



Thursday, May 22
10:30 am–12:00 pm

402 The Complexities of Employment

JoAnna L. Brooks

Partner

Jackson Lewis LLP

Bruce Pincus

General Counsel

Minitab, Inc.

W. Joseph Thesing

Former General Counsel, USA & International

Merial Limited

Faculty Biographies

JoAnna Brooks

JoAnna L. Brooks is a partner at Jackson Lewis, LLP in its San Francisco office. Ms. Brooks has extensive experience defending employment disputes, including, harassment, discrimination, breach of contract, wage and hour and unfair business practices. She routinely works on complex multi-plaintiff and class action matters. In addition to her litigation practice, Ms. Brooks spends considerable time counseling clients regarding preventative measures to avoid litigation. She assists employers in the formulation of personnel policies and procedures. She has conducted numerous training seminars on prevention of discrimination and harassment in the workplace, personnel management and wage and hour compliance.

Prior to joining Jackson Lewis, LLP, she worked as an associate at Wilson Sonsini Goodrich and Rosati where she specialized in assisting in-house counsel with the development and implementation of employment related policies and procedures.

Ms. Brooks received her BA from Purdue University and her JD from the Georgetown University Law Center.

Bruce Pincus

Bruce Pincus is general counsel and secretary of Minitab, Inc., located in State College, Pennsylvania. Mr. Pincus is responsible for identifying, directing, and responding to all legal matters relating to the company. He works closely with Minitab's executive and management team on all general corporate operational concerns, with a focus on employment and labor law issues, software licensing, sales contracts and agreements, and trademark and copyright matters.

Prior to joining Minitab, Mr. Pincus was in private practice in the San Francisco Bay Area where he advised corporate clientele in the technology sector and related industries, ranging from start-ups to firmly established businesses.

Mr. Pincus is secretary of the ACC's Employment and Labor Law Committee.

Mr. Pincus received a B.A. from the University of California, Berkeley and is a graduate of John F. Kennedy University School of Law.

W. Joseph Thesing

W. Joseph (“Joe”) Thesing is the former general counsel, USA & International for Merial Limited. Merial is the industry leading manufacturer of branded pharmaceutical and vaccine products for pets and livestock and is a joint venture of Merck & Co. and Sanofi-Aventis S.A. Mr. Thesing’s responsibilities at Merial included leadership of a department of 5 lawyers and 2 paralegals to support business in the U.S. and International Regions as well as global corporate functions. He provided counsel in a number of substantive areas including M&A, licensing, and employment law issues.

Prior to joining Merial in 2001, Mr. Thesing was previously of counsel with Paul Hastings LLP in Los Angeles. His experience also includes seven years with The Coca-Cola Company in Atlanta and Asia. Prior to joining Coke, Mr. Thesing practiced in Chicago with Jenner & Block LLP and Schiff Hardin LLP. He began his career as a law clerk to The Honorable Robert L. Miller Jr. of the United States District Court in South Bend, IN.

Mr. Thesing previously served as vice president of ACC’s Georgia Chapter and was also a member of the Program Committee for several years.

Mr. Thesing received a B.A. from the University of Notre Dame and a J.D. from Duke University School of Law.

ACC Association of Corporate Counsel

THE COMPLEXITIES OF EMPLOYMENT

ACC's 2008 Annual Corporate Counsel University® May 21 – 23, 2008 – The Palace Hotel, San Francisco

ACC Association of Corporate Counsel

HIRING ESSENTIALS

ACC's 2008 Annual Corporate Counsel University® May 21 – 23, 2008 – The Palace Hotel, San Francisco



EMPLOYMENT APPLICATION

- ✓ Use lawful application form
 - At-will policy
 - Criminal conviction inquiries
 - Request for social security number
 - Request for birth date/graduation dates
 - Consent to background check

ACC's 2008 Annual Corporate Counsel University®

May 21 – 23, 2008 – The Palace Hotel, San Francisco



BACKGROUND CHECKS

- ✓ Information from third party “consumer reporting agencies” on applicants and employees
- ✓ Fair Credit Reporting Act (FCRA) compliance
 - Written advance disclosure and advance written consent
 - Copy of report if “adverse action” (with FTC summary of rights)
 - Notice of any adverse action (after waiting period)
- ✓ Applicable state laws for credit checks (CA)
- ✓ Health Insurance Portability and Accountability Act of 1996 (HIPAA) Privacy Rule
 - Could apply if obtaining “protected health information” (PHI) of job applicants or employees
 - Detailed, lengthy and comprehensive body of federal regulations

ACC's 2008 Annual Corporate Counsel University®

May 21 – 23, 2008 – The Palace Hotel, San Francisco



APPLICANT RECORD-KEEPING

- ✓ Retention of job postings/applicant data
- ✓ EEO data – What should you request and how?
- ✓ Federal contractors/subcontractors must:
 - Solicit and record race and gender
 - Monitor selection and rejection statistics
 - Comply with federal EEO reporting requirements

ACC's 2008 Annual Corporate Counsel University®

May 21 – 23, 2008 – The Palace Hotel, San Francisco



AVOID IMPROPER INQUIRIES

- ✓ Age
- ✓ Religion
- ✓ Marital status
- ✓ Sex
- ✓ Economic background/credit history
- ✓ Military background
- ✓ Disability
- ✓ Criminal background
- ✓ Other protected characteristics
- ✓ What else?

ACC's 2008 Annual Corporate Counsel University®

May 21 – 23, 2008 – The Palace Hotel, San Francisco



LAWFUL REASONS FOR NOT HIRING AN APPLICANT

- ✓ The applicant reveals he/she is unable to work the required hours (watch out for reasonable accommodation requirements!)
- ✓ The applicant lacks the physical and/or mental ability (with or without reasonable accommodation) to perform the essential functions of the position
- ✓ The applicant is unable to communicate in the English language *if doing so is a bona fide function of the job*
- ✓ The employer's reference check revealed unfavorable responses regarding the applicant's prior work performance or criminal history
- ✓ The applicant made inconsistent, inaccurate, or fraudulent statements on his/her application
- ✓ The employer hired a better qualified candidate

ACC's 2008 Annual Corporate Counsel University®

May 21 – 23, 2008 – The Palace Hotel, San Francisco




THE EMPLOYMENT OFFER LETTER

- ✓ Include statement of “at-will” employment
- ✓ Consider attaching arbitration agreement, confidentiality agreement and handbook
- ✓ Contingent upon background check
- ✓ Contingent upon lawful right to work in U.S.
- ✓ Integration clause

ACC's 2008 Annual Corporate Counsel University®


May 21 – 23, 2008 – The Palace Hotel, San Francisco



**HANDBOOKS,
POLICIES, AND PROCEDURES**

**EMPLOYEE
HANDBOOK**

ACC's 2008 Annual Corporate Counsel University® May 21 – 23, 2008 – The Palace Hotel, San Francisco



REALLY NECESSARY?

- ✓ Establishes uniform, well-defined standards
- ✓ Creates a vehicle for disseminating the employer's standards
- ✓ Establishes a common understanding and expectations regarding employer standards
- ✓ Provides guidance to supervisors and personnel administrators
- ✓ Reduces the risk of employee lawsuits

ACC's 2008 Annual Corporate Counsel University® May 21 – 23, 2008 – The Palace Hotel, San Francisco



WHAT TO INCLUDE (GENERAL POLICIES)

- ✓ Attendance
- ✓ At-will policy
- ✓ Discipline policy
- ✓ Dress code
- ✓ Email/voicemail
- ✓ Employment categories
- ✓ Equal employment opportunity statement
- ✓ Harassment/discrimination policy
- ✓ Internet
- ✓ Investigation policy
- ✓ Performance reviews
- ✓ Personal information
- ✓ Safety and accident rules
- ✓ Sexual harassment
- ✓ Smoking
- ✓ Substance abuse
- ✓ Use of company property
- ✓ Additional policies?

ACC's 2008 Annual Corporate Counsel University®

May 21 – 23, 2008 – The Palace Hotel, San Francisco



WHAT TO INCLUDE (COMPENSATION AND BENEFITS)

- ✓ Continuation of medical/COBRA
- ✓ Employee assistance program
- ✓ Group insurance benefits
- ✓ Holidays
- ✓ Jury duty
- ✓ Leaves of Absence
- ✓ Military service
- ✓ Payroll
- ✓ Retirement plans
- ✓ Short term disability
- ✓ Sick time
- ✓ Tuition assistance
- ✓ Vacation
- ✓ Work hours and reporting
- ✓ Worker's compensation
- ✓ Other compensation and benefits?

ACC's 2008 Annual Corporate Counsel University®

May 21 – 23, 2008 – The Palace Hotel, San Francisco



WHAT ABOUT PROTECTION OF INFORMATION?

- ✓ Confidentiality Agreements
- ✓ Non-Solicitation Agreements
- ✓ Non-Compete Agreements

ACC's 2008 Annual Corporate Counsel University®

May 21 – 23, 2008 – The Palace Hotel, San Francisco



WHAT ABOUT ARBITRATION POLICIES?

- ✓ Implementation and applicability:
 - Determine how the arbitration program will be implemented, and to whom it will be applicable
 - Agreement contained in application for employment
 - Acknowledgment at time of hire that agreement is a condition of employment
 - Agreement incorporated in employee handbook
 - Agreement to arbitrate as a stand-alone document
 - Arbitration provision contained in an individual employment agreement
- ✓ Enforcement recommendations:
 - Enforce it consistently, for the integrity of the program, relying upon the same representations and arguments
 - Enforce it economically by utilizing specialized, limited-role counsel
 - Enforce it promptly so as to avoid waiver of the right to compel arbitration

ACC's 2008 Annual Corporate Counsel University®

May 21 – 23, 2008 – The Palace Hotel, San Francisco



AVOID WAGE AND HOUR TRAPS

- ✓ Misclassification
- ✓ Overtime policies
- ✓ Meal/Rest policies
- ✓ Bonus plans
- ✓ Commission plans
- ✓ Vacation policies
- ✓ Final paychecks

ACC's 2008 Annual Corporate Counsel University®

May 21 – 23, 2008 – The Palace Hotel, San Francisco



OTHER EMPLOYEE BENEFITS ISSUES

- ✓ Domestic Partners
- ✓ Cal-COBRA/Conversion of Group Health Plans
- ✓ Workers' Compensation
- ✓ Unemployment Compensation
- ✓ State Disability Insurance

ACC's 2008 Annual Corporate Counsel University®

May 21 – 23, 2008 – The Palace Hotel, San Francisco



EQUAL OPPORTUNITY LAW

ACC's 2008 Annual Corporate Counsel University®

May 21 – 23, 2008 – The Palace Hotel, San Francisco



WHAT IS "UNLAWFUL DISCRIMINATION?"

- ✓ Treatment less favorable than others in employment because of their membership in one or more protected classes (disparate treatment)

- ✓ Employment practices appearing to be neutral and nondiscriminatory, but has a disproportionate adverse impact on a protected class and cannot be justified by a business necessity (disparate impact)

- ✓ Harassment is a form of discrimination

ACC's 2008 Annual Corporate Counsel University®

May 21 – 23, 2008 – The Palace Hotel, San Francisco



WHAT IS "UNLAWFUL HARASSMENT?"

- ✓ Offensive conduct (may be verbal, physical, or visual) to a reasonable person; and
- ✓ Based on a protected characteristic; and
- ✓ Unwelcome; and
- ✓ Severe or pervasive



WHAT IS "UNLAWFUL RETALIATION?"

- ✓ An "adverse employment action" (e.g., denial of promotion, transfer to a less desirable position, denial of support, exclusion from meetings, etc.); or
- ✓ A "hostile work environment" (conduct that is sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment) . . .
- ✓ Motivated by a protected activity



WHAT ARE THE PROTECTED CHARACTERISTICS?

- ✓ Sex
- ✓ Race
- ✓ Color
- ✓ National origin/ancestry
- ✓ Religion
- ✓ Gender identity
- ✓ Pregnancy
- ✓ Age
- ✓ Sexual orientation
- ✓ Marital status
- ✓ Disability/medical condition
- ✓ Veteran status
- ✓ Engaging in protected activity
- ✓ Political affiliation

ACC's 2008 Annual Corporate Counsel University®

May 21 – 23, 2008 – The Palace Hotel, San Francisco



PROTECTED LEAVES OF ABSENCE (ACCOMMODATION REQUIREMENTS)

- ✓ Family medical leave
- ✓ Pregnancy disability leave
- ✓ Time off for school activities
- ✓ Kin care leave
- ✓ Military leave
- ✓ Jury service or other court-related appearance
- ✓ Time off for crime victims
- ✓ Time off to vote
- ✓ Public service leave
- ✓ Accommodation for lactating mothers
- ✓ Drug and alcohol rehabilitation accommodations
- ✓ Literacy assistance

ACC's 2008 Annual Corporate Counsel University®

May 21 – 23, 2008 – The Palace Hotel, San Francisco



OTHER PRIVACY RIGHTS

- ✓ State Constitutional right to privacy
- ✓ Lawful off-duty conduct
- ✓ Criminal convictions
- ✓ Credit checks and background checks
- ✓ Drug testing and drug-free workplace
- ✓ HIV testing
- ✓ Genetic testing
- ✓ Tape recording and videotaping
- ✓ Polygraph tests
- ✓ Medical records
- ✓ Use of social security numbers
- ✓ Duty to notify of breach of computerized personal information
- ✓ Psychological tests

ACC's 2008 Annual Corporate Counsel University®

May 21 – 23, 2008 – The Palace Hotel, San Francisco



INVESTIGATION ESSENTIALS

ACC's 2008 Annual Corporate Counsel University®

May 21 – 23, 2008 – The Palace Hotel, San Francisco



THE DUTY TO CONDUCT AN INVESTIGATION

- ✓ Once the employer is on notice of a complaint, it has an obligation to conduct a prompt and thorough investigation
- ✓ The standard is whether the employer conducted a timely, reasonable, good faith investigation

ACC's 2008 Annual Corporate Counsel University®

May 21 – 23, 2008 – The Palace Hotel, San Francisco



PRESERVATION OF EVIDENCE

- ✓ Document the information gathered
- ✓ Litigation Hold (identify all sources electronic and hard-copy materials)

ACC's 2008 Annual Corporate Counsel University®

May 21 – 23, 2008 – The Palace Hotel, San Francisco



TEN STEPS TO CONDUCTING THE INVESTIGATION

- | | |
|-----------------------------------|-------------------------------------|
| Prepare an investigative workplan | Follow-up interviews (if necessary) |
| Review the applicable documents | Conclude the investigation |
| Interview the complainant(s) | Prepare the investigative report |
| Interview the witnesses | Prepare the investigative file |
| Interview the respondent(s) | Submit the investigative report |

ACC's 2008 Annual Corporate Counsel University®

May 21 – 23, 2008 – The Palace Hotel, San Francisco



MANAGING PERFORMANCE

- Conduct routine performance reviews
- Be truthful -- avoid evaluation inflation
- Develop procedures and follow them consistently
- Results should not be a surprise
- Avoid insulting, defamatory or inflammatory language

ACC's 2008 Annual Corporate Counsel University®

May 21 – 23, 2008 – The Palace Hotel, San Francisco



THE PROGRESSIVE DISCIPLINE PROCESS

- ✓ Oral reprimand
- ✓ Written reprimand
- ✓ Suspension
- ✓ Demotion
- ✓ Pay reduction
- ✓ Probation
- ✓ Dismissal

- ✓ What about administrative leave ~ when is it appropriate?

ACC's 2008 Annual Corporate Counsel University®

May 21 – 23, 2008 – The Palace Hotel, San Francisco



WRITTEN DOCUMENTATION

- ✓ The employee's name
- ✓ The date of the oral reprimand
- ✓ Specific rule violation or performance problem that has occurred
- ✓ A reference to previous conversations about the problem
- ✓ A specific statement of the expected performance
- ✓ Any explanation given by the employee or other significant information
- ✓ A statement indicating your confidence in the employee's ability to perform properly in the future

ACC's 2008 Annual Corporate Counsel University®

May 21 – 23, 2008 – The Palace Hotel, San Francisco



REDUCED-RISK TERMINATIONS

ACC's 2008 Annual Corporate Counsel University®

May 21 – 23, 2008 – The Palace Hotel, San Francisco



GENERAL CONSIDERATIONS FOR ALL DISMISSALS

- ✓ Will the dismissal violate any law or public policy?
- ✓ Is there an outstanding or settled workers' compensation claim subjecting the employer to a retaliation action?
- ✓ What is the employee's tenure? (Does the employer "owe" the employee some special consideration?)
- ✓ Will the dismissal of the employee prevent the vesting of benefits?
- ✓ Did the employee's protected status arguably have anything to do with the decision?
- ✓ Has the employer made an offer of reasonable accommodation?
- ✓ Has a thorough investigation been conducted to ensure the decision is based upon facts and not perception, hearsay or speculation?
- ✓ Has the employee been given the opportunity to relate his/her side of the story?
- ✓ Are there extenuating circumstances or other mitigating factors which justify a lesser penalty?
- ✓ Is the decision timely?
- ✓ Is this action consistent with prior incidents of a similar nature?

ACC's 2008 Annual Corporate Counsel University®

May 21 – 23, 2008 – The Palace Hotel, San Francisco



DISCIPLINARY DISMISSALS

- ✓ Was the rule known to the employee? (Was the rule published?
Was the practice consistent with the rule?)
- ✓ Have appropriate disciplinary steps been followed?
- ✓ Did the employee have an opportunity to take constructive action?
- ✓ Are the witnesses credible?
- ✓ Was the information regarding the infraction obtained lawfully?
- ✓ Is the documentation in order?
- ✓ Does the employee's overall documented record support the decision?
- ✓ Is this action consistent with prior incidents of a similar nature?

ACC's 2008 Annual Corporate Counsel University®

May 21 – 23, 2008 – The Palace Hotel, San Francisco



PERFORMANCE DISMISSALS

- ✓ Do past performance evaluations support the decision?
- ✓ Was the employee not only told of deficiencies but also advised how to improve and when?
- ✓ Did the employee ask for help to improve and was denied?
- ✓ Is the articulated reason for the dismissal the real reason?
- ✓ Is the deficiency capable of objective measurement, or are the criticisms at least specific?
- ✓ Does the employee's overall record support the decision?
- ✓ Was the employee ever told the employee's failure to improve would result in dismissal?
- ✓ Is this action consistent with prior incidents of a similar nature?

ACC's 2008 Annual Corporate Counsel University®

May 21 – 23, 2008 – The Palace Hotel, San Francisco

ACC Association of Corporate Counsel

THE COMPLEXITIES OF EMPLOYMENT

The graphic consists of several interlocking puzzle pieces arranged in a grid. Each piece contains a specific employment law topic. The pieces are arranged as follows:

- Top row: HANDBOOKS, BENEFITS
- Second row: PRIVACY, LEAVES, INVESTIGATIONS
- Third row: EEO LAW, WAGE AND HOUR, DISCIPLINE, TERMINATIONS
- Bottom row: HIRING

ACC's 2008 Annual Corporate Counsel University® May 21 - 23, 2008 - The Palace Hotel, San Francisco