do in other failure to hire cases, pursuant to *FES*, 331 N.L.R.B. 9 (2000)). According to the Board, the additional requirements established in *FES* are not appropriate in the successorship context because the predecessor's employees presumptively meet the successor's qualifications for hire. Additionally, "because a successor employer must fill vacant positions in starting up its business, it is similarly of little use to require the General Counsel to demonstrate that the employer was hiring or had concrete plans to hire." 347 N.L.R.B. at 670. Thus, to establish a violation of Section 8(a)(3) and (1) in cases where a refusal to hire is alleged in a successorship context, the General Counsel has the burden to prove that the employer failed to hire employees of its predecessor and was motivated by antiunion animus. *See also W&M Props. of Conn., Inc. v. NLRB,* 514 F.3d 1341, 1348 (D.C. Cir. 2008) (holding that the Board provided a sound rationale for eliminating the *FES* burden in the successorship context; "By providing a reasoned justification for its departure from precedent, the Board avoided a finding of arbitrary and capricious action under the Administrative Procedure Act.")

2. Stock Purchase. Generally, a purchaser of stock is required to bargain with the union and adopt the existing collective bargaining agreement. *See, e.g., TransMontaigne, Inc.*, 337 N.L.R.B. 262 (2001); *Teamsters v. Portland Auto Delivery Co.*, 90 L.R.R.M. (BNA) 2786, 2788 (D. Or. 1975) ("[a] corporation may not avoid its labor contract obligations any more than it may avoid other contractual obligations simply because there has been a sale of assets or stock between two individuals. The corporate entity continues together with the rights, privileges, and obligations accruing thereto.") Thus, if there is no significant change in the organization due to the stock purchase then the obligation to bargain will remain. *See TransMontaigne, Inc.*, 337 N.L.R.B. 262, 263 (where there was simply a transfer of stock that did not involve a substitution of one employer for another, the changes in stock ownership and corporate name did not result in any significant changes to the operation; accordingly, there was no need for a successorship analysis because the purchaser was the same legal entity.)

However, in some stock purchase situations, the Board or court will apply a successorship analysis, which is traditionally applied in asset purchase situations.

3. Asset Purchase. In an asset purchase situation, whether the purchaser is required to bargain with the exclusive representative of the seller's employees depends on whether there is "substantial continuity in the employing enterprise." *See, e.g., Aircraft Magnesium,* 265 N.L.R.B. 1344, 1345 (1982), *enf'd without op.,* 730 F.2d 767 (9th Cir. 1984); *Miami Industrial Trucks, Inc.,* 221 N.L.R.B. 1223, 1224 (1975).

In determining whether there is substantial continuity, the Board generally looks at: (a) business operations; (b) plant; (c) workforce; (d) jobs and working conditions; (e) supervisors; (f) machinery, equipment and methods of production; and (g) products or service. *See Aircraft Magnesium,* 265 N.L.R.B. 1344, 1345. Although the issue of successorship is primarily a factual determination based on the totality of the circumstances, courts generally will not find successorship unless the majority of the new employer's bargaining unit employees were members of the seller's unit work force at or near the time the seller ceased operations. *See Airport Bus Service, Inc.,* 273 N.L.R.B. 561, 562 (1984) (citations omitted), *disavowed on other grounds in St. Mary's Foundry Co.,* 284 N.L.R.B. 221 fn. 4 (1987); *accord, Royal Vending Services, Ltd.,* 275 N.L.R.B. 1222, 1226-27 (1985). Without a "majority" the Board generally will find no successorship, regardless of the presence of other indicia. *See, e.g., G.W. Hunt,* 258 N.L.R.B. 1198, 1201 (1981).

4. Successor Bar. While an asset purchaser must recognize and bargain with the seller's union where the seller's unionized employees comprise a majority of the purchaser's workforce in an appropriate bargaining unit, it typically is not required to assume the seller's collective bargaining agreement. *See NLRB v. Burns Int'l Security Services*, 406 U.S. 272 (1972). Thus, in an asset purchase, there often is not a contract in place that prevents challenges to a union's continuing status as the desired representative of a majority of the employees. Before the NLRB's decision in *MV Transportation*, 337 N.L.R.B. 770 (2002), a company that purchased the assets of a unionized employer found itself in a difficult situation. Such a purchaser had to recognize and bargain with the seller's union for a "reasonable period" of time, even though it might have suspected or even known that most of its employees no longer desired union representation. *See St. Elizabeth Manor, Inc.*, 329 N.L.R.B. 341 (1999). Under the NLRB's "successor bar" rule, employers acted at their peril by challenging whether such a union continued to enjoy majority support because the "reasonable period" standard was so imprecise.

The Board's decision in *MV Transportation* overturned *St. Elizabeth's Manor* and removed the uncertainty of the successor bar rule for a purchasing employer. In *MV Transportation,* the Board returned to the position it held prior to the *St. Elizabeth Manor* decision and held that an incumbent union in a successor employer situation is entitled only to a rebuttable presumption of continuing majority status, which will not operate to bar an otherwise valid decertification, rival union, or employer petition. *MV Transportation,* 337 N.L.R.B. at 773. In light of this reversal, employees of an acquired business are free to seek to decertify their union at any time after an acquisition, as long as the union has been their certified bargaining representative for more than one year and there is no collective bargaining agreement in effect. As noted above, the Board has granted review in *UGL-UNICCO Service Company*, 355 NLRB No. 155 (August 27, 2010), and other consolidated cases that raise substantial issues regarding whether the Board should modify or overrule *MV Transportation.*

E. Accretion. An accretion occurs when new employees, or present employees in new jobs, perceived to share a sufficient community of interest with existing unit employees, are added to an existing bargaining unit without being afforded an opportunity to vote in a union election. The Board will accrete employees to an existing unit without an election only when the additional employees have little or no separate group identity and thus cannot be considered to be a separate appropriate unit and when the additional employees share an overwhelming community of interest with the preexisting unit to which they are accreted. *See Safeway Stores, Inc.*, 256 N.L.R.B. 918 (1981) (footnotes omitted). *See also Frontier Telephone of Rochester, Inc.,* 344 N.L.R.B. 1270 (2005) (the Board will permit accretion only when "employees sought to be added to an existing bargaining unit have little or no separate identity and share an overwhelming community of interest with the preexisting unit to which they are accreted"; finding accretion of Internet help technicians to bargaining unit of customer service workers violated § 8(a)(2) and that the enforcement of the union security clause as to the Internet help technicians by deducting union dues from their pay violated § 8(a)(3)), *enf'd,* 2006 U.S. App. LEXIS 12443 (2d Cir. May 16, 2006).

The most common circumstances giving rise to a claim of accretion involve an employer with a preexisting bargaining unit that acquires an additional facility where the new employees' interests align with existing unit employees, and the union attempts to add the new employees to the existing bargaining unit without an election. *Id.* at n.5. *See also Bryan Infants Wear Company*, 235 N.L.R.B. 1305, 1306 (1978) (the following factors are relevant in determining whether an accretion has occurred: "the bargaining history; the functional integration of operations; the differences in the types of work and the skills of employees; the extent of centralization of management and supervision, particularly in regard to labor relations, hiring, discipline, and control of day-to-day operations; and the extent of interchange and contact between the groups of employees"); *Judge & Dolph, Ltd.*, 333 N.L.R.B. 175 (2001) (Geographic separation is a factor to be considered in addition to the aforementioned).

III. THE COLLECTIVE BARGAINING PROCESS AFTER THE BARGAINING OBLIGATION ATTACHES

A. Duty to Bargain in Good Faith.

1. Section 8(d) Definition of Bargaining. Section 8(d) of the Act requires an employer and a union to meet at reasonable times and to confer in good faith with respect to wages, hours, and other terms and conditions of employment in an effort to reach an agreement. Neither party, however, is required to agree to a proposal or make a concession.

The Office of General Counsel has issued a Memorandum calling for the Board to impose additional remedies in first term contract bargaining cases where bad-faith bargaining tactics or other violations substantially hinder, delay, or otherwise undermine negotiations. In such situations, "a bargaining order alone may be insufficient to restore the status quo ante where cumulative illegal tactics significantly stall a newly-formed relationship." (GC Memorandum 07-08). These additional remedies include "scheduled bargaining orders" – required bargaining on a prescribed schedule; periodic reports on bargaining status; a six-month extension of the certification year; and reimbursement of bargaining costs.

Under § 8(a)(5) of the Act, it is an unfair labor practice for an employer to refuse to bargain with the exclusive bargaining representative of its employees, 29 U.S.C. §

158(a)(5). A violation of § 8(a)(5) constitutes a derivative violation of § 8(a)(1). *See Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1164 (D.C. Cir. 2004). The same bargaining considerations apply to unions as apply to employers pursuant to § 8(a)(5) of Act. Thus, § 8(b)(3) prohibits a collective bargaining representative from refusing to engage in collective bargaining when the union represents an employer's employees. A union likewise cannot force members of multi-employer bargaining unit to bargain individually. *See Roofers, Local 220 (Jones & Jones, Inc.)*, 177 N.L.R.B. 632 (1969).

The duty to bargain is mandatory with respect to the subjects listed in § 8(d) of the Act, 29 U.S.C. § 158(d), i.e., wages, hours, and terms and conditions of employment. *See Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991). Subjects that are "plainly germane to the 'working environment'" and are "not among those 'managerial decisions, which lie at the core of entrepreneurial control'" are deemed "terms and conditions of employment" and therefore are mandatory subjects of bargaining. *Ford Motor Co. (Chicago Stamping Plant) v. NLRB*, 441 U.S. 488, 498, (1979) (quoting *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 222, 223, (1964) (Stewart, J., concurring)). Thus, an employer's unilateral change in a term or condition of employment without first bargaining to impasse violates §§ 8(a)(5) and (1). *See Litton*, 501 U.S. at 198; *Beverly Health & Rehab. Servs., v. NLRB*, 317 F.3d 316, 322 (D.C. Cir. 2003).

Definitions of "Good Faith." The parties must enter into collective bargaining with an open mind and a sincere desire to reach an agreement; the parties must make every reasonable effort to reach an agreement, *Houde Eng'g Corp.*, 1 N.L.R.B. (Old) 35, 44 (1934); and the parties must bargain with a bona fide intent to reach an agreement, *Atlas Mills, Inc.*, 3 N.L.R.B. 10, 21 (1937).

2. Duration of the "Duty to Bargain." The obligation to bargain in good faith extends to a union the Board certifies as the exclusive bargaining representative and when the employer voluntarily recognizes a union that represents a majority of unit employees.

There is a one-year presumption (absent unusual circumstances) that a certified union is the majority representative of the unit's employees. *Brooks v. NLRB*, 348 U.S. 96 (1954). After an initial refusal to bargain, the certification year begins when good faith bargaining begins. *See Van Dorn Plastic Mach. Co. v. NLRB*, 939 F.2d 402 (6th Cir. 1991). Loss of majority status within the certification year is, in all likelihood, no defense. *Franks Bros. Co. v. NLRB*, 321 U.S. 702 (1944). After the certification year, which can be extended because of employer unfair labor practices, the union's majority status can be challenged. *Celanese Corp. of Am. (Bishop, Tex.)*, 95 N.L.R.B. 664 (1951), *overruled in part by Levitz Furniture Co. of the Pac., Inc.*, 333 N.L.R.B. 717 (2001).

3. Examples of "Bad Faith" Bargaining Tactics. Examples of conduct considered "per se" violations: a blanket refusal to meet; a refusal to execute a written contract embodying the terms agreed upon; refusal to turn over relevant information; unilateral changes in mandatory subjects under negotiation before reaching impasse (see discussion below); and insistence to impasse on a nonmandatory subject of bargaining.

4. Surface Bargaining.

a. Surface Bargaining Defined. If it appears that the employer is merely going through the motions of bargaining but has no intention of reaching a collective bargaining agreement, the employer may be found guilty of surface bargaining.

b. Evidence of Surface Bargaining. The refusal to make concessions or the making of proposals to which "no self-respecting union could agree" has been determined to constitute evidence, in certain cases, of surface bargaining.

Generally, however, bad faith will not be found when such proposals are merely opening proposals and are later withdrawn. *Hondo Drilling Co., N.S.L.*, 213 N.L.R.B. 229 (1974), *enf'd*, 525 F.2d 864 (1976); *Orion Tool, Die & Machine Co.*, 195 N.L.R.B. 1080, 864 (1972). Dilatory tactics may constitute evidence of surface bargaining, *Lloyd A. Fry Roofing Co. v. NLRB*, 216 F.2d 273 (9th Cir. 1954), *opinion modified,* 220 F.2d 432 (9th Cir. 1955), as may arbitrary scheduling of meetings, revocation of prior agreements, and making new proposals well into negotiations.

c. Hard Bargaining Distinguished from Surface Bargaining. In avoiding an "overall bad faith" finding where the employer maintains a "hard" bargaining position, it is critical that the employer demonstrate sound business reasons for its positions. For example, in *Cincinnati Newspaper Guild, Local 9 v. NLRB*, 938 F.2d 284 (D.C. Cir. 1991), an employer's insistence on controlling wage increases was not bad faith bargaining. *See also Garden Ridge Mgmt., Inc.,* 347 N.L.R.B. 131 (2006) (employer did not engage in surface bargaining by submitting a proposal that the union refrain from organizing certain non-bargaining-unit employees and a broad management rights proposal, which it subsequently modified; the employer's effort to "secure agreement, where possible, while voicing its intent not to retreat from the substance of its bargaining position, is not inconsistent with an intent to reach an agreement"), *aff'd,* 349 N.L.R.B. 1180 (2007). In *Garden Ridge,* the Board noted that although the employer's refusal to meet more frequently for negotiating sessions violated its obligation to "meet at reasonable times," the fact that a party does not meet with sufficient frequency does not necessarily mean that it does not wish to agree to a contract.

5. Boulwarism. An employer that carefully researched and formulated a single offer anticipating the union's demands was found to violate the duty to bargain in good faith. The Board also found that the employer's mass communication campaign selling its proposal directly to the employees contributed to a finding of bad faith. *General Electric Co. (New York, N.Y.)*, 150 N.L.R.B. 192 (1964), *enf'd*, 418 F.2d 736 (2d Cir. 1969). Communications to employees during negotiations may be critical, however. The Board has reaffirmed the employer's right to communicate directly with its employees provided the union is not bypassed. *United Techs. Corp.*, 274 N.L.R.B. 609 (1985), *enf'd*, 789 F.2d 121 (2d Cir. 1986).

6. Duty to Provide Information to the Union. Generally, an employer violates its duty to bargain in good faith when it refuses to provide to the union information "relevant" to the union's representation of the employees in the bargaining unit.

7. No Changes In "Mandatory Subjects" of Bargaining Until Agreement, Impasse, or Waiver. A unilateral change is a per se violation of § 8(a)(5). *NLRB v. Katz*, 369 U.S. 736 (1962).

Exceptions to the Per Se Test.

a. Upon Reaching Bona Fide Impasse. *American Laundry Machinery Co. (Cincinnati, Ohio)*, 107 N.L.R.B. 1574 (1954). Changes in mandatory subjects of bargaining before impasse may support an inference of a lack of good faith. *NLRB v. Fitzgerald Mills Corp.*, 313 F.2d 260 (2d Cir. 1963).

b. Waiver of Bargaining Rights. A waiver of bargaining rights evidenced by "clear and unmistakable language" gives employers the right to take certain action without having to negotiate with the union. *United States Lingerie Corp.*, 170 N.L.R.B. 750 (1968). A waiver of bargaining rights may occur when the employer gives notice to the union of a proposed change and the union then fails to request bargaining. *YHA,*

Inc. v. NLRB, 2 F.3d 168 (6th Cir. 1993) (union's failure to request bargaining, after being formally and fully apprised of employer's intent to completely eliminate smoking, until last business day before new policy was to take effect, found to be waiver of obligation to bargain).

In *Allison Corp.*, 330 N.L.R.B. 1363 (2000), the Board held that the employer had no duty to bargain over the decision to subcontract work, where the management rights clause in the contract specifically stated that the employer had "the exclusive right to . . . subcontract." The Board held that this clause was a clear and unmistakable waiver by the union of its right to bargain over the issue of subcontracting. The Board also held, however, that the employer violated § 8(a)(5) by failing to bargain over the effects of subcontracting.

c. Notice and Opportunity to Bargain. The Fifth Circuit recognizes an exception when the employer has afforded the union notice and an opportunity to bargain, even if impasse has not been reached. *Nabors Trailers v. NLRB*, 910 F.2d 268 (5th Cir. 1990); *NLRB v. Citizens Hotel Co.*, 326 F.2d 501 (5th Cir. 1964).

For a unilateral change to be unlawful, it must involve "wages, hours, terms or conditions of employment."

B. Subjects for Collective Bargaining. The three types of bargaining subjects are classified as mandatory, permissive, or illegal.

1. "Mandatory" Subjects of Bargaining. The distinction between mandatory and permissive subjects was first described by the U.S. Supreme Court in *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958). Both parties have a statutory obligation to bargain only with respect to "mandatory" subjects; that is, wages, hours, and other terms and conditions of employment. *Inland Steel Co. v. NLRB*, 170 F.2d 247 (7th Cir. 1948), *aff'd*, 339 U.S. 382 (1950). *See also Verizon N.Y., Inc. v. NLRB,* 360 F.3d 206 (D.C. Cir. 2004) (employer's decision to terminate a policy allowing employees to participate in blood drives on company time was a mandatory subject under CBA; employees received full pay and time credits for periods in which they donated blood and the employer's decision to stop permitting blood donations during company time implicitly affected the wage and hour conditions of employees). Parties may only bargain to impasse concerning mandatory subjects of bargaining. Some examples of "mandatory" subjects are:

a. Pensions and welfare plans;

b. Profit-sharing plans;

c. Wage rates, piece rates, incentive pay, and overtime pay;

d. Holidays, vacations, sick and other leaves;

e. Hours of work, clean-up time, breaks, shift differentials, call-in pay, reporting pay;

f. Insurance benefits for current employees;

g. Severance pay;

h. Seniority and promotions;

i. Grievance and arbitration procedure;

j. No-strike clause;

k. Plant rules;

- Drug Testing. In *Johnson-Bateman Co.*, 295 N.L.R.B. 180 (1989), the Board held that drug testing all current employees involved in on-the-job injuries was a mandatory subject of bargaining and that the employer's general management rights clause did not evidence a waiver of the union's right to bargain over this subject. A pre-employment testing policy requiring that all applicants pass a drug test to be eligible for employment is not a mandatory subject of bargaining, however, and employers are free to unilaterally implement such policies without bargaining with the union. *Star Tribune, Div. of Cowles Media Co.*, 295 N.L.R.B. 543 (1989). In *LID Elec., IBEW, Local 134,* 362 F.3d 940 (7th Cir. 2004), the court held that the employer was bound to a drug testing agreement between it and the union, even though the agreement required testing of non-union employees. The court held that the rights of non-union employees were not in jeopardy because the agreement did not place any obligations on them. Only the employer had an obligation under the agreement – to administer the drug tests.
- Smoking. In *W-I Forest Prods. Co.*, 304 N.L.R.B. 957 (1991), the Board explicitly held that a ban on smoking on an employer's premises during working hours is a mandatory subject of bargaining, regardless of whether the union seeks to obtain such a ban or to limit or eliminate such a ban. Moreover, a union's alleged waiver of its right to bargain over a smoking policy must be "clear and unmistakable."
- Installation of surveillance cameras. In *Anheuser-Busch, Inc.*, 342 N.L.R.B. 560 (2004), a 2-1 panel of the Board held that the employer violated §§ 8(a)(5) and (1) by failing to give notice to and bargain with the union before installing and using hidden surveillance cameras in the workplace. The Board held that the use of hidden surveillance cameras in the workplace is a mandatory subject of bargaining. *Id.* Thus, by unilaterally installing hidden cameras in the employees' work and break areas, the employer violated § 8(a)(5). The D.C. Circuit upheld this decision, but remanded the case to the Board to determine the appropriate remedial order for the employees who were disciplined as a result of misconduct discovered by the use of the hidden cameras. *Brewers & Maltsters, Local Union No. 6 v. NLRB*, 414 F.3d 36 (D.C. Cir. 2005). On remand, the NLRB ordered the employer to bargain with the union over the use of hidden surveillance cameras, but it did not order the reinstatement of employees who were previously discharged for being caught on camera engaging in misconduct. *Annheuser-Busch, Inc.*, 351 N.L.R.B. 644 (2007).

l. Duration of agreement;

m. Management rights clause;

n. Union security and check-off clauses;

o. Strike settlement agreements;

p. Work rules and work assignments; and

q. Zipper clauses or waivers of bargaining.

2. "Permissive" Subjects of Bargaining. Subjects that fall outside the realm of the phrase "wages, hours and other terms and conditions of employment" are generally considered permissive subjects of bargaining. Insistence to impasse on inclusion of a permissive subject of bargaining in a collective bargaining agreement is a violation of §

8(a)(5) or 8(b)(3). *Steere Broadcasting Corp.*, 158 N.L.R.B. 487 (1966). "Permissive" subjects include:

a. Definition of the bargaining unit. In *Antelope Valley Press*, 311 N.L.R.B. 459 (1993), and *Bremerton Sun Publishing Co.*, 311 N.L.R.B. 467 (1993), the Board held that when the bargaining unit description is couched in terms of work performed, the employer, after reaching impasse, may insist on transferring work of a type covered by the description to employees other than those currently performing the work. The employer may not, however, change the unit description or insist that nonunit employees to whom the work is transferred will remain outside the bargaining unit. The Board, either in an unfair labor practice proceeding or in a unit clarification proceeding, may then determine whether such employees fall within the unit.

b. Internal union affairs (including union agreement to require ratification of contract or negotiate procedures of ratification by employees).

c. Industry promotion funds.

d. Settlement of lawsuits.

e. Provisions for tape-recording collective bargaining sessions and grievance meetings. *Hutchinson Fruit Co.*, 277 N.L.R.B. 497 (1985).

f. Interest arbitration. Interest arbitration is a form of arbitration used as part of, or in lieu of, the actual collective bargaining process. The typical format entails the submission of unresolved issues to a neutral arbitrator who decides between the proposals of the employer and the union.

g. Entrepreneurial decisions. In *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), the U.S. Supreme Court held that an employer's purely economic decision to close a part of its business is not a mandatory subject, although the employer must bargain over the "effects" of the decision. The Board has since held that even if labor costs are admittedly a factor in a decision to relocate, there is no obligation to bargain where the decision does not "turn on" labor costs. *Columbia City Freight Lines, Inc.*, 271 N.L.R.B. 12 (1984); *Bostrom Div., UOP, Inc.*, 272 N.L.R.B. 999 (1984). However, in *Dubuque Packing Co.*, 303 N.L.R.B. 386 (1991), *enf'd*, 1 F.3d 24 (D.C. Cir. 1993), the Board set forth a new test for determining when bargaining over plant relocations is required. Under the new test, the Board's General Counsel has the initial burden of establishing that the relocation decision is not accompanied by a basic change in the nature of the employer's operation. If the General Counsel meets that burden, a prima facie case for bargaining has been established. To avoid bargaining, an employer must establish that: (1) the work at the new location varies significantly from the work at the old location; (2) the work performed at the old location will be completely discontinued; or (3) the relocation decision is part of a change in the scope of the employer's enterprise. The employer may also avoid bargaining by showing that labor costs are not a factor in the decision, or that even if they are a factor, the union cannot offer labor cost concessions that will change the management decision. *See Komatsu Am. Corp.*, 342 N.L.R.B. 649 (2004) (affirming ALJ's dismissal of failure to bargain claim based on employer's implementation of a reduction in force while the employer and union were in the midst of effects bargaining; the General Counsel failed to show a causal nexus between the outsourcing initiative and the reduction in force. The reduction in force adversely affected the entire workforce, not just the machine shop from which work was being outsourced, and was caused by a general downturn in business.)

h. A provision allowing management the right to offer retirement incentives to individual employees. *Toledo Typographical Union No. 63 v. NLRB*, 907 F.2d 1220 (D.C. Cir. 1990).

i. Provisions prohibiting employees and their union from interfering with the employer's ability to maintain funding. *Mental Health Services, Northwest, Inc.*, 300 N.L.R.B. 926 (1990).

j. A provision banning dual shop operations by a construction industry employer, i.e., a clause that provides that if the employer or its owners form another business enterprise performing work within the union's jurisdiction, that business enterprise should be manned in accordance with referral provisions found in the collective bargaining agreement and be covered by all the terms of the agreement. *Northeast Ohio Dist. Council of the United Bhd. of Carpenters & Joiners*, 310 N.L.R.B. 1023 (1993).

k. A provision requiring an employer to recognize the union at other facilities via a "card check" process instead of an election.

l. Supervisors' working conditions.

m. Performance bonds and indemnity clauses.

3. Examples of "Illegal" Subjects of Bargaining. Illegal subjects cannot be properly included in a labor agreement and should not be proposed. Illegal subjects include:

a. Hot cargo clauses;

b. Closed shop clauses;

c. Union security clauses in right-to-work states, discriminatory union hiring hall procedures;

d. Provisions unduly encouraging or discouraging union membership or status. *Radio & Television Broadcast Eng'rs Union, Local 1212*, 288 N.L.R.B. 374 (1988);

e. Language prohibiting employees from engaging in "misrepresentation in connection with any employee benefit" and "misrepresentation of any material fact in connection with any claim concerning . . . employment or . . . pay" was found unlawfully overbroad. *Universal Fuels, Inc.*, 298 N.L.R.B. 254 (1990); and

f. Negotiating for pensions for otherwise ineligible union officials in return for concessions. In *United States v. Phillips*, 19 F.3d 1565 (11th Cir. 1994), *amended* 59 F.3d 1095 (11th Cir. 1995), the Eleventh Circuit affirmed the conviction of the employer and union officials for entering into a "kick back scheme" whereby the employer granted pension benefits to employees who would not otherwise be eligible for benefits in exchange for other concessions by the union. The employer was fined $4.1 million and ordered to pay $289,995 to its pension fund while the two union officials were sentenced to jail.

4. Plant Closings and Removals. In some situations, management has a right to make a decision or take an action without bargaining with the union but must bargain over the "impact" or "effects" of its decision on bargaining unit employees. *See Cyclone Fence, Inc.*, 330 N.L.R.B. 1354 (2000) (an employer's failure to bargain with the union over the effects of the decision to terminate its operations, which was caused by its creditor's abrupt withdrawal of funds, violated § 8(a)(5); the Board ordered the company to bargain with the union concerning the effects of the closure). As a practical matter, however, management may wish to bargain over the decision even if it arguably does not have to. That way, the employer is less susceptible to a potential costly remedy such as

back pay and/or reinstatement if the NLRB later determines the matter was subject to mandatory bargaining.

C. Employer Defenses to Union Charges of Bad Faith Bargaining.

1. Not a mandatory subject for bargaining;

2. Bona fide impasse;

3. Union waived right to bargain; and

4. Necessity. The Board rarely permits employers to refuse to bargain and use necessity as an affirmative defense. *See Proctor Express v. NLRB*, 135 F.3d 766 (1997).

D. Impasse.

1. Legal Implications of Impasse on a Unilateral Change. The requirement of reaching impasse is a severe limitation on an employer's ability to unilaterally change "wages, hours, and other terms and conditions of employment." During the collective bargaining process, employers are precluded from making changes in these employment terms without first bargaining to a good faith impasse with the union representing its employees. The usual remedy for implementing terms before impasse is a bargaining order. A bargaining order is a mandate that the employer maintain the status quo in the employment relationship as it existed before the changes and that employees be made whole for any loss resulting from the unilateral change. *Beacon Journal Publishing Co. v. NLRB*, 401 F.2d 366 (6th Cir. 1968). An employer may implement all or some of its proposals about which it has reached impasse, but generally may not implement more or less favorable terms than have been offered to the union in bargaining. *Buck Creek Coal,* 310 N.L.R.B. 1240 (1993). An employer may choose to implement some or all of its proposals after impasse to attempt to avoid a strike or to limit the number of employees who choose to strike.

2. Common Definitions of Impasse.

a. That point at which, despite the best efforts of the parties to achieve an agreement, neither party is willing to move from its respective position. *Dust-Tex Service, Inc.*, 214 N.L.R.B. 398 (1974), *enf'd*, 521 F.2d 1404 (8th Cir. 1975);

b. When the parties have exhausted all avenues for reaching agreement and there is "no realistic possibility that continuation of discussion at that time would have been fruitful." *American Federation of Television & Radio Artists v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968); or

c. When the parties have reached that point in negotiations when the parties are warranted in assuming further bargaining would be futile. Furthermore, a party's declaration that an impasse has occurred will not be dispositive in determining whether one does indeed exist. All of the circumstances of the case must be analyzed. *Patrick & Co.*, 248 N.L.R.B. 390 (1980), *enf'd*, 644 F.2d 889 (9th Cir. 1981). *See also Coastal Cargo Co.,* 348 N.L.R.B. 664 (2006) (adopting ALJ's determination that the parties had not reached impasse; relying particularly on the fact that the parties did not have adequate opportunity to bargain because, while they agreed to discuss the economic proposals at future meetings, the employer presented its final offer before they had an opportunity to do so. (citing *Ead Motors E: Air Devices, Inc.,* 346 N.L.R.B. 1060 (2006)). The Board also relied on the fact that the employer demonstrated that further movement was possible by presenting the union with multiple final offers after indicating that it had reached a point where it

could not bargain further. *Id.* (citing *Duane Reade, Inc.*, 342 N.L.R.B. 1016, 1017 (2004)).

3. Are You at Impasse? In *Taft Broadcasting Co., WDAF AM-FM TV*, 163 N.L.R.B. 475 (1967), the Board set forth several relevant factors to be considered in deciding whether an impasse in bargaining exists:

a. bargaining history;

b. the good faith of the parties in negotiations;

c. the length of the negotiations;

d. the importance of the issue or issues as to which there is no agreement;

e. the contemporaneous understanding of the parties as to the state of the negotiations; and

f. other factors the Board considers when determining the presence/absence of impasse:

- Whether there is a strike or whether the union has consulted employees about a strike. Note that, without more, a strike does not signify impasse and may break an impasse. *Huck Mfg. Co. v. NLRB*, 693 F.2d 1176 (5th Cir. 1982).
- The fluidity of positions taken by the parties. *J. Josephson, Inc.*, 287 N.L.R.B. 1188 (1988).
- Number of and length of each bargaining session. *Sierra Pub. Co.*, 291 N.L.R.B. 552 (1988), *enf'd*, 888 F.2d 1394 (9th Cir. 1989).
- Whether the employer has demonstrated past or present union animus. *Association of D.C. Liquor Wholesalers,* 292 N.L.R.B. 1234 (1989), *enf'd*, 924 F.2d 1078 (D.C. Cir. 1991).
- Whether the parties continued to bargain after impasse was declared by the employer. *Huck Mfg. Co. v. NLRB*, 693 F.2d 1176 (5th Cir. 1982).
- Other actions inconsistent with impasse such as an employer's statement that it would consider counterproposals. *Valley Mould Div., Microdot, Inc.*, 288 N.L.R.B. 1015 (1988).

E. Employer's Duty to Provide Information. For the bargaining process to function properly there must be exchange of essential information. *NLRB v. Jarm Enters.*, 785 F.2d 195 (7th Cir. 1986). Therefore, the Board holds that it is necessary to the proper discharge of the duties of a bargaining agent that unions gain access to relevant information. *NLRB v. Whitin Machine Works*, 217 F.2d 593 (4th Cir. 1954). Not only may an employer's refusal to supply relevant information give rise to an independent violation of the duty to bargain, it may also preclude a finding of a good faith impasse in negotiations. *Sioux City Stockyards Div. of United Stockyards, Corp.*, 293 N.L.R.B. 1 (1989), *enf'd*, 901 F.2d 669 (8th Cir. 1990). Unions must also provide relevant information to employers for the purpose of collective bargaining. *Detroit Newspaper Printing & Graphic Communications Union v. NLRB*, 598 F.2d 267 (D.C. Cir. 1979).

1. When Duty Attaches. An employer has an obligation to furnish to its employees' union, upon that union's request, sufficient information to enable the union to fulfill its role as a collective bargaining representative. This duty arises as soon as the union is elected the bargaining representative. *Sundstrand Heat Transfer, Inc. v. NLRB*, 538

F.2d 1257 (7th Cir. 1976). The duty does not attach when the union's request is made in bad faith and/or to harass the employer.

2. Requirements for Information Requested.

a. Necessity of Good Faith Demand. A good faith demand or request by the union is a prerequisite to an employer's obligation to supply information. *Westinghouse Electric Supply Co. v. NLRB*, 196 F.2d 1012 (3d Cir. 1952).

b. Relevance and Reasonably Necessary Information. The information demanded must be relevant and "reasonably necessary" for the performance of the union's function as representative of the employees. *J. I. Case Co. v. NLRB*, 253 F.2d 149 (7th Cir. 1958).

3. Examples of Relevant and Reasonably Necessary Information.

a. Wage data;

b. Wage information concerning employees outside the bargaining unit;

c. Insurance and pension plan information;

d. Time study and incentive plan information;

e. Seniority information;

f. A request to have the union's Safety and Health Specialist inspect the employer's facility – *Klein Tools, Inc.*, 1994 NLRB LEXIS 767 (Sep. 21, 1994);

g. An environmental audit – *Detroit Newspaper Agency*, 317 N.L.R.B. 1071 (1995);

h. Customer complaints – *Resorts Int'l Hotel Casino v. NLRB*, 996 F.2d 1553 (3d Cir. 1993) (The Board found that employer must disclose identity and contact information for customers who complained of poor service unless the employer can show either that the customer requested or the employer promised confidentiality);

i. Medicaid cost reports – *New Surfside Nursing Home*, 330 N.L.R.B. 1146 (2000); and

j. Extent of use of contractors – *W. Penn Power Co. v. NLRB,* 394 F.3d 233 (4th Cir. 2005) (finding the extent of use of contractors was relevant to the union's attempt to police the company's compliance with specific provisions of CBA and that the company failed to make reasonable efforts to obtain information from contractors regarding the number of contract employees used).

4. Employer Defenses to the Duty to Provide Information.

a. Difference Between Employer Claim of "Inability to Pay" vs. "Unwillingness to Pay." A claim of inability to pay ("claiming poverty") requires that the company open its books to examination by the union. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956). The duty to furnish information is triggered only when an employer claims it cannot currently meet bargaining demands or cannot satisfy those demands during the term of the contract being negotiated. *Concrete Pipe & Prods. Corp.-Syracuse Div.*, 305 N.L.R.B. 152 (1991), *aff'd*, 983 F.2d 240 (D.C. Cir. 1993). Furthermore, the duty to provide information does not attach when, instead of claiming poverty, the employer claims that its reason for refusing to make concessions is a competitive disadvantage in the market in which it operates. *Nielsen Lithographing Co.*, 305 N.L.R.B. 697 (1991).

In *Lakeland Bus Lines, Inc. v. NLRB,* 347 F.3d 955 (D.C. Cir. 2003), the D.C. Circuit overturned a Board decision that the company's president had implicitly asserted an

inability to pay during union negotiations and that the company had, therefore, violated the NLRA by refusing to turn over its financial records and by unilaterally implementing its final offer in the absence of a valid impasse. In overturning the Board's decision, the court held that a letter sent to employees during contract negotiations laying out the company's bargaining position "to bring the bottom line back into the black" did not mean that the company based its bargaining position on an inability to pay. The court stated held that "[e]ven when an employer's statements suggest an inability to pay, no duty to disclose arises if that employer clarifies that it did not intend to plead financial inability."

In *AMF Trucking & Warehousing,* 342 N.L.R.B. 1125 (2004), the Board held that the employer's comments during contract negotiations that it had purchased the company in distress and that the company was still in distress and that it was fighting to keep the business alive were not synonymous with as assertion that the employer has or will have insufficient assets to pay. Accordingly, the employer did not unlawfully refuse to supply financial information to the union.

b. Confidentiality. Employers that attempt to defend on the grounds of confidentiality have attained limited success.

(1) Preserving the Investigatory Process. In *United States Postal Serv.*, 306 N.L.R.B. 474 (1992), the Board held lawful the employer's refusal to supply names of internal informants and audio/video recordings of employees suspended for drug-related offenses. The factor weighing in favor of the employer was the interest in maintaining confidential identity of the informants and the integrity of future investigations. In *Fleming Cos.*, 332 N.L.R.B. 1086 (2000), the Board reiterated that an employer is not required to provide witness statements to the union.

(2) Bargaining Over Confidentiality. The Board takes the position that an employer is entitled to bargain with a union to resolve confidentiality concerns. If these concerns are legitimate and substantial, an employer is entitled to discuss the confidentiality concerns and try to develop preventative measures tied to the release of the information. *Silver Bros. Co.*, 312 N.L.R.B. 1060 (1993). In *Roseburg Forest Prods. Co.*, 331 N.L.R.B. 999 (2000), the Board held that an employer violated § 8(a)(5) by failing to disclose medical information to a union concerning a disabled employee. The union requested the information after the employer assigned the employee out of seniority order to a sought-after job to accommodate the employee's disability. The employer, relying on its obligation under the ADA to keep medical information confidential, refused to comply with the union's request. The Board held that the employer must either provide the information promptly, or attempt to accommodate its confidentiality concerns and the union's need for the information.

(3) Assurances Required. When producing financial records, an employer has the right to demand assurances from the union that it will protect the confidentiality of the documents. *See King Soopers, Inc.,* 344 N.L.R.B. 842 (2005) (the Board balances the union's need for requested financial information against any legitimate and substantial confidentiality interests of the employer), *enf'd,* 476 F.3d 843 (10th Cir. 2007).

c. Lack of Relevance: Information About Other Plants. A union has a right to information about the operations of a nonunion plant run by the employer only if the union can show that the information is relevant and useful to its representation of employees it represents. *Bohemia, Inc.*, 272 N.L.R.B. 1128 (1984). In addition to

the requirement of relevancy, the Board also requires that the union show the specific scope of the information where it relates to employees outside the bargaining unit. *Island Creek Coal Co.*, 292 N.L.R.B. 480 (1989), *enf'd*, 899 F.2d 1222 (6th Cir. 1990).

Double-Breasted Operations. An employer is obligated to provide information as to its relationship with nonunion firms when the union reasonably believes the employer is operating a "double-breasted operation" or that the employer is contracting work away to a plant that is the employer's alter ego. *Pence Constr. Corp.*, 281 N.L.R.B. 322 (1986). To be entitled to information, the union's request must be related to the union's function as a bargaining representative.

d. Form of Information Supplied to Union. Generally speaking, the employer may supply information to a union in a form generally accepted in business; however, the information cannot be supplied in a manner so burdensome or time consuming as to impede the collective bargaining process. *Cincinnati Steel Castings Co.*, 86 N.L.R.B. 592 (1949).

An employer may also avoid violating its duty to bargain when it provides information to the union in a form other than that requested by the union. *Oil, Chem. & Atomic Workers Local Union No. 6-418 v. NLRB*, 711 F.2d 348 (D.C. Cir. 1983). When the employer allows the union free access to its records and fully cooperates with the union in answering questions, it does not have to thoroughly furnish information in a more organized form than that in which it keeps its own records. *NLRB v. Tex-Tan, Inc.*, 318 F.2d 472 (5th Cir. 1963).

5. Timeliness in Responding to the Union's Information Request. An employer must comply with a union's demand for information within a reasonable period of time. A lengthy delay in furnishing information can support an argument that the employer has violated § 8(a)(5) of the Act.

F. Management Rights, Power, Authority, and Functions. Upon certification or recognition of the union, management's exclusive right to manage has been lost. Even in the absence of a collective bargaining agreement, the presence of a union prevents management from making any changes in wages, hours, terms, or conditions of employment, unless and until it has bargained with the union to impasse or mutual agreement. In *Brooks v. NLRB*, 348 U.S. 96 (1954), the U.S. Supreme Court held that, generally, an employer must bargain with a union that has won an election for a year even if the employer believes the union has lost its majority status.

The Board holds that an employer is obligated to bargain regarding changes in terms and conditions of employment even during the term of the collective bargaining agreement, unless there is "a clear and unmistakable waiver" from the union. The collective bargaining agreement itself is the best and safest way to "prove" such a waiver. When a specific waiver can be discerned, the employer may take unilateral action. The Board holds that if there is a specific waiver, bargaining has effectively already occurred with regard to that issue. Therefore, unilateral action is proper.

A collective bargaining agreement simply memorializes the parties' negotiations. It can: (1) memorialize a whole series of "waivers" by the union, or (2) memorialize a whole series of limitations on management rights.

Management Rights Define a Strong Agreement. Management wants an agreement with few limitations. The agreement should contain strong language that evidences that the union has waived its right to negotiate on as many specifically identified subjects as possible. Thus, management will be able to continue to manage unilaterally during the term of the

contract just as before the union was certified. The U.S. Supreme Court has held that it is not a per se unfair labor practice to insist upon a broad management rights clause. *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395 (1952).

The Board has held that even when the parties have bargained on an issue, management does not have the automatic ability to implement its desires because a union waiver will not be presumed unless there is "clear and unequivocal evidence establishing that the union made a conscious decision to relinquish its rights." *Henry Vogt Machine Co.*, 251 N.L.R.B. 363 (1980), *enforcement denied*, 718 F.2d 802 (6th Cir. 1983).

Modern Requirements for Valid Management Rights. Many years ago, it was possible to retain management's right to manage by simply stating that management reserved all rights not given up through the agreement. Over the years, however, arbitrators and the Board have increasingly refused to find such broad language effective in retaining management's right to manage. Today, the only safe management rights clause sets forth and retains every specific management right that management intends to retain, resulting in such clauses often being of considerable length.

A contract clause reserving to management the right to determine "shift schedules and hours of work" was found to permit the employer to increase a regular Saturday overtime shift from five hours to eight, over union objection. *United Technologies Corp., Hamilton Standard Div.*, 300 N.L.R.B. 902 (1990). Where a reasonable interpretation of an arbitrator's decision was that the management rights clause authorized implementation of an absence control policy, the employer's implementation of such a policy during the term of the CBA was not an unfair labor practice. *See Smurfit-Stone Container Corp.*, 344 N.L.R.B. 658 (2005).

G. Employer Techniques in Negotiation. In determining bargaining techniques, the employer should first determine the long-term employee relations and financial objectives to be achieved. Also, at the onset of negotiations management should realistically evaluate its ability and willingness to withstand union concerted activity (e.g., a strike).

1. Importance of the Initial Contract. The first collective bargaining agreement is by far the most important because it sets the pattern for future negotiations. A union is generally weakest at the time the first contract is negotiated. Therefore, the union is most willing to make concessions at this time. Management should be able to substantially improve its position in terms of wages, hours, and terms and conditions of employment. Management should also be able to obtain an extremely strong management rights clause and, if it agrees to arbitration, impose a total restriction on the ability of the arbitrator to substitute his judgment for that of management.

The union is generally not as interested in wages or benefits in the first contract. It is much more interested in clauses that will strengthen its position and enable it to sink its roots deeply into the organization. Accordingly, it wants strong clauses regarding: (1) check-off; (2) arbitration; (3) seniority; and (4) grievance processing rights.

2. Ground Rules. During the first negotiating session, try to establish ground rules including: frequency of meetings; length of meetings; that noneconomic subjects will be discussed and agreement reached before turning to economic subjects; and taking of minutes.

3. Terms. When making detailed proposals, management must first assess the likelihood of success in obtaining detailed terms. If management proposes specific, detailed terms and is unsuccessful, management may be in a less favorable position when later administering the agreed upon contract.

4. Establish Credibility. Take steps to establish credibility. (e.g., explain the business reasons for your proposals).

5. Basic Considerations in Negotiations.

a. Take advantage of superior strength. If the employer is in a stronger bargaining position than the union, it is permissible for the employer to take advantage of this fact and "to use its advantage to retain as many rights as possible." *Chevron Oil Co. v. NLRB*, 442 F.2d 1067 (5th Cir. 1971). *See also Barry-Wehmiller Co.*, 271 N.L.R.B. 471 (1984). A union may also take advantage of its greater strength during bargaining.

b. Employers are generally able to determine internally the wage and fringe benefit levels that are necessary to sustain the organization. But, employers generally tend to be much less concerned about retaining as many rights as possible and maintaining the maximum degree of control through the negotiation of waivers. This may, in fact, be crucial in the long run.

c. Select a chief negotiator to negotiate for the company:

- She or he should do all of the talking to ensure a cohesive message unless it is previously understood that someone else from the management negotiating team will speak on a certain issue;
- Do not let a union negotiator trick your team into having someone else do the talking; and
- If necessary, recess the session in order to discuss or solidify the management's position.

d. Determine what wages and benefits are being paid by other employers in your industry and by other employers in your area. Use this information to assist in bargaining.

e. Cost out management's proposals as well as the union's proposals.

f. Try to bargain from management's proposals rather than from the union's proposals.

g. Do not accede too quickly to union demands. Certain demands can be key bargaining tools such as union security provisions, dues check-off, and successorship clauses.

h. If the union makes a costly wage proposal, do not state that you are financially unable to make such payments unless management is willing to supply financial information upon the union's demand. See the discussion in § II.E.4.A., above, of the difference between "pleading poverty" and arguing that a costly wage proposal will lead to competitive disadvantage.

i. Make final agreement on all contract provisions contingent upon reaching an overall agreement. To be effective, get union's agreement on this process at a ground rules session.

H. Important Contract Terms: Cornerstones of the Collective Bargaining Agreement.

1. Management Rights Clause. As noted above, employers should push for a strong management rights clause. Employers should aim for the right to make unilateral changes on any subject not specifically prohibited by agreement. The negotiator should then include a list in the contract of every change an employer might want to make during the term of the contract.

2. Zipper Clause. Absent a zipper clause, an employer is not relieved of the duty to bargain with regard to subjects that were neither discussed during negotiations nor embodied in any of the terms of the contract. A "zipper" clause may limit the issues that are subject to bargaining. The NLRB suggests a willingness to interpret zipper clauses broadly, perhaps to the point of authorizing unilateral changes by the employer. *Columbus & Southern Ohio Electric Co.*, 270 N.L.R.B. 686 (1984), *enf'd*, 795 F.2d 150 (D.C. Cir. 1986). More commonly, though, the Board has recognized that the normal function of such clauses is to maintain the status quo, not to facilitate unilateral changes. *Murphy Oil USA, Inc.*, 286 N.L.R.B. 1039 (1987); *Suffolk Child Dev. Center, Inc.*, 277 N.L.R.B. 1345 (1985).

A zipper clause creates a waiver by the union of bargaining during the term of the contract. The language in this area of the law has become relatively standardized, and unions are frequently willing to accept such clauses with little resistance. Employers may also wish to push for a waiver by the union of bargaining over the decision to make a unilateral change and the impact of that decision when management makes unilateral changes during the term of the contract.

3. Grievance and Arbitration Clause. Tailor the grievance and arbitration clauses to meet management's objectives.

a. Definition of Grievance. A grievance is a dispute that a union represented employee or the union has with the employer regarding the employment relationship. These disputes tend to involve various levels of discipline and contract interpretation. A grievance may also indicate what the contract does not say about an issue as well as the prior practice of the parties regarding the issue in dispute. Consider a limiting definition.

b. Who Can File a Grievance? Absent contractual language to the contrary, individual bargaining unit members and the local union may file grievances. Some contracts include language providing that the employer may file grievances against the union.

c. Timeliness of Grievance Filing. Generally, a grievance procedure will consist of a series of steps in which different levels of union and management leadership meet to attempt to resolve a problem in the employment relationship. Usually, each step in the grievance procedure creates a mini "statute of limitations" with a window period in which to file the grievance and bring the grievance to the next step in the process. Failure to follow these time limits may nullify a grievance to the extent that an arbitrator would find it not procedurally arbitrable. If the contract does not contain time limitations for grievances, an arbitrator may still refuse to decide the merits of a grievance if the grievance is filed so long after the acts giving rise to the grievance that it would be unfair to the employer for the matter to go forward.

d. Limiting Arbitration of Certain Grievances. Parties are free to negotiate the issues that are to be arbitrable. For example, in *International Bhd. of Teamsters, Local Union No. 371 v. Logistics Support Group*, 999 F.2d 227 (7th Cir. 1993), the court upheld the employer's refusal to arbitrate a grievance over an employee's termination, finding that the employer had acted within its rights under the arbitration clause of the collective bargaining agreement since the agreement specified clearly that the employer had exclusive authority over discharge decisions. Further, since the agreement specified that only alleged violations of express contractual terms were grievable, the union was not entitled to arbitrate.

e. Pay for Grievance Handling. Unions want pay for grievance handling so that stewards and employees will have an incentive to spend time not only in the processing of old grievances, but also in the development of new ones. Management should avoid such clauses. Ambiguous words such as pay for time spent "processing" grievances may be construed to include time spent roving the premises to determine whether grievances exist.

f. Authority of Arbitrator. The parties may agree upon limitations to the arbitrator's authority. However, in the absence of explicit limits on his or her authority, arbitrators must "hang their hat" on a contractual provision in deciding a grievance. If the decision fails to "draw its essence from the contract," violates public policy, or if the arbitrator shows a great deal of bias, the decision may be overturned in court. *See United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29 (1987); *Beaird Indus. Inc. v. Local 2297 Int'l Union,* 404 F.3d 942 (5th Cir. 2005) (where contract clearly and unambiguously preserved the company's right to subcontract with no limits, the Fifth Circuit reversed the arbitrator's decision ordering the employer to restore subcontracted work to bargaining unit employees, finding "the Arbitrator has failed utterly to draw his conclusions from the essence of the CBA.")

In *Totes Isotoner Corp. v. Int'l Chem. Workers Union Council,* 2008 U.S. App. LEXIS 14603 (6th Cir. 2008), *supplemental op.,* 532 F.3d 405 (6th Cir. 2008), the court held that the arbitrator exceeded his authority when he interpreted a subsequent CBA during a supplemental proceeding to address the employer's alleged violation of his original award under an earlier CBA. In this case, the employer unilaterally increased the costs of health care premiums under the 1998 CBA, for which the union filed a refusal to bargain in good faith. The arbitrator found in favor of the union and the employer complied up to the beginning date of the 2002 CBA. The union complained to the arbitrator that the employer was not in compliance with the original award and the arbitrator ruled in favor of the union. The Sixth Circuit affirmed the trial court's decision reversing the arbitrator's decision. The issue the court addressed was whether the arbitrator had authority to interpret the 2002 CBA in enforcing the original award during the supplemental compliance proceedings.

The court found that the parties did not submit a grievance for resolution under the 2002 CBA. Thus, the arbitrator acted outside his authority in opining that "if Management's decision was violative of the 1998-2001 agreement it is violative of the 2002-2007 agreement." The court rejected the union's argument that the employer's statutory duties to bargain in good faith were incorporated into a contractual recognition clause where the arbitrator did not rest his decision on the contractual recognition clause.

g. Loser Pays. Consider including language that arbitration expenses for both sides will be paid by the non-prevailing party. This may discourage the union from taking frivolous cases to arbitration.

4. Work Schedules and Hours of Work. Employers should push for as much flexibility in this area as possible. With just-in-time manufacturing becoming the rule, employers must fight hard to ensure that they can make scheduling decisions with little or no interference from a union. Employers should also attempt to secure broad rights in the assignment of overtime work to meet daily needs.

5. Seniority and Superseniority.

a. Seniority. The union wants it because: (1) long-term employees who do not advance into management are frequently strong union supporters; (2) aggressive, more junior employees on the way up are generally not strong union supporters; (3) making decisions by seniority spares the union from having to take positions between its members. Management should be cautious about the role of seniority because, while seniority may spare management from making unpopular choices, the limitation on management's ability to efficiently manage the workforce is obvious.

b. Superseniority for Union Stewards. The union wants superseniority to ensure it has representatives in the plant whenever possible and to increase the benefits and status of being a steward. Management should recognize: (1) there are legal limits to the ability to grant superseniority to union stewards; (2) it has little reason to make stewardship a "status" position; (3) it helps the union sink its roots in the organization.

6. No Strike Clause. A no strike clause, which is usually negotiated in exchange for a grievance and arbitration clause ("quid pro quo"), usually limits a union's members from striking over a grievance the employer refuses to adjust to their satisfaction. These clauses, however, may implicate further limits on the right to strike.

The union may be willing to agree to a clause in which it agrees not to "authorize" a strike during the contract term. If not, management should insist upon an article that: (1) prohibits all strikes, especially including sympathy strikes and boycotts; (2) includes a requirement that the union use its best efforts (spelled out with particularity) to stop any strike that occurs and that a failure to do so constitutes an authorization of the strike; and (3) provides that if the contract remains in effect pending the negotiation of a successor contract, then the no strike provision remains in effect as well. Employers should push for a clause that prohibits union members from engaging in unfair labor practice strikes during the term of the contract. A waiver of this statutory right must be "clear and unmistakable." *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983). The Board has found that a no strike/no lockout clause that specifically stated it was intended to prohibit conduct that would lead to the suspension of work due to labor disputes did not preclude employees from engaging in picketing a shareholders' meeting, which was held more than seventy miles away from the employees' worksite. *Engelhard Corp.*, 342 N.L.R.B. 46 (2004), *enf'd,* 437 F.3d 374 (3d Cir. 2006). Accordingly, the Board held that the employer unlawfully suspended the employees who engaged in the picketing.

7. Management Work Rules. Work rules are considered a mandatory subject of bargaining. *Tower Hosiery Mills, Inc.*, 81 N.L.R.B. 658 (1949), *enf'd*, 180 F.2d 701 (4th Cir. 1950). Unions are, at times, willing to give a broad waiver in the management rights clause giving management the right to establish and impose working and/or safety rules during the term of the agreement. This is generally preferable to including the work rules in the contract.

8. Successorship. The union wants such a clause to facilitate representation of employees of any successor company should the employer sell the facility. Moreover, such a clause may create an "action" against selling company. Management should avoid agreeing to a clause limiting its flexibility should the company sell because: (a) it could impede sale of the business even though it is not binding on successor; and (b) management could be held liable for breach of contract if the successor disavows the contract.

9. Union Dues Check-Off. The union wants a dues check-off so it will not have to alienate employees when collecting dues. A dues check-off reduces net pay to employees who often forget about it and blame management for the smaller paycheck. Under most circumstances, management should be cautious about refusing to agree to such a clause. In 1985 the Board overruled prior law and upheld an employer's insistence to impasse on discontinuing dues check-off, where the employer's rationale was to avoid the check-off being used to prove management knowledge of union membership in unfair labor practice cases. *American Thread Co.*, 274 N.L.R.B. 1112 (1985). In determining whether to agree to dues check-off, employers should consider changes in law, the likelihood of a strike, bargaining over cost, and whether they deduct for other "causes."

10. Discipline and Discharge. The union usually will propose a "just cause" provision or some similar limitation on management's authority to discipline and discharge. There is no per se requirement that management agree to a "just cause" provision, and management may be able to avoid such language, but beware of a charge of overall bad faith. Consider a "substantial evidence" standard as a possible compromise. Always bargain to limit an arbitrator's discretion.

11. Advance Planning for Renegotiation at Contract Expiration. When the contract expires, the union may strike. The employer can act now to increase its leverage down the road. Strikers may (or may not) be entitled to vacation pay and group health insurance while on strike, depending upon contract wording. *Nuclear Fuel Serv., Inc.*, 290 N.L.R.B. 309 (1988) (vacation pay lawfully denied to strikers since not "accrued" under language of contract).

I. Preparation for Negotiations and Possibility of a Strike.

- ***Select a Management Team.*** The employer should consider its goals in negotiations and select team members who can best work to meet these goals. Also, selecting a speaker with a good relationship with union leaders may avert a strike and promote advantageous negotiations;
- ***Compile Economic Data.*** The use of economic data may be crucial. If employees are supplied factual basis for employer concerns, labor strife may be avoided even though concessions are gained;
- ***Set Ground Rules for Negotiations.*** Setting ground rules may lead to more harmonious negotiations. If employees are clear on when/where meetings can be held, what will be discussed at each meeting, etc., negotiations will run more smoothly. Note that an employer can be found guilty of a refusal to bargain if it is not fair regarding time/place of negotiations;
- ***Develop a Theme for Particular Negotiations.*** A theme is important so employees understand the employer's concerns. For example, if an employer is attempting to dramatically improve efficiency, then its theme could be the tying of economic benefits to an efficiency goal plan. Thus, whenever an economic issue comes up, the management team can push the union to discuss efficiency;
- ***Communicate With Bargaining Unit.*** Communications to employees during negotiations may be critical and may be a means of pressuring union leaders who often limit the information employees get from the bargaining table. The Board has recognized the employer's right to communicate directly with its employees provided the union is not bypassed. *United Technologies Corporation*, 274 N.L.R.B. 609 (1985), *enf'd*, 789 F.2d 121 (2d Cir. 1986); and

- ***Use of Mediation Services.*** If the company is in a strong bargaining posture, use of a mediation service is less important. If, however, company is not prepared to take a strike, use of mediation service may help to move union off adamant positions. Do not automatically involve mediation service; timing is important. Employers should recognize the goal of mediation services. In using mediation service, employers should recognize that they may be bargaining with the mediator as the other side's representative.
- ***Ensure Availability of Legal Counsel.*** Ensure the availability of legal counsel with experience in strike situations on a day-to-day basis.

IV. STRIKES, LOCKOUTS AND BOYCOTTS

A. Definition of "Concerted Activity." Concerted activity includes the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of employees' own choosing, strikes, boycotts, picketing, and leafleting. The concerted activity must also be protected for the Act to shield employees from employer discipline. Note that §7 of the NLRA gives covered employees the right to engage in concerted activities even though no union activity is involved and even though no collective bargaining is contemplated by the employees involved. *NLRB v. Phoenix Mutual Life Insurance Co.*, 167 F.2d 983 (7th Cir. 1948).

B. Types of Strikes. There are three types of strikes – economic strikes, unfair labor practice strikes, and illegal (unprotected) strikes.

1. Economic Strikes. Economic strikes generally seek, in some lawful manner, to change some facet of the employment relationship, i.e., wages, hours, terms and conditions of employment.

Economic strikers may be permanently replaced; that is, strikers have no statutory claim to their jobs if they strike for economic ends and employers may replace them with new employees on a permanent basis. An employer bears the burden of demonstrating a replacement's permanent status. *O.E. Butterfield, Inc.*, 319 N.L.R.B. 1004, 1006 (1995). Thus, employers should provide permanent replacements with documentation noting their status as such.

In *Jones Plastic & Eng'g Co.*, 351 N.L.R.B. 61 (2007), the Board held that an employer can show that it hired permanent replacements for economic strikers even though the replacements are considered to be at-will employees under state law. The decision in *Jones* overruled the Board's prior holding in *Target Rock Corp.*, 324 N.L.R.B. 373, 374 (1997), *enf'd* 172 F.3d 921 (D.C. Cir. 1998), in which the Board held that proof of at-will employment "obviously" did not support the employer's position that its striker replacements were permanent.

If there are insufficient jobs for the economic strikers to fill upon their unconditional offer to return to work, they need not be immediately reinstated, but must be placed on a preferential hiring list from which the former economic strikers must be rehired to fill openings as they occur prior to hiring new employees. *Laidlaw Corp.*, 171 N.L.R.B. 1366 (1968), *enf'd*, 414 F.2d 99 (7th Cir. 1969). Permanent replacements who lose their jobs through a strike settlement in which the employer agrees to terminate them and return the replaced strikers may sue the employer for damages. *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983). *But see Tobin v. Ravenswood Aluminum Corp.*, 838 F. Supp. 262 (S.D. W. Va. 1993), in which the court dismissed most of the claims filed against the employer by employees who were hired during a strike but were let go when the strike

was settled. The court reasoned that the replacements signed forms releasing all claims against the employer in exchange for one month's pay, accumulated vacation, and the employer's contribution of medical insurance for three months. Therefore, the replacements were without a remedy.

2. Unfair Labor Practice Strikes. An unfair labor practice strike is a strike, in whole or in part, over employer unfair labor practices. An economic strike may be converted into an unfair labor practice strike due to employer unfair labor practices. The commission of an unfair labor practice during a strike does not automatically convert the strike into an unfair labor practice strike. Rather, the union or the NLRB must show that the unlawful conduct was a factor in prolonging the strike. *F.L. Thorpe & Co. v. NLRB*, 71 F.3d 282 (8th Cir. 1995).

Employees can only be temporarily replaced and not permanently replaced in an unfair labor practice strike. They must be offered their jobs back upon making an unconditional offer to return to work. *Trading Port, Inc.*, 219 N.L.R.B. 298 (1975).

3. Unlawful Strikes (Unprotected). Even if a strike has a lawful goal, when unlawful methods are used to achieve that goal, the strike may be declared unprotected.

a. Employee Rights. Employees engaged in an unprotected strike may be discharged with no right of reinstatement.

b. Examples of Unlawful/Unprotected Strikes.

- Repeat, intermittent, or quickie-type strikes. In *Audobon Health Care Center,* 268 N.L.R.B. 135 (1983), nurses' aides at a nursing home refused to work in a section of the facility left open by another aide, who had left work early because of illness. The nurses' aides were discharged. The Board found that since they did not completely walk off the job, but engaged in a partial strike, their actions were unprotected and their terminations were lawful.

  Work stoppages that extend beyond a reasonable period of time. Although employees have a § 7 right to engage in protected, concerted activity, such as peaceful work stoppages, to protest their terms and conditions of employment, if that protest continues beyond a reasonable period of time, the work stoppage may be determined to be unprotected. *See, e.g., Cambro Manufacturing Co.,* 312 N.L.R.B. 634 (1993) (when an in-plant stoppage is peaceful, focused on a specific, job-related complaint, and causes little disruption of production by those employees who continue to work, employees are entitled to persist in their in-plant protest for a reasonable period of time; employees' failure to return to work after being told a second time by their supervisor that the plant owner would meet with them in the morning resulted in a forfeiture of the Act's protection); *Quietflex Mfg. Co.,* 344 N.L.R.B. No. 130 (2005) (peaceful twelve-hour protest of eighty-three employees was protected concerted activity but lost its protection when the employees refused to vacate employer's property after being told to return to work or leave for the second time because refusing to leave the property served no protected employee interest and interfered with the employer's use of its property). In other cases, shorter, peaceful protests have been held to be protected. *See, e.g., Roseville Dodge, Inc. v. NLRB,* 882 F.2d 1355 (8th Cir. 1989) (court agreed with the Board that employees who peacefully remained at their work stations in a sincere effort to talk with management concerning their protest over wages did nothing wrong or illegal; the work stoppage was a peaceful attempt by unsophisticated workers to notify the

company, which did not have a grievance procedure, of their dissatisfaction with working conditions because other methods of communication had proven futile.)

- Striker misconduct. Employees engaged in an economic or unfair labor practice strike can lose the protection of the Act by engaging in improper conduct on the picket line. The Board holds that verbal misconduct can justify denial of reinstatement to a striker, provided that the misconduct "may reasonably tend to coerce or intimidate" other employees. *Clear Pine Mouldings, Inc.*, 268 N.L.R.B. 1044 (1984), *enf'd*, 765 F.2d 148 (9th Cir. 1985). This includes conduct that blocks ingress or egress. *Capital Bakers Div. of Stroehmann Bros. Co.*, 271 N.L.R.B. 578 (1984). A union can be held liable for damages for the actions of its members if the union's officers or members authorized, participated in, or ratified tortious acts. *Laborers' Int'l Union v. Rayburn Crane Serv., Inc.*, 559 So. 2d 1219 (Fla. 2d DCA 1990). Employees seeking to engage in direct dealing or bargaining with their employer in circumvention of a majority union's contract could be deemed to be engaged in unprotected conduct. *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50 (1975).
- Failure to file notice with FMCS. In *Boghosian Raisin Packing Co.,* 342 N.L.R.B. 383 (2004), the Board held that an employer legally fired economic strikers based on the union's failure to notify the Federal Mediation and Conciliation Service (FMCS) of the existence of a labor dispute that might lead to a strike as required by § 8(d) of the NLRA. The failure to provide the notice, even though it was caused by the union's clerical error, rendered the strike illegal, thus the strikers could be fired.

4. Strikes In Breach of a No-Strike Clause. In *Indiana & Michigan Electric Co.*, 273 N.L.R.B. 1540 (1985), *enf'd*, 786 F.2d 733 (6th Cir. 1986), a contract clause required the union to disavow publicly any unlawful strike, and to take whatever affirmative action was necessary to bring about a quick termination of the strike. The Board held that the employer's five-day suspensions of two union shop stewards who participated in and took no action to halt the work stoppage did not violate § 8(a)(3) or 8(a)(l) of the Act even though lesser discipline was imposed on other employees who were not leaders in the union.

In *Engelhard Corp. v. NLRB,* 437 F.3d 374 (3d Cir. 2006), the Third Circuit affirmed the Board's determination that employees who engaged in peaceful picketing at the employer's corporate headquarters did not violate a no-strike provision in the employees' collective bargaining agreement because it did not involve any work stoppage at the plant, which was 50 miles away from the headquarters. Accordingly, the court denied the employer's petition for review of the Board's decision that its suspension of the employees who engaged in the picketing violated §§ 8(a)(1) and (3).

C. Employer Rights During Strike.

1. Hiring of Replacements. An employer is free to advertise for help during a strike. Be careful of state laws concerning disclosures about the strike in such advertising.

2. Use of Nonbargaining Unit Employees and Contractors to Perform Bargaining Unit Work. In addition to having the right to hire permanent replacement employees in an economic strike, a company can subcontract its work to discharge employees who engage in an unlawful strike, and temporarily replace unfair labor practice strikers. The Board, however, takes the position that a "permanent" subcontract must be bargained

about before implementation, even in response to a strike. *See Land Air Delivery, Inc. v. NLRB*, 862 F.2d 354 (D.C. Cir. 1988). An employer also has the right to have supervisors, salesmen, and other nonunit employees perform the unit work during the strike.

3. Lockout. An employer may lockout all or part of the unit employees to apply economic pressure in support of its bargaining goals.

4. Implementation of Last Offer. An employer can implement the terms of its last offer if impasse has been reached. The employer may, if it is winning a strike, lawfully withdraw prestrike concessions made to avoid the strike and otherwise modify its offer in recognition of its increased "economic muscle" so long as it is not done with "an intent to frustrate the bargaining process and thereby preclude the reaching of *any* agreement." *Barry-Wehmiller Co.*, 271 N.L.R.B. 471 (1984).

D. Rights of Strikers.

1. Right to Return to Work. Unfair labor practice strikers may return to work upon their unconditional offer, and the employer must reinstate them. This may result in firing replacements because every employee on an unfair labor practice strike has a right to return to work limited only by the employer's valid need for employees. Economic strikers, however, may be permanently replaced, and, upon offering to return to work, may be placed behind permanent replacements hired in their absence.

2. Right to Cross Picket Line and Work. Just as employees have the § 7 right to engage in the concerted activity of striking and picketing, they also have the right not to engage in such activity. Therefore, employees may cross the picket line and work, but should resign from the union before doing so or they face the possibility that the union may fine them and seek enforcement of those fines in state court. *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967).

E. Rights of Strike Replacements. Strike replacements may come from inside or outside the company. The employer may set new terms and conditions of employment for striker replacements even in the absence of an impasse in bargaining. *Marbro Co.*, 284 N.L.R.B. 1303 (1987), *aff'd*, 310 N.L.R.B. 1145 (1993). The Board permits an employer to permanently replace an employee by shifting a nonstriking employee to fill a striking employee's job; however, it must be clear that this is being done on a permanent basis. A company should keep a good supply of employment applications on hand in order to contact these applicants should a strike occur. The Board holds that the date the employer commits to make a replacement employee permanent is controlling, not the date the employee actually begins working. If a company decides to employ permanent replacement employees, it is important to keep those employees on the job after the strike ends and not give in to union demands that replacements be discharged with the strikers getting their former positions back. Employees who cross a picket line and return to work during a strike may be retained as permanent replacements when the strike is over, even if full-term strikers have more seniority. *Trans World Airlines, Inc. v. Independent Federation of Flight Attendants*, 489 U.S. 426 (1989).

In a strike situation, one of the major problems for an employer is determining whether the strike will be deemed to be an unfair labor practice strike or an economic one. Back pay can be considerable should the employer erroneously conclude that the strike is an economic strike. Under COBRA, a strike may constitute a qualifying event that will allow the striking employee to obtain sixty or more days of health insurance protection without any requirement of immediate payment.

F. Lockouts. The Board and courts have recognized both offensive and defensive lockouts.

1. Defensive Lockouts. A defensive lockout is lawful when the employer, in anticipation of a strike, uses a lockout to avoid unusual operational problems or economic losses over and beyond the ordinary losses incurred during a strike. The lockout, however, may not be tainted by union animus. A defensive lockout can also be justified in a multi-employer setting when the lockout is meant to avoid a "whipsaw strike" against one member of the multi-employer group. A "whipsaw strike" is an attempt by a union to break up a multi-employer bargaining unit by striking only one member. This divide and conquer philosophy could provide unions with a means of overpowering each individual employer if and when the unit breaks up.

2. Offensive Lockouts. According to the U.S. Supreme Court, the use of offensive lockouts does not violate the Act. *See American Ship Bldg. Co. v. NLRB*, 380 U.S. 300 (1965) (finding no violation of the Act where intent of employer in locking out employees is merely to bring about a settlement of a labor dispute on terms favorable to the employer); *NLRB v. Brown*, 380 U.S. 278 (1965).

However, the Board has rejected a hospital's argument that its refusal to hire workers who were striking another hospital was a legal economic weapon analogous to offensive lockouts permitted in *American Ship Building.* In *Allina Health Sys.*, 343 N.L.R.B. 498 (2004), in a 2-1 decision, a panel of the Board held that the hospitals' refusal to hire as temporary workers nurses who were striking another hospital was an unfair labor practice. In this case, the respondent hospitals were part of a "coordinated bargaining plan" in which the hospitals bargained separately with the nurses' union but coordinated their strategy and agreed to help each other withstand a strike if one occurred. All but one of the hospitals reached an agreement with the union. The union commenced a strike at the hospital with which it had not reached an agreement. The other hospitals told temporary agencies not to send striking nurses to them as temporary workers and threatened to fire the agencies who did so.

The ALJ held that the refusal to hire the striking workers was an unfair labor practice and the Board affirmed this decision. The Board rejected the hospitals' argument that their refusal to hire the striking nurses was motivated only by a desire to support their coordinated-bargaining partners and to protect their economic interests and not by antiunion animus. The Board held that the hospitals had resolved their economic concerns through collective bargaining with the union and were not parties to the labor dispute between the union and the hospital subject to the strike. The Board pointed out that the hospitals had abandoned multi-employer bargaining in favor of individual bargaining and that if they had wanted to protect themselves from the consequences of what other hospitals might agree to, they could have remained in the multiemployer bargaining relationship with the union.

3. Partial Lockout. In *Local 15, IBEW v. NLRB,* 429 F.3d 651 (7th Cir. 2005), the Seventh Circuit held that an employer's lockout of employees who were on strike at the time of the union's unconditional offer to return to work, while not locking out employees who, prior to the unconditional offer, had returned or scheduled a return to work was an unfair labor practice. The Seventh Circuit held that the partial lockout was not justified by operational needs because the employer had successfully continued its business operations before any employees crossed over, thus it failed to demonstrate that it needed the crossovers and non-strikers to continue its business operations. "Simply put, to justify a partial lockout on the basis of operational need, an employer must provide a reasonable basis for finding some employees necessary to continue operations and

others unnecessary." The court also found that the partial lockout was not justified as a lawful means of economically pressuring holdouts. The court rejected the employer's argument that additional pressure was not needed for crossovers since they had already demonstrated they were no longer committed to the union's position, since there was no evidence regarding why the employees crossed over. Further the court noted that when the employer announced the partial lockout, all employees in the collective bargaining unit had removed themselves from the economic strike by offering to return to work. The court found that the employer's action in this case appeared to demonstrate antiunion animus because the only distinction between the employees who were locked out and those who were not was their participation in union activities. Thus, the court held that the partial lockout was an unfair labor practice.

4. Replacements. The Board and courts have permitted an employer to lock out employees and temporarily replace them. In *Harter Equipment, Inc.*, 280 N.L.R.B. 597 (1986), the Board held that, absent specific proof of antiunion motivation, an employer may hire temporary replacement employees after locking out permanent employees for the sole purpose of bringing economic pressure to bear in support of the employer's legitimate bargaining position.

G. Maintenance of Benefits and Contract Provisions During Strike.

1. General Rule. An employer may not refuse to pay "accrued" benefits to strikers, while paying them to nonstrikers. *See NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967). On the other hand, an employer is not required to "compensate" strikers for the time they are not working. Determining what constitutes an "accrued" benefit may be difficult. *See Amoco Oil, Co.*, 286 N.L.R.B. 770 (1987); *Texaco, Inc.*, 285 N.L.R.B. 241 (1987).

2. Cessation of Insurance Premium Payments. Unless otherwise obligated under the collective bargaining agreement, an employer may discontinue payment of life, health and disability insurance premiums for striking employees during the period they are on strike. *Sherwin-Williams Co.*, 269 N.L.R.B. 678 (1984); *Simplex Wire & Cable Co.*, 245 N.L.R.B. 543 (1979); *Trading Port, Inc.*, 219 N.L.R.B. 298 (1975). Under COBRA, an employer must offer a striking employee the right to maintain coverage and assume payments that otherwise would be made by the employer. *Communications Workers of America, Dist. One v. Nynex Corp.*, 898 F.2d 887 (2d Cir. 1990). Thus, employees have a forty-five day grace period in which to submit premium payments for continuing coverage. *Id.*

3. Beware of Discriminatory Application. The above cases deal with the employer's right to cease payments under § 8(a)(5) of the Act, describing the employer's duty to bargain. If the employer extends benefits to other employees who are not in active service, the employer may be found in violation of § 8(a)(3) of the Act (prohibiting discrimination) if the employer decides not to extend benefits to strikers because they are not in active service.

4. Unemployment Compensation for Striking Employees. In January 2009, the New Jersey Supreme Court held that striking nurses qualified for unemployment benefits since a loss of revenue attributable to the strike was not the equivalent of a "stoppage of work" within the intended meaning of the statute regarding disqualification of benefits because the hospital continued to function at full service despite the considerable financial difficulties produced by the strike. *Lourdes Medical Center of Burlington County v. Board of Review*, 197 N.J. 339 (2009). New Jersey law denies unemployment benefits if the unemployment is due to a "stoppage of work." Because the hospital

functioned at higher than 80% capacity, there was no "stoppage of work" and the nurses who struck were thus entitled to unemployment.

H. Preparing for a Possible Strike.

1. Communications.

a. Bargaining Unit Employees. Consider explaining to employees what they can legally lose with respect to their wages and jobs as well as the right and intention of the company to operate during a strike. Do not promise employees any benefits or threaten them to get them to consider crossing the picket line.

b. Supervisors and Managers. Call a meeting of managerial, office, supervisory personnel, salespeople, and any other employees whom the employer has previously determined will work during a strike. Advise these individuals of the possibility of a strike, and instruct each on what she or he should do if a strike does occur. Cover the following points: what job each person will do; how they will report for work; where they will park; and when they will report for work. Advise all supervisory employees that the company expects them to report to work regularly and that if transportation is needed, it will be furnished.

2. Physical Steps to Protect Property and Persons. If some or all of the employer's parking is normally some distance from its operations, make arrangements to have the employees who will work during the strike park as close as possible. Determine how the union might sabotage the employer's operations if its employees walk out. If the employer receives advance word of an impending strike, ensure that all of the employer's property is fully covered by insurance. If the employer receives advance word of an impending strike, request that law enforcement officials be present on the day of the expected strike before the time the employees report for work and leave work, and for at least the first week of the strike. Make sure that gates are closed and locked and that all fences around the worksite are in good order. Employ all necessary security personnel to protect the property twenty-four hours a day. If shipments are to be moved in or out by railway or truck line, advise the railway or truck line of the labor dispute and the possibility of a strike and tell them the employer expects delivery to be made regardless of the picket line. Consider making arrangements with a private employment office for interviewing and hiring employees off site.

3. Legal Steps: Gathering Information. Assign at least two people to make a written record of everything said and done by strikers and pickets, giving names, time of day, date, actual words spoken, where incident occurred, and especially specific curse words or threats. Be aware that this must be done in lawful manner. Have a digital camera or videotaping equipment on hand with a knowledgeable operator to use in the event any incidents occur that should be photographed.

- Do NOT take pictures of the people peacefully picketing except to get one picture of each picket sign that has different wording; and
- Make arrangements to have a competent photographer, who is not timid, available for immediate call.

I. Settlement of Strike. When settling a strike, a primary consideration is future management credibility both as to maintaining positive employee relations and future bargaining relationships at both the facility involved and other company facilities.

J. Boycotts and Picketing.

1. Consumer Picketing and Employer Property Rights. A union may picket a secondary employer (i.e., an employer with whom the union does not have a dispute) to

persuade consumers not to purchase a specific product produced by a primary employer (i.e., an employer with whom the union has dispute). For example, the Supreme Court held it was lawful for a union to picket outside a grocery store to persuade employees not to buy Washington State apples supplied by an employer with whom the union had a dispute. *NLRB v. Fruit & Vegetable Packers & Warehousemen Local 760*, 377 U.S. 58 (1964). However, when a product provided by the primary employer has become an integral part of the secondary employer's entire offering, so that any product boycott is in actuality a boycott of the entire business of the secondary employer, such a boycott becomes unlawful. *Honolulu Typographical Union v. NLRB*, 401 F.2d 952 (D.C. Cir. 1968).

Section 8(b)(4)(ii)(B) of the NLRA makes it unlawful for a labor organization to threaten, coerce or restrain any person engaged in commerce where an object thereof is forcing any person to cease doing business with any other person. In other words, a union cannot picket a secondary employer in an effort to have him stop doing business with a primary employer, i.e., a secondary boycott. In some industries, such as construction, the primary employer is on site at a secondary employer's premises. To be lawful, picketing at a common site must meet the following conditions: (1) the picketing is limited to times when the primary employer is on site at the primary employer's premises; (2) the primary employer is engaged in its normal business at the site when the picketing takes place; (3) the picketing is reasonably close to the site; and (4) the picketing discloses that the dispute is with the primary employer. *Sailors Union of the Pacific (Moore Dry Dock Co.)*, 92 N.L.R.B. 547, 549 (1950). *See also Southwest Reg'l Council of Carpenters,* 2011 NLRB LEXIS 34, 356 NLRB No. 88 (Feb. 3, 2011) (unions' display of banners at two secondary employers' construction jobsites did not constitute picketing because they lacked the element of confrontation and were not disruptive of the secondary employers' normal operations or otherwise coercive; banners were not signal picketing – the use of the term "labor dispute" on the banners was not a "prearranged or generally understood signal" to any employees to cease work) (citing *Carpenters Local 1506 (Eliason & Knuth of Arizona, Inc.*), 355 NLRB No. 159 (2010))

In *NLRB v. Babcock & Wilcox Co.,* 351 U.S. 105 (1956), the Court upheld the right of the employer to exclude nonemployees from the employer's property except where (1) the organizational activity was directed at employees who are inaccessible through other means; and (2) "the employer's notice or order does not discriminate against the union by allowing other distribution." These two exceptions to the rule that an employer may keep out nonemployee union organizers have come to be known as the "inaccessibility" exception and the "discrimination" exception. *See Salmon Run Shopping Ctr., LLC v. NLRB,* 534 F.3d 108 (2d Cir. 2008).

In *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), the U.S. Supreme Court held that a private employer could keep nonemployee union organizers out of its parking lots unless there was no other reasonable means of communicating with employees. *See also United Food & Commercial Workers, Local No. 880 v. NLRB*, 74 F.3d 292 (D.C. Cir. 1996) (due to the availability of mass media, such as newspapers, radio, and television, it is virtually impossible for a union to have grounds to enter an employer's property to petition the employer's customers).

In *Salmon Run Shopping Center v. NLRB,* 534 F.3d 108 (2d Cir. 2008), the Second Circuit overturned a Board decision against the operator of an enclosed shopping mall. The Board found that the mall violated § 8(a)(1) by refusing to allow the Carpenters Union to distribute flyers to the public inside the mall. One of the flyers listed the benefits of union membership and the other alleged that a non-union contractor doing work for a

retailer/tenant of the mall did not pay "area standard" wages. The Board held that the mall denied the union access because it was a union seeking to engage in labor-related speech, which violated the "discrimination" exception.

The Second Circuit rejected this determination. The court found that the focus of a discrimination analysis under § 7 must be on the disparate treatment of two like persons or groups. "The standard for assessing discrimination must take account of the general rule that a private property owner need not provide a forum for expression on its property and may be arbitrary and inconsistent in its selection of speakers." Here, the court found no discrimination because there was no evidence in the record that any employer was permitted to communicate to the general public, through the use of mall facilities, its reasons for not paying area standard wages to members of a unionized trade. Nor was any competing labor group permitted to engage in efforts to organize members of their trade. Accordingly, the court overruled the Board's conclusion that the operator of the mall discriminated against the Carpenters' Union.

2. Handbilling. The second proviso to § 8(b)(4) affords great protection to labor organizations choosing to handbill. *NLRB v. Servette, Inc.*, 377 U.S. 46 (1964). The prohibitions on secondary boycotts do not reach peaceful distribution of the handbills at a mall, urging customers not to shop at the mall. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building Constr. Trades Council*, 485 U.S. 568 (1988). Handbilling can lose the protection of the proviso where it is combined with unlawful picketing. *Warshawsky & Co. v. NLRB,* 182 F.3d 948 (D.C. Cir. 1999).

3. Bannering. "Bannering" involves displaying large banners in front of businesses involved in on-going labor disputes to discourage customers from patronizing these businesses. In *Overstreet v. United Bhd. Carpenters & Joiners of America,* 409 F.3d 1199 (9th Cir. 2005), the Ninth Circuit held that peaceful bannering of a secondary employer, which did not involve patrolling or picketing, should not be enjoined because the NLRB was not likely to prevail on its unfair labor practice charges against the union. The court did not specifically hold that the banners are protected by the First Amendment, but noted that the union has a plausible argument that they are so protected. In this case, the court repeatedly emphasized that the conduct only involved bannering and handbilling, not picketing or patrolling.

In *United Bhd. of Carpenters & Joiners of Am., Local Union No. 1506 ,* 355 N.L.R.B. No. 159 (2010) (*Eliason*), the Board held that a union did not violate the NLRA's prohibition on secondary boycotts by displaying "shame on" banners attacking neutral employers who were doing business with companies with whom the union had a labor dispute. In finding that the display of stationary banners does not violate the Act, the Board held that the language of the Act and its legislative history "do not suggest that Congress intended Section 8(b)(4)(ii)(B) to prohibit the peaceful stationary display of a banner."

In this case, the union was involved in a labor dispute with four employers in the construction industry. As part of this dispute, the union displayed large banners at the facilities of three companies who did business with the primary employers. The union did not have a labor dispute with any of these secondary employers. The banners were 3 or 4 feet high and 15 to 20 feet long and read "SHAME ON [secondary employer]" in large letters, flanked on either side by "Labor Dispute" in smaller letters. At one of the locations, a restaurant called RA Tempe, the middle section of the banner read, "DON'T EAT 'RA' SUSHI." At each location, the banners were held stationary by union representatives. The union representatives also handed out fliers that explained that the dispute was with the primary employers and that the union believed by using one of the contractors, the secondary employers were contributing to the undermining of area labor

standards. Subsequently, one of the primary employers and two of the secondary employers filed unfair labor practice charges with the NLRB, arguing that the union violated the NLRA by displaying banners at the secondary employers' facilities.

The Board held that the text of the Act and its legislative history establish that Congress did not intend to bar displays of stationary banners. According to the Board, to be illegal under the secondary boycott provision, the activity must "threaten, coerce or restrain." In this case, the Board found no evidence that the union threatened, coerced or restrained the secondary employers or anyone else. The Board held that Supreme Court precedence interprets the words "coerce" or "restrain" to require "more than mere persuasion" and held that "here, however, there is nothing more."

In the past, the Board has interpreted this provision to prohibit picketing and disruptive or otherwise coercive nonpicketing conduct by a union directed toward a neutral employer. However, the Board has found that peaceful handbilling does not violate the secondary boycott provision. According to the Board, the display of stationary banners in this case is more like handbilling and is noncoercive conduct falling outside the proscriptions of the secondary boycott provisions. "Nothing in the legislative history suggests that Congress intended to prohibit the peaceful, stationary display of a banner on a public sidewalk."

The Board found that the banner displays in this case did not constitute such proscribed picketing because they did not create a confrontation. The Board noted that the union representatives did not hold the banners in a way that blocked the entrance to the secondary sites or required those wishing to enter or exit the sites to confront the banner holders. "Banners are not picket signs. Furthermore, the union representatives held the banners stationary, without any form of patrolling." *See also Southwest Reg'l Council of Carpenters,* 2011 NLRB LEXIS 34, 356 NLRB No. 88 (Feb. 3, 2011) (finding the banners at issue in that case were, for all relevant purposes, the same as the conduct found lawful in *Eliason*, thus the unions' conduct did not violate § 8(b)(4)(ii)(b)).

The dissent argued that the majority opinion puts neutral employers "right back into the fray" by allowing unions to target secondary employers with large banners and predicted that the decision will foster an increase in secondary boycott activity.

4. "Street Theater" and Inflatable Rats. In *Kentov ex rel. NLRB v. Sheet Metal Workers' Int'l Ass'n, Local 15, AFL-CIO*, 418 F.3d 1259 (11th Cir. 2005), the court held that the union's conduct of carrying out a mock funeral procession, including a union representative in a grim reaper costume and funeral music, was more like secondary picketing than peaceful handbilling and thus enjoinable. Additionally, an NLRB Administrative Law Judge has found the use of an inflatable rat, along with aggressive picketing, constituted an unlawful secondary boycott and was an unfair labor practice. *See Mid-Atlantic Reg'l Council of Carpenters,* 2006 NLRB LEXIS 80 (2006), *judgment entered, injunction granted,* 2010 NLRB LEXIS 442 (Nov. 2, 2010).

5. Unlawful Secondary Activity. Section 8(b)(4) is typically thought of as secondary boycott picketing and strikes; however, § 8(b)(4) conduct goes beyond secondary boycotts. Section 8(b)(4) prohibits a union from unlawfully inducing or encouraging employees to engage in a strike and from threatening, coercing, or restraining any person engaged in commerce, in order to:

a. Force an employer or self-employed person to join a labor organization or enter into an agreement that is considered a hot cargo agreement, i.e., an agreement prohibited by §§ 8(e)-8(b)(4)(A);

b. Force a business (or other "person") to cease doing business with another business or person and/or to bargain with a union that has not been certified, § 8(b)(4)(B);

c. Force an employer to recognize or bargain with one union when another union has been certified by the Board to represent the employees of the employer, § 8(b)(4)(C); or

d. Force an employer to assign particular work to employees in a particular union or trade rather than some other union or trade. There need not be two competing labor organizations seeking work; rather it may be a violation of this section if an employer assigns work to nonunion employees and a union wants the work for employees it represents, § 8(b)(4)(D).

The protections of § 8(b)(4)(B) are not limited to employers covered by the Act but are available to any individual and are often used by knowledgeable public employers to prohibit unlawful picketing directed against their facilities.

An injured party may both file § 8(b)(4) charges and sue a labor organization for damages under § 303 of the Act for a violation of any of the four subparts of § 8(b)(4). For example, mass "shopping sprees" by the Teamsters were enjoined as an illegal secondary boycott in *Pye v. Teamsters Local Union No.122*, 61 F.3d 1013 (1st Cir. 1995). The Teamsters organized a demonstration at one of the employer's stores, took up most of the parking spaces, entered the store and created long lines, and generally purchased one small ticket item with large bills. After making purchases, they would leave the store and then re-enter to buy another small ticket item.

6. Picketing for Recognition Under § 8(b)(7). Section 8(b)(7)(C) of the Act gives unions the right to picket for recognition for a reasonable period of time not to exceed thirty days. In addition, picketing for the purpose of seeking recognition is prohibited when either the employer has lawfully recognized another labor organization or when a valid election has been conducted during the preceding twelve months.

7. Injunctive Relief Available. When unlawful picketing occurs in violation of § 8(b)(4) or 8(b)(7), the Board must seek injunctive relief against such activity.

8. State Court Jurisdiction. State courts retain jurisdiction to enjoin strikes marked by violence and mass picketing that block ingress and egress.

9. Picketing of Private Homes. Picketing of private homes may be banned by state or local law. In *Frisby v. Schultz*, 487 U.S. 474 (1988), an ordinance banning only picketing "before or about the residence of any individual" was upheld.

V. ADMINISTRATION OF THE COLLECTIVE BARGAINING AGREEMENT

A. Duty to Bargain During the Term of the Agreement: Waiver by Inaction. An employer must give prior notice and an opportunity to bargain before making a change in wages, hours, terms, or conditions of employment, unless it has reserved the right to make such changes without bargaining. However, if the union is put on notice but makes no attempt to bargain over the subject, the union may be held to have waived its right to bargain. *Hartmann Luggage Co.*, 173 N.L.R.B. 1254 (1968); *United Press Int'l*, 289 N.L.R.B. 309 (1988).

An international union's failure to approve a midterm renegotiation of a contract does not relieve the local union of the obligation to sign the amended contract. In *NLRB v. Local 554, Graphic Communications Int'l Union*, 991 F.2d 1302 (7th Cir. 1993), the Seventh Circuit held

that although midterm changes negotiated with and agreed to by a local union required international approval to validate the change, the local union's "dilatory behavior" in failing to submit the change to the international excused the need for the international's signature.

There is a continuing obligation to provide the union with requested information.

B. Handling Disputes During the Bargaining Relationship.

1. Union's Right to be Present at Employee Disciplinary Interviews (*Weingarten*). An employee in a disciplinary or investigatory interview may have a right to the presence of a representative under certain circumstances. Denial of that right may constitute an unfair labor practice. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975). The right to a representative does not arise unless and until the employee requests the presence of the representative. *Montgomery Ward & Co.*, 269 N.L.R.B. 904 (1984). The employer is not required to advise the employee of his or her right to a representative. In situations in which a *Weingarten* request has been made, the employer has three options: (a) discontinue the interview, remaining free to continue the investigation through other channels; (b) grant the request for a representative; or (c) allow the employee to choose between discontinuing the interview or continuing it without a representative (in which case, employee should be required to sign a written waiver of the right to a representative). In *Taracorp Industries*, 273 N.L.R.B. 221 (1984), the Board held that a *Weingarten* violation would not result in the remedy of reinstatement.

In *IBM Corp.*, 341 N.L.R.B. 1288 (2004), the Board overturned its decision in *Epilepsy Foundation of Northeast Ohio*, 331 N.L.R.B. 676 (2000), which held that the *Weingarten* right applies to nonunion employees as well as union employees. The Board now holds that this right only applies to unionized employees. The NLRB has swung back and forth on this issue depending upon its composition. The Board appointed under the Obama administration has a decidedly pro-union bent, so it is possible that non-union employees will soon be entitled to *Weingarten* rights. If and when this happens, the NLRB may apply its rule retroactively, which non-union employers should consider if an employee asks for a representative.

The Fourth Circuit has held that, absent special circumstances, an employee or union, not the employer, has the right to select who will represent the employee during an employer's investigation. As a result, the court concluded that the Board correctly found the employer guilty of an unfair labor practice when it denied the employee his choice of union representative in a disciplinary meeting. *See Anheuser-Busch, Inc. v. NLRB*, 338 F.3d 267 (4th Cir. 2003).

2. Arbitration vs. NLRB.

a. Employer's Consideration When Making Decisions. Employers should be mindful that arbitrators and the Board might apply different legal standards.

b. NLRB's Approach When Handling Charges. The Board applies three deferral policies when arbitration machinery is in place in a collective bargaining agreement.

- *Collyer Deferral (Collyer Insulated Wire,* 192 N.L.R.B. 837 (1971)). The Board should defer to existing grievance-arbitration procedures before either party's invocation of those procedures where: (a) the dispute arose within the confines of a long and productive collective bargaining relationship and there is no claim by the union that the employer is hostile to the employees' exercise of protected rights; (b) the employer credibly asserts its willingness to resort to arbitration under a clause providing for arbitration in a range of disputes that is broad enough to embrace the dispute before the Board; and

(c) the contract and its meaning lie at the center of the dispute. The Board retains jurisdiction over the dispute pending acceptable resolution consistent with the *Spielberg* doctrine set forth below. In *Caritas Good Samaritan Medical Center,* 340 N.L.R.B. 61 (2003), the Board dismissed a complaint that a hospital that unilaterally changed health insurance benefits violated the NLRA, holding that deferral to arbitration was appropriate because the situation met the factors identified in *Collyer* and the CBA language was ambiguous.

- *Dubo Deferral (Dubo Mfg. Corp.,* 142 N.L.R.B. 431 (1963)). The Board should defer to the grievance-arbitration procedure where the dispute has already been submitted to that procedure. Thus a charging party may avoid deferral only by forgoing its use of the grievance-arbitration machinery. In other words, a charge will be subject to *Dubo* if the individual and the union are voluntarily pursuing the matter through arbitration machinery. The practical effect is that a smart union representative will file a grievance and then file a charge. The Board will then give the charging party the choice of forum in which it wishes to pursue the matter.
- *Spielberg Deferral* (*Spielberg Mfg. Co.,* 112 N.L.R.B. 1080 (1955)). The Board refuses to pursue unfair labor practices and will defer to the findings of an arbitrator where: (a) the arbitration proceedings were fair and regular; (b) all parties agreed to be bound; (c) the arbitrator's decision is not repugnant to purposes/policies of the Act; and (d) the issue involved in the unfair labor practice case were presented to and considered by the arbitrator, or at least, there is no evidence to the contrary.

c. General Counsel Memorandum Addressing Deferral to Arbitral Awards and Grievance Settlements in Section 8(a)(1) and 8(a)(3) Cases. Acting General Counsel Solomon recently issued a Guideline Memorandum stating that the Board's current post-arbitral deferral policy[1] is at odds with that which prevails in other areas of employment law. Accordingly, the Memorandum urges the Board to adopt a new approach in cases that will be deferred under *Collyer* and *Dubo Mfg. Corp.* Specifically, the Memorandum states that in in §§ 8(a)(1) and 8(a)(3) statutory rights cases, the Board should no longer defer to an arbitral resolution unless it is shown that the statutory rights have been adequately considered by the arbitrator. This includes not only cases involving §§ 8(a)(1) and 8(a)(3) discipline and discharge, but also all other cases involving § 8(a)(1) conduct that is subject to challenge under a contractual grievance provision. Thus, the Memorandum provides the following instructions:

- Before making an "arguable merit" determination in considering *Collyer* deferral, Regions should take affidavits from the charging party and all witnesses in control of the charging party[2]. Only then, if the Region

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[1] The memorandum sets forth the Board's current standard, established in *Olin Corp.*, 268 N.L.R.B. 573 (1984), for accepting an arbitral award as the resolution of NLRA rights: "that the contract and statutory issues were 'factually parallel' and the arbitrator was 'presented generally with the facts relevant to resolving the unfair labor practice,'" and describes this standard as "overly deferential" when addressing statutory rights. GC Memorandum, p. 5. The Memorandum also states, however, that the *Olin* standard is appropriate for cases alleging violations of § 8(a)(5).

[2] The Memorandum also states that, at the Region's discretion, it may wish to undertake a more complete investigation before deciding whether to defer.

determines there is arguable merit to the charge and the other *Collyer* requirements are met, should the Region defer the charge.

- In all pending and future cases where the Region has deferred a charge to arbitration under *Collyer*, when the arbitral award issues, the Region must review the award to determine whether post-arbitral deferral is appropriate. The Region should determine if the party urging deferral can demonstrate that: (1) the contract had the statutory right incorporated into it or the parties presented the statutory issue to the arbitrator and (2) the arbitrator correctly enunciated the applicable statutory principles and applied them in deciding the issue. If the party urging deferral makes that showing, the Board defer unless the award is "clearly repugnant" to the Act. The award should be considered clearly repugnant if it reached a result that is "palpably wrong," i.e., the arbitrator's award is not susceptible to an interpretation consistent with the Act.

See Memorandum GC 11-05, January 20, 2011, available at: http://www.nlrb.gov/publications/general-counsel-memos. The Memorandum also urges the Regions to adopt a rule that gives no effect to a pre-arbitral grievance settlement unless the evidence demonstrates that the parties intended to settle the unfair labor practice charge as well as the grievance. If the evidence does so indicate, the Board should apply current non-Board settlement practices and procedures in deciding whether to accept the non-Board settlement. *Id.*

C. Obligations After Expiration of Agreement.

1. Continuation of Contract Terms. Upon expiration of the contract, the employer is obligated to maintain certain "core" employment terms from the agreement until a new agreement is reached or until impasse permits unilateral implementation of new terms.

2. Obligation to Arbitrate Grievances. The obligation may include an obligation to continue arbitration of grievances even after the contract expires. *Nolde Brothers, Inc. v. Bakery & Confectionery Workers Union*, 430 U.S. 988 (1977). In *Litton Financial Printing v. NLRB*, 501 U.S. 190 (1991), the U.S. Supreme Court held that post-expiration arbitration is required only with respect to disputes arising under the contract. Such disputes would include disputes involving facts or occurrences prior to contract expiration; rights that accrued or vested under the previous contract; or when, under normal principles of contract interpretation, the disputed contractual right survives expiration of the remainder of the agreement. *See also Operating Engineers Local Union No. 3 v. Newmont Mining Corp.*, 476 F.3d 690 (9th Cir. 2007) (termination that occurred after the expiration of a collective bargaining agreement is still arbitrable under the terms of the agreement if the circumstances giving rise to the termination occurred prior to the expiration of the agreement).

In *Cincinnati Typographical Union No. 3 , Local 14519 v. Gannett Satellite Info. Network*, 17 F.3d 906 (6th Cir. 1994), the Sixth Circuit Court of Appeals upheld an employer's refusal to submit to arbitration a disputed layoff that occurred after the contract expired. The court rejected the union's argument that the right not to be laid off was akin to vested rights to severance benefits. The court reasoned that severance accrues and vests over time, but the protections from layoff are strictly creatures of the collective bargaining agreement that do not extend beyond expiration. The court compared the layoff protections to a just cause provision that does not survive the expiration of a collective bargaining agreement.

3. Conditions of Employment That Do Not Survive Expiration of Agreement. To be enforceable, the following provisions normally require agreement by both parties since the statutory provisions in the Act only permit these obligations when specified by express terms of a collective bargaining agreement: (a) union security; (b) dues check-off; (c) arbitration; and (d) no strike (no lockout). *See Office & Professional Employees Int'l Union v. Wood County Telephone Co.,* 408 F.3d 314 (7th Cir. 2005) (consent for dues check-off expires with the collective bargaining agreement unless the employees give or reiterate permission individually). *But see Local Joint Exec. Board of Las Vegas v. NLRB,* 540 F.3d 1072 (9th Cir. 2008) (court remanded the case to the NLRB to determine "whether dues-checkoff in right-to-work states may be ceased unilaterally after the contract expires or whether dues-checkoff is a mandatory subject of bargaining.")

D. Handling of Grievances.

1. Duty to Accept Grievances. The employer has a duty to accept all grievances from the union. Refusal to accept grievances constitutes a refusal to bargain in violation of the act. *Imperial Court Hotel v. SEIU Local 144*, 322 N.L.R.B. 96 (1996).

2. Handling and Preserving Timeliness Issues and Other Issues of Procedural Arbitrability. The best tactic for an employer to follow when it believes a grievance is not timely or is otherwise not procedurally arbitrable is to accept the grievance and document to the union its belief that the matter is not grievable/arbitrable. This will permit an employer to preserve the issue for an arbitrator to resolve and avoid any arguments by the union that the employer waived its right to defend on this issue.

E. Handling of Arbitration Cases. Under any contract, issues will arise that were not contemplated during negotiations. Some employers believe utilizing arbitration to decide these issues is preferable, while other employers actively seek to avoid arbitration by authorizing grievance settlements to decide these issues.

1. Effect on Future Contract Negotiations. Logically, the prevailing party at an arbitration will not wish to change the favorable ruling of an arbitrator, but the rules governing collective bargaining of mandatory subjects of bargaining still apply. Therefore the employer should not flatly refuse to bargain over an issue the arbitrator has resolved when that issue is a mandatory subject of bargaining.

2. Education of Supervisors. Supervisors should understand the employer's goals in grievance handling. Training may be necessary to ensure that supervisors are not conceding issues that may become important down the road.

3. Arbitrator's Decision. Arbitrators' decisions are often based on the arbitrator's personal concept of fairness. They need only "draw their essence from" the contract. *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). The Eighth Circuit Court of Appeals held that an arbitrator acted within his authority in reinstating an employee who was discharged for fighting in *Trailmobile Trailor L.L.C. v. International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers*, 223 F.3d 744 (8th Cir. 2000). In *Trailmobile*, the court rejected the employer's argument that the arbitrator ignored the broad language of the management rights clause, which gave the employer "sole discretion" in employment decisions, and held that the arbitrator acted within his authority in reinstating the employee.

Arbitrators' decisions can be overturned through court action if the arbitrator exceeds his or her authority in the contract, engages in misconduct, or the arbitrator's decision violates an explicit public policy. *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29 (1987). For example, an arbitrator's decision to reinstate an employee who was discharged for drug use was overturned by the Fifth Circuit in *Gulf Coast Indus. Workers*

Union v. Exxon Co., 70 F.3d 847 (5th Cir. 1995). In *Gulf Coast*, the court found that the arbitrator ignored the positive drug test results submitted by the employer, finding that the results were hearsay. In another case, *Houston Lighting & Power Co. v. IBEW Local 66*, 71 F.3d 179 (5th Cir. 1995), an arbitrator re-determined a disputed job rating for an employee. The Fifth Circuit refused to enforce the award, holding that the only remedy available was to remand the matter to the company so that the company could make a re-determination of the employee's qualifications under a valid process. According to the court, by performing his own re-evaluation, the arbitrator went beyond the scope of his authority, and beyond the parties' contractual agreement. *See also Armco Employees Independent Federation, Inc. v. AK Steel Corp.*, 149 Fed. Appx. 347 (6th Cir. 2005) (arbitrator exceeded his authority in awarding monetary relief "to those apprentices who did not fulfill the grievance requirements" under the CBA).

F. Duty of Fair Representation.

1. Definition of Duty of Fair Representation. There is a judicially created duty to fairly represent the employees for whom the union acts as exclusive collective bargaining agent under the NLRA and the Railway Labor Act. The U.S. Supreme Court holds that conduct toward a member of the bargaining unit that is arbitrary, discriminatory, or in bad faith breaches the duty. *Vaca v. Sipes*, 386 U.S. 171 (1967). More than mere errors of judgment are required to breach this duty. The union is permitted a "wide range of reasonableness." *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953). The federal courts struggle with finer definitions of the standard. Some courts hold that perfunctory treatment breaches the duty under certain circumstances. Other courts find a breach in the presence of mere negligence by the union. *But see Steel Workers v. Rawson*, 495 U.S. 362, 372-73 (1990) (holding that mere negligence does not state a claim for breach of duty of fair representation).

A union may violate its duty of fair representation by encouraging workers to join a strike when it knows they are likely to be fired for doing so. *Alicea v. Suffield Poultry, Inc.*, 902 F.2d 125 (1st Cir. 1990).

2. Forums for Enforcement. Union breaches of the duty of fair representation may be actionable under the Act both before the Board and in a lawsuit filed under § 301 of the Act. Generally, the action is against both the union and the employer since it is usually the employer who holds the key to the relief sought, i.e., back pay and reinstatement. The U.S. Supreme Court has held that employees are entitled to a jury trial under § 301. *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558 (1990).

3. Prerequisites for Bringing Action. When the complaint involves a breach of contract, the employee asserting breach of contract must first attempt to use the grievance procedure to afford the union an opportunity to act on his or her behalf. *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965). In certain situations, an employee need not exhaust contractual remedies prior to filing an unfair labor practice charge or a § 301 action where the conduct of the employer amounts to a repudiation of contractual procedures. The U.S. Supreme Court has held that if a union breaches its duty of fair representation in the grievance process, the employee may maintain an action against an employer for breach of contract even though the employer acted in good faith throughout the grievance arbitration proceeding. *See DelCostello v. IBT*, 462 U.S. 151 (1983).

The U.S. Supreme Court has held that when a union constitution or bylaws provide for an internal review process of complaints by members, these procedures must be exhausted before a § 301 suit can be filed. *See Clayton v. Automobile Workers*, 451 U.S. 679 (1981). At least three factors should be considered in determining whether

internal union procedures need to be exhausted: (a) Are the union officials so hostile to the employee that the employee could not hope to obtain a fair hearing? (b) Are the internal union appeals procedures inadequate to reactivate the employee's grievance or to award the full relief sought under § 301? (c) Would the exhaustion of internal procedures unreasonably delay the employee's opportunity to obtain a judicial hearing on the merits of the claim?

There is a six-month statute of limitations for filing suit under § 301 for breach of the duty of fair representation and "hybrid" breach of contract/duty of fair representation claims. This is the same limitation period applicable to unfair labor practice charges. *DelCostello v. IBT*, 462 U.S. 151 (1983).

4. Remedies Vary With The Forum. An employee who prevails before the Board may secure: (a) a cease and desist order; (b) processing of the grievance, if applicable; (c) make whole relief; and (d) possible apportionment of make whole relief between employer and union, if jointly responsible. The Board has no authority to order the employer to reinstate the employee or give compensation where the charge is not filed against the employer or the employer's conduct does not amount to an unfair labor practice. Under these circumstances, the Board has required the union to make the employee whole until the union fulfilled its duty or the employee found substantially equivalent employment elsewhere, whichever first occurred.

An employee who prevails in a court action may secure damages, which are normally apportioned between the union and the employer based upon responsibility. Awards have also included: (a) back pay; (b) future losses; and (c) compensatory damages. Attorneys' fees may also be awarded but the issue has not been resolved. Courts permit injunctive and other equitable relief including compelling arbitration. The courts disagree over awarding damages for mental distress. Punitive damages are not recoverable against a union but may be against the employer.

VI. ENDING THE EMPLOYER-UNION RELATIONSHIP

A. Union Disclaimer. Unions in certain situations (for example, as part of a strike or unfair labor practice settlement) will execute a written disclaimer of continued interest of representation.

B. Loss of Majority Status: Presumption of Majority Status. Once certified, a union enjoys a presumption of continued majority status, which becomes a rebuttable presumption one year after certification. *Terrell Machine Co.*, 173 N.L.R.B. 1480 (1969), *enf'd*, 427 F.2d 1088 (4th Cir. 1970).

In *Levitz Furniture Co. of the Pacific, Inc.*, 333 N.L.R.B. 717 (2001), the Board revised its legal standard for determining the circumstances in which an employer can lawfully withdraw recognition from a union representing its employees. In *Levitz,* the Board held that "an employer may rebut the continuing majority status, and unilaterally withdraw recognition, only on a showing that the union has, *in fact*, lost the support of a majority of the employees in the bargaining unit." (Emphasis added.) In so holding, the Board expressly overruled a long line of decisions allowing employers to withdraw recognition based upon a "good-faith doubt" (defined to mean "uncertainty or disbelief") as to the union's continued majority status.

Under *Levitz*, an employer who withdraws recognition from a union based even upon objective evidence that the union has lost employee support (e.g., a petition signed by the vast majority of unit employees), does so "at its peril." *Levitz*, *supra*. If the union contests the withdrawal by filing an unfair labor practice charge, the employer will be required to prove to

the Board, by a preponderance of the evidence, that its conclusion that the union lacked majority support was, *in fact*, correct. For a variety of reasons (including the burden of questioning each and every unit employee under oath at a Board hearing, the likelihood that certain employees may testify falsely or change their minds in the intervening time between the employer's action and the hearing on the charge, and the possibility that the union may attempt to impeach witnesses or demonstrate that the employer coerced its employees into denying union support), this may be a very difficult showing for an employer. In practical terms, the Board has made it extremely burdensome and risky for an employer to unilaterally withdraw recognition from an incumbent union.

An employer may not lawfully withdraw recognition from a union where it has committed unfair labor practices that are likely to affect the union's status, cause employee disaffection or improperly affect the bargaining relationship itself. *See Garden Ridge Mgmt.*, 347 N.L.R.B. 131 (2006), *aff'd,* 349 N.L.R.B. 1108 (2007). However, where the unfair labor practice does not involve a general refusal to recognize and bargain with the union, "there must be specific proof of a causal relationship between the unfair labor practice and the ensuing events indicating a loss of support." *Garden Ridge Mgmt.*, 347 N.L.R.B. at 134 (Board could not conclude that employer's refusal to schedule additional bargaining sessions had a meaningful impact on employee disaffection.)

C. Employee Resignations from the Union and Cancellation of Dues Check-Off. A union may not restrict the right of its members to resign, even in a non-right-to-work state. *PatternMakers' League v. NLRB*, 473 U.S. 95 (1985). Generally speaking, an employee may resign from the union at any time by giving the union proper written notification of the resignation. An employee who resigns union membership is not subject to union fines or assessments for such conduct as crossing a union's picket line.

In some situations, a resignation of union membership may not relieve the employer from the contractual obligation to check-off the employee's union dues. For example, in states permitting union security clauses, an employee's resignation from union membership may not relieve the employee's financial obligations to the union as a financial core member. However, when the payment of union dues is considered to be a "quid pro quo" for union membership, the Board holds that resignation of union membership automatically constitutes a revocation of check-off authorization. *See United Steelworkers of Am., Local No. 7450 (ASARCO Inc.)*, 246 N.L.R.B. 878 (1979); *Carpenters Council*, 243 N.L.R.B. 147 (1979). The Board does not always find that union membership dues are a "quid pro quo" for union membership. *See Frito-Lay,* 243 N.L.R.B. 137 (1979).

The Board generally finds that resignation from the union ends the check-off obligation where there is no union security clause. *IBEW Local 2088 (Lockheed Space Operations)*, 302 N.L.R.B. 322 (1991). According to the Board:

> Explicit language within the checkoff authorization clearly setting forth an obligation to pay dues even in the absence of union membership will be required to establish that the employee has bound himself or herself to pay the dues even after resignation of membership. If an authorization contains such language, dues may properly continue to be deducted from the employee's earnings and turned over to the union during the entire agreed-upon period of irrevocability, even if the employee states he or she has had a change of heart and wants to revoke the authorization.

Id. at 329.

D. Employer Involvement in Employee Revocation of Union Authorization. An employer must be extremely careful soliciting employees to resign union membership or

revoke authorization cards. Generally, an employer may inform employees of their rights, and may respond to questions posed by individual employees; however, an employer may not lawfully solicit employees to resign union membership or cancel check-off authorizations and may run risks if it responds to queries from individual employees with answers directed to the entire group. *See Heck's, Inc.*, 293 N.L.R.B. 1111 (1989).

E. Types of NLRB Decertification Petitions.

1. Employer-Filed Representation Petition (RM). If the employer ceases bargaining with the union altogether, it risks violating § 8(a)(5) and may incur liability to make employees whole for any unilateral changes. A safer course, therefore, is to file an "RM" petition. Simultaneous with the announcement of its more stringent standard to be applied in cases of unilateral withdrawal of recognition, the Board in *Levitz* also implemented a more lenient standard for RM petitions. Whereas the Board previously would consider such a petition only on a showing that the employer "had a good-faith reasonable belief, grounded in objective considerations, that the union no longer enjoyed the support of a majority of the unit employees," the new standard requires an employer to demonstrate only a good-faith "uncertainty" – as opposed to an affirmative belief – as to the union's continued majority status. *Levitz*, *supra*. Thus, even if an employer is presented with conflicting evidence regarding the union's continuing status as a majority representative, the employer may nevertheless petition for an election to oust the union based on its good-faith uncertainty.

In *Shaw's Supermarkets,* 350 N.L.R.B. 585 (2007), the Board held that an employer may rely upon evidence of the union's "actual loss of majority support" to withdraw recognition from a union after the third year of a contract of longer duration. In rendering this decision, the Board sought to determine the appropriate balance between the "policy goals of stability in labor relations and employee freedom of choice..." The Board held that these objectives can best be reconciled if an employer, "relying on untainted evidence of a union's actual loss of majority support, [can] withdraw recognition of a union after the third year of a contract of longer duration."

2. Employee-Filed Decertification Petition (RD). Thirty percent of the employees in the unit can petition to decertify a collective bargaining representative. Recent decertification election results show that unions lose approximately three-quarters of such decertification elections. Petitions seeking to decertify a union must be filed between sixty and ninety days prior to the expiration date of a contract (90-120 in the health care field) or following expiration of the contract, without an extension of the agreement.

The Board holds that negotiations must go on even though a decertification petition has been filed. *Dresser Indus.*, 264 N.L.R.B. 1088 (1982). *Cf. Indiana Cabinet Co.*, 275 N.L.R.B. 1209 (1985).

In *Truserv Corp.*, 349 N.L.R.B. 227 (Jan. 31, 2007), the Board held that a decertification petition filed after an employer's unfair labor practice but before the settlement of the charge should not be dismissed where there has been no finding or admission that the employer engaged in or committed the allegedly unlawful conduct. In reaching this decision, the Board overruled the prior decision of *Douglas-Randall Inc.*, 320 N.L.R.B. 431(1995), and its progeny, and returned to the Board's prior doctrine regarding the processing of decertification petitions established in *Passavant Health Care*, 278 N.L.R.B. 483 (1986). In *Truserv*, the Board held that absent a finding of a violation of the Act or an admission of wrongdoing by the employer, there is no basis for dismissing a decertification petition based on a settlement of alleged but unproven unfair labor practices. To do otherwise, according to the Board, would compromise employee rights

under § 7 of the Act. The Board also identified three scenarios in which a decertification petition should not be processed: (1) when the execution of the settlement agreement precedes the petition filing; (2) the Regional Director concludes that the employer instigated the decertification petition or that the employees' showing of interest in support of the petition was solicited by the employer; or (3) the parties' settlement includes an agreement by the petitioner to withdraw the decertification petition.

F. Employer Sponsorship of Decertification Petitions. An employer cannot sponsor a decertification petition or permit its agents (supervisors) to initiate or encourage the filing of a decertification petition. In *Tyson Foods, Inc.*, 311 N.L.R.B. 552 (1993), the Board ordered the employer to recognize and bargain with a union based on the Board's finding that the employer had unlawfully assisted an employee effort to decertify the union by supporting the activities of an employee who was the primary force in the decertification campaign and then withdrawing its recognition of the union, although the decertification election was never held.

The Board holds that an employer has the right to lawfully inform employees of their ability to revoke union authorization cards, even where employees have not solicited such information, where the employer does not attempt to find out whether employees will avail themselves of this right and where the employer does not offer any assistance or otherwise create a situation where employees tend to feel peril in refraining from such action. *R.L. White Co.*, 262 N.L.R.B. 575 (1982).

The safest approach is to refer the employee to the Board. Recognize, however, that the Board is not particularly sympathetic to employees desiring to decertify their union, and the employee may be "worn out" by the Board's processes. There are many technical rules that must be followed and the employee may lose interest prior to exhausting all of those requirements.

The Board has also approved giving employees advice on how to resign from a union or giving a list of employees' names and addresses to an attorney representing employees who wish to decertify a union. *See Continental Nut Co.*, 195 N.L.R.B. 841 (1972); *Consolidated Rebuilders, Inc.*, 171 N.L.R.B. 1415 (1968).

G. Repudiation of an 8(f) Prehire Agreement in the Construction Industry. In *John Deklewa & Sons,* 282 N.L.R.B. 1375 (1987), *enf'd sub nom, Int'l Assoc. of Bridge, Structural and Ornamental Iron Workers v. NLRB (Deklewa),* 843 F.2d 770 (3d Cir. 1988), the Board announced a new position on the issue of when a party to a § 8(f) contract may repudiate that agreement. Prior to *Deklewa*, the Board had maintained that either party to a prehire agreement could repudiate that agreement at any time before the union obtained majority status in the appropriate bargaining unit. When the union obtained majority status, which was known as "conversion," the union enjoyed full status as a § 9(a) bargaining representative. However, the *Deklewa* rule provides that § 8(f) imposes an obligation on the parties to a prehire agreement to comply with it. That obligation is enforceable under §§ 8(a)(5) and 8(b)(3) unless the covered employees vote to reject the union as their bargaining representative in a Board conducted election. *See, e.g., C.E.K. Indus. Mech. Contractors v. NLRB,* 921 F.2d 350 (1st Cir. 1990).

After expiration of the § 8(f) agreement, however, the signatory union, unlike a full § 9(a) representative, is not entitled to a presumption of majority status. At that point, either party could repudiate the § 8(f) relationship. *Id.*

Construction industry employers may repudiate a § 8(f) prehire agreement where the agreement has expired, provided the employer has not voluntarily recognized the union on the basis of majority support. *San Antonio Control Sys., Inc.*, 290 N.L.R.B. 786 (1988).

Overview of Florida Employment Laws

By

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SELECTED TOPICS IN FLORIDA EMPLOYMENT LAW

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I. Introductory Comments:

A. Florida is not a state with an enormous amount of state-specific employment law, as compared to jurisdictions like California or Puerto Rico.

1. Ex.—Little in the way of wage and hour law; thus Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*, generally governs.

2. Ex.—Florida's anti-discrimination scheme, the Florida Civil Rights Act ("FCRA"), Fla. Stat. § 760.01 *et seq.*, looks to the caselaw interpreting the federal anti-discrimination laws.

B. Thus, any Florida employment lawyer must be fully fluent with the United States Supreme Court, 11th Circuit and Florida district court caselaw on employment law issues.

C. To the extent there is Florida-specific employment law, however, Florida employment lawyers must understand how the Florida law operates and, if applicable, how it differs from federal employment law.

II. Florida Gun Law:

A. One of the more significant recent pieces of Florida employment legislation is the Preservation and Protection of the Right to Keep and Bear Arms in Motor Vehicles Act of 2008 (Florida Gun Law), Fl. Stat. §790.251.

B. The Florida Gun Law became effective July 1, 2008. In broad terms, the law, as written, allows employees, customers and invitees to bring legally owned firearms to a public and private employer's place of business, as long as the firearms are locked in their cars in the employer's parking lot. In other words, the Florida Gun Law applies to people with concealed weapons permits.

1. EMPLOYMENT PROVISIONS:

a. An employer cannot condition employment upon an agreement that prohibits an employee from keeping a legally owned firearm locked inside the employee's car parked in the employer's lot.

b. An employer may not prevent an employee from entering the parking lot of the employer's place of business because the employee has a legally owned firearm in his car.

c. An employer may not terminate or discriminate against an employee for keeping a gun or using a gun in self-defense, as long as the gun is never exhibited on company property for unlawful purposes.

d. Employers are immune from civil liability based on actions taken in compliance with the new law. Likewise, an employer has no duty of care relating to the actions prohibited under the law.

2. EXEMPTIONS FROM THE FLORIDA GUN LAW:

a. School property.

b. Correctional institutions.

c. Any property where a nuclear powered electricity generation facility is located.

d. Property upon which substantial activities involving national defense, aerospace or homeland security are conducted.

e. Property upon which the primary business conducted is the manufacture, use, storage, or transportation of combustible or explosive material regulated by state or federal laws.

f. Property owned or leased by an employer who has obtained a permit under 18 U.S.C. §842 to engage in the business of importing, manufacturing or dealing in explosive materials on such property.

g. A motor vehicle owned, leased or rented by an employer.

h. Any property upon which the possession of a firearm is prohibited under federal law.

3. IMPORTANT DEFINITIONS:

a. ***Employee***: any person who works for salary, wages or other remuneration; an independent contractor, volunteer, intern, ***and*** who possesses a valid license pursuant to §790.06 (license to carry a concealed weapon).

b. ***Employer***: any business that is a sole proprietorship, partnership, corporation, limited liability company, professional association,

cooperative, joint venture, trust, firm, institution or association, or public-sector entity, that has employees.

c. ***Firearm***: ammunition and accoutrements attendant to the lawful possession and use of a firearm.

4. REACTION FROM BUSINESSES:

a. At least four Florida businesses, Walt Disney Company, NBC Universal's Universal Studios in Orlando, Jacksonville Electric Authority and Georgia Pacific LLC, have claimed exemptions to the new claim and instituted a gun-free workplace.

5. CASES:

a. *Sotomayor v. Walt Disney World, Co*., 08-CA-0016442-O (Fla. Cir. Ct.)

i. A former Disney security guard sued the company in the Ninth Judicial Circuit for Orange County, Florida, because he was fired after taking his handgun to work.

ii. Disney claimed that it was exempt from the gun law because it has a federal permit to use, store or transport combustible or explosive materials. Disney has the federal permit for its nightly firework shows.

iii. The case was ultimately dismissed.

b. *Florida Retail Federation, Inc. v. Attorney General of Florida*, 576 F. Supp. 2d 1301 (N.D. Fla. 2008)

i. The Florida Retail Federation, Inc. moved for a preliminary injunction to prevent the gun law from taking effect.

ii. The court upheld provisions of the statute that allows employees who legally own firearms to keep the firearms locked in their car in their employer's parking lot.

iii. However, the court enjoined the Attorney General from enforcing the provisions of the law that allowed customers to keep their guns locked in their cars while shopping. The court then ultimately converted the preliminary injunction into a permanent injunction.

c. *Bruley v. Village Green Management Co.*, 592 F.Supp.2d 1381 (M.D. Fla. 2009)

i. Leasing agent brought action against apartment community management company alleging wrongful discharge in violation of his right to bear arms in self-defense.

ii. Agent heard an argument in the apartment complex along with a cry for help and someone saying "I've been shot." He carried his shotgun across the complex to help the victim. He was later terminated in part for having a firearm on the property.

iii. Court held Florida Gun Law was inapplicable to his case because: (1) the agent carried his firearm across the property, rather than storing it in his car; and (2) the law did not apply retroactively.

III. Wage Issues

A. **Florida Minimum Wage**

1. Voters amended the Florida Constitution in 2004 to add a provision for a state minimum wage. *See* Fla. Constitution, Article X, § 24.

2. The Minimum Wage Amendment has resulted in a Florida minimum wage in Florida higher than the federal minimum wage; as in any state with a minimum wage in addition to the federal minimum wage, Florida employers must pay the higher of the two wages.

3. The minimum wage is raised annually based on a formula to adjust for inflation; on July 1, 2011, it increased to $7.31 per hour for non-tipped hourly employees.

4. On July 24, 2009, the federal minimum wage rose to $7.25 per hour for non-tipped employees, which at the time was higher than the Florida minimum wage, such that Florida employers needed to pay the higher federal wage. Now that the Florida minimum wage is again higher than the federal minimum wage, Florida employers again are responsible to pay the higher Florida minimum wage.

B. **What is a "Wage"?**

1. Section 448.08 of the Florida Statutes states:

The court may award to the prevailing party in an action for unpaid wages costs of the action and a reasonable attorney's fee.

2. Regardless of whether an employee has an employment contract, 448.08 allows for recovery of fees and costs, independent of any contractual fee-shifting provision.

3. *Strasser v. City of Jacksonville*, 655 So. 2d 234 (1st DCA 1995), interpreted Section 448.08 and held that leave credits were considered part of wages.

4. Accordingly, vacation/paid time-off policies should be closely inspected.

   a. Employers in Florida should not have "use it or lose it" policies; they should not take away accrued, unused vacation days from employees.

   b. To avoid employees accruing excessive banks of vacation days, employers should:

      i. Pay out accrued, unused vacation days at the end of each year; OR

      ii. Allow carry-over of accrued, unused vacation days but cap accrual of new vacation days so that a maximum number is never exceeded.

   c. Even if an employer has allowed full carry-over in the past, there is no legal concern in modifying the policy as to *prospective vacation days that have not yet accrued.*

IV. Florida Law on Restrictive Employment Covenants (Non-Competes, Non-Solicits, Non-Disclosures of Confidential Information)

A. Unlike other areas of employment law, Florida has a well-developed statutory scheme to address restrictive employment covenants.

B. Restrictive employment covenants are contractual restrictions that operate against the common law prohibition on employment contracts that restrain trade or limit free competition.

C. Restrictive employment covenants enacted prior to 1996 are governed by the terms of Section 542.33 of the Florida Statutes, while restrictive employment covenants enacted after 1996 are governed by Section 542.35.

D. Section 542.35 is not radically different from Section 542.33; it is more detailed in its requirements and since, in 2009, it can be assumed that most restrictive employment covenants are likely to be post-1996 covenants, this section will concern itself with Section 545.35. Bear in mind that, if faced with a pre-1996 restrictive employment covenant, a lawyer must apply Section 542.33 to the covenant.

E. **There are three main kinds of restrictive employment covenants:**

1. **Non-compete provisions**: these limit an employee's ability to compete against his or her employer, typically while the employee is employed and for a period of time after employment ends and in a specifically-defined geographic area.

2. **Non-solicit provisions**: these limit an employee's ability to solicit customers of his or her former employer after employment ends, again for a specific period of time and in a specific geographic area, and also may limit a former employee's ability to solicit others employees to join him/her in the new employment.

3. **Non-disclosure provisions**: these prevent an employee from disclosing trade secrets or other confidential business information (e.g., customer lists, financial data, marketing strategies) at any time, during and after employment, without the permission of the employer; unlike the first two kinds of restrictive employment covenants, under the right factual circumstances, it is possible for a non-disclosure provision to last for an indefinite amount of time.

F. **Basic Requirements for Restrictive Employment Covenants to be Effective**

1. The covenant(s) must be in a writing signed by the employee against whom the employer seeks to enforce the covenant(s). *See* 542.35(1)(a), Fla. Stat.

2. The employer must be able to articulate the existence of a "legitimate business interest" that the covenant(s) is/are designed to protect. Section 542.35(1)(b) provides the following, non-exclusive list of examples of legitimate business interests:

   a. Trade secrets (as defined by Fla. Stat. 688.002(4);

   b. valuable confidential business information that does not constitute a trade secret;

   c. substantial relationships with specific existing or prospective customers, patients or clients;

   d. customer, patient or client goodwill; and

   e. extraordinary or specialized training.

3. If an employer establishes one or more legitimate business interests, the employer also has to establish that the scope of the restrictive covenant(s) is/are reasonable. *See* 542.35(1)(c).

4. So long as a legitimate business interest is shown, a court should not outright reject a restrictive covenant, but it may modify the covenant (i.e., "blue pencil") if it views the covenant as overly broad or excessive. *See id.*. A court typically will only toss out a restrictive covenant if it feels there is no legitimate business interest being protected.

5. Section 542.35(1)(d) sets forth certain presumptions regarding the temporal scope of restrictive covenants.

    a. For example, if the restrictive covenant is associated with the sale of a business, a period of three or less years is presumed reasonable, while a term of seven or more years is presumed unreasonable.

    b. In most cases involving employees, a term of six months or less is presumed reasonable while a term of two years or more is presumed unreasonable.

    c. As with most presumptions, it is possible to challenge these statutory presumptions based on the unique facts of a case.

6. The statutory scheme does not address geographic scope specifically; a good rule of thumb is that the geographic should bear some resemblance to the scope of the employee's employment. For example, if an employee had a sales territory of Broward County, a non-compete provision limited to Broward County would likely be reasonable, while a statewide limitation might be unreasonable.

G. **Other Considerations**

1. Restrictive employment covenants can generally be enacted at any point in an employee's employment, not just at the outset. *See Open Magnetic Imaging, Inc. v. Nieves-Garcia*, 826 So. 2d 415 (Fla. 3d DCA 2002).

    a. This is so because the promise of continued employment provides sufficient consideration for the covenant.

    b. It is also possible to enter into a restrictive employment covenant for the first-time as part of a termination agreement. *See Kroner v. Singer Asset Finance Co., L.L.C.*, 814 So. 2d 454 (Fla. 4th DCA 2001).

2. While an employee can attempt to argue that a restrictive covenant violates public policy, this is a tough argument. Pursuant to Section 542.35(i), a court can only invalidate a restrictive covenant on public policy grounds if it finds that the public policy concerns "substantially outweigh" the legitimate business interests of the employer.

3. A court may NOT consider the economic harm an employee might suffer if it enforces a restrictive covenant when ruling on whether to enforce the covenant. *See* Section 542.35(g), Fla. Stat.

4. In a temporary injunction proceeding to enforce a restrictive covenant, Section 542.35(j) creates a presumption that irreparable injury has occurred when a breach of a restrictive covenant is established.

5. In order to establish a legitimate business relationship based on relationships with specific customers or prospective customers, an employer does NOT need to demonstrate that the specific employee had the relationship with the customer; it is sufficient to show that the business as a whole had the relationship with the customer. *See Milner Voice & Data, Inc. v. Tassy*, 377 F. Supp. 2d 1209 (S.D. Fla. 2005).

6. Even if an agreement with restrictive covenants does not have an attorney's fees provision, the statute provides for an award of prevailing party attorney's fees in an action to enforce or challenge a Florida restrictive employment covenant. *See* Section 542.35(k), Fla. Stat.

H. **Enforcement Issues**

1. Upon learning that a former employee may be violating a restrictive covenant, an employer should take prompt attention.

2. The employer should begin by sending a cease and desist letter to the employee and new employer.

3. If this produces no result, employer should, in most cases, file a complaint for injunctive relief and a motion for a temporary restraining order.

   a. If the employer fails to seek enforcement repeatedly, this may allow the argument that the employer is estopped from seeking enforcement in the future, but this is not a particularly strong argument. *See, e.g., Minnesota Mining & Manufacturing Co. v. Kirkevold*, 87 F.R.D. 324 (D. Minn. 1980).

   b. Generally, a complaint will seek injunctive relief because of how difficult it is to quantify damages. *See Corporate Mgmt. Advisors, Inc. v. Boghos*, 756 So. 2d 246 (Fla. 5th DCA 2000).

4. In order to obtain preliminary injunctive relief, a party must show:

   a. a substantial threat of irreparable harm;

   b. a substantial likelihood of success on the merits;

   c. that its own injury outweighs the injury of the non-movant; and;

d. that the injunction would not disserve the public interest. *See Colucci v. Kar Kare Auto. Group, Inc.*, 918 So. 2d 431 (Fla. 4th DCA 2006).

5. While most litigation over restrictive covenants concludes at the preliminary injunction stage, it is possible that a case may proceed to a full trial. It is more common that the parties settle at some stage in the process, however.

V. Florida Unemployment Law

A. Florida's unemployment scheme is governed by the Unemployment Compensation Law (Fla. Stat. § 443.011 *et seq.*). The scheme was dramatically revamped in 2011. Major changes include:

1. Shorter duration of benefits;

2. More burden on claimant to document search for work;

3. Easier for employer to claim employee terminated for misconduct.

B. The scheme is "…liberally construed to accomplish its purpose to promote employment security by increasing opportunities for reemployment and to provide, through the accumulation of reserves, for the payment of compensation to individuals with respect to their unemployment," Fla. Stat., § 443.031.

C. Effective July 1, 2011, Florida's Agency for Workforce Innovation (AWI's) duties related to unemployment benefits were transferred to the Department of Economic Opportunity. 2011 Fla. Laws 142.

D. **Overview of Process:**

1. Employee is terminated;

2. Employee applies to for unemployment benefits;

3. Agency requests information about the employment and separation from the employee and the employer;

4. Agency makes an initial determination on benefits claim; and

5. Either party can then appeal this initial determination.

E. **To qualify for benefits, an employee**:

1. must have earned sufficient wages (the employee must have earned at least 1.5 times the earnings of the high quarter of the "base period," which is the first four quarters of the five completed quarters prior to filing the

unemployment claim; the employee also must have earned at least $3,400 in the base period). *See* Fla. Stat., §§ 443.036(7); 443.091(1)(g).

2. must be physically able to work, "available" to work and looking for work

   a. "Available to work" means actively seeking and being ready and willing to accept suitable work. *See* Fla. Stat., § 443.036(6).

   b. Effective Aug. 1, 2011 – claimant must register with the state and participate in an initial skills review. "Initial skills review" means an online education or training program that is approved by the Agency for Workforce Innovation and designed to measure an individual's mastery level of workplace skills. *See* Fla. Stat., § 443.036(26).

   c. Work Search – effective August 1, 2011, the claimant must make contact with five (5) prospective employers on a ***weekly*** basis and provide this information via the Internet during bi-weekly certifications for benefits. If the individual is unable to make five employer contacts in a week, meeting with a representative at the One-Stop Career Center for reemployment services may satisfy the requirement.

3. must have become unemployed through no fault of his/her own.

   a. An employee is unemployed through no fault of his/her own unless

      i. s/he was discharged for misconduct "irrespective of whether the misconduct occurs at the workplace or during working hours," Fla. Stat., § 443.036(31). The 2011 change included the fact that behavior "off the clock" can constitute misconduct.

         (a) Misconduct must be more than ordinary negligence on isolated occasions. *See Gerhart v. Florida Unemployment Appeals Com'n*, 694 So. 2d 880 (Fla. 2d DCA 1997).

         (b) Misconduct is more than inefficiency, unsatisfactory conduct, inadvertence or good-faith errors in judgment or discretion. *See Vilar v. Unemployment Appeals Com'n*, 889 So. 2d 933 (Fla. 2d DCA 2004).

         (c) Excessive absenteeism will count; one unexcused absence will not. *See Byrum v. Unemployment Appeals Com'n*, 920 So. 2d 184 (Fla. 2d DCA 2006); Fla. Stat., § 443.036(31)(c). ("Chronic

absenteeism or tardiness in deliberate violation of a known policy of the employer or one or more unapproved absences following a written reprimand or warning relating to more than one unapproved absence.") This quoted language is part of the 2011 change.

(d) "A violation of an employer's rule, unless the claimant can demonstrate that: (1.) He or she did not know, and could not reasonably know, of the rule's requirements; (2.) The rule is not lawful or not reasonably related to the job environment and performance; or (3.) The rule is not fairly or consistently enforced." Fla. Stat., § 443.036(31)(e). This is new language added to the statute as a result of the 2011 amendment.

(e) Repeated violations of specific policies after warnings will count. *See Vilar*.

(f) Isolated profanity will not constitute misconduct. *See Benitez v. Girlfriday, Inc.*, 609 So. 2d 665 (Fla. 3d DCA 1992).

ii. s/he voluntarily resigned absent good cause attributable to the employer.

(a) "Good cause" means a reason that reasonable people would deem valid and not indicative of an unwillingness to work. *See Schenck v. State, Unemployment Appeals Com'n*, 868 So. 2d 1239 (Fla. 4th DCA 2004).

iii. s/he failed to accept suitable work.

F. Benefits are chargeable to an employer if the employee is eligible based on wages paid to an employee during the base period.

1. If the employee had more than one employer during the base period, each employer is responsible for unemployment based on its proportion of the total wages paid to the employee.

G. **Appeals**

1. The initial determination can be appealed to the agency's Office of Appeals, then to the Unemployment Appeals Commission and ultimately to a district court of appeal

2. An appeal is a formal, recorded procedure:

   a. Witnesses are sworn in;

   b. Hearing officer leads questioning;

   c. Parties may cross-examine; and

   d. Documentation can be introduced as evidence.

H. Duration of Benefits

1. Currently Florida provides for a maximum of 26 weeks of unemployment benefits.

2. This scheme will change as of January 1, 2012. For all claims filed as of that date, the duration of benefits adjusts from the current maximum of 26 weeks to a range of 12 to 23 weeks, based upon the average unemployment rate in Florida for the third calendar quarter of the previous year. *See* Fla. Stat., § 443.111(5)(c)(as amended):

   a. Twelve weeks of unemployment will be provided if Florida's average unemployment rate is at or below 5%.

   b. An additional week in addition to the 12 weeks for each 0.5% increment in Florida's average unemployment rate above 5%.

   c. Up to a maximum of 23 weeks if Florida's average unemployment rate equals or exceeds 10.5%.

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