Monday, October 19
4:30 pm–6:00 pm

904 A Stitch in Time: How HR Best Practices Can Help Defeat Subsequent Employment Claims

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Faculty Biographies

Megan M. Belcher

Megan M. Belcher is senior counsel with ConAgra Foods, Inc., a Fortune 500 consumer foods company headquartered in Omaha, Nebraska. Ms. Belcher focuses her practice on the day-to-day management of the company's labor and employment matters, including providing day-to-day advice to business and human resource clients, and managing administrative charges and litigation in the state and federal courts. Ms. Belcher's practice extends to ConAgra's operations in all 50 states, and internationally.

Prior to joining ConAgra, Ms. Belcher practiced with Husch Blackwell Sanders LLP, in its Kansas City office, defending corporate clients in their labor and employment litigation matters and providing counseling on human resource issues.

Ms. Belcher is very active in ACC's Employment and Labor Law Committee, acting as the co-chair of the programs subcommittee. She is also an advisory board member to the *ACC Docket* and regularly writes and speaks on labor and employment related matters.

Ms. Belcher received her BA, with honors, from the University of Missouri, her JD from Boston College Law School, and holds a Certificate in Human Resource Studies from Cornell University's School of Labor and Industrial Relations. She is also certified as a Senior Professional in Human Resources by the Society for Human Resource Management.

Nicky Jatana
Partner
Jackson Lewis

Gregory R. Watchman

Gregory R. Watchman is associate general counsel for employment law at Freddie Mac in Tyson's Corner, Virginia.

Previously, Mr. Watchman served as acting assistant secretary of labor and deputy assistant secretary of labor at the US Department of Labor, Occupational Safety and Health Administration. In addition, he served as labor counsel to the labor committees in the US Senate and House of Representatives, working on a broad range of employment and labor law legislation, including the Civil Rights Act of 1991, the Family & Medical Leave Act of 1993, and the Older Workers Benefits Protection Act. Mr. Watchman also has experience counseling employers on employment law issues, with the national firms Paul Hastings and Morgan Lewis.

Mr. Watchman presently serves ACC as chair of the Employment & Labor Law Committee. In 2006, Mr. Watchman received the ACC's Jonathan S. Silber Award as Outstanding Committee Member of the Year.

Mr. Watchman received his law degree from Cornell Law School and is a graduate of Williams College.

H.R. Best Practices Scenario: "American Icon"

- Simon is the CEO of a production company that produces a hit television show called "American Icon". Simon's production company, based in Burbank, California, employs 500 employees. The staff includes Paula (HR Director), Randy (General Counsel), and Ryan (Talent Manager). All three also appear with Simon in the television show, which is based on a singing competition. The individual scenarios that follow trace certain events in the company's history over the past year.

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American Icon: January & February

- ***Drafting Policies.*** During the filming of auditions for the show, Paula grabs Ryan and kisses him. Later, Ryan complains to Simon that he is being harassed. Randy advises Simon to put some HR policies in place. Randy and Paula draft an EEO policy and a record retention policy. The EEO policy includes a complaint procedure that states that EEO and harassment complaints should be made to the head of HR. The record retention policy provides for the retention of payroll and personnel documents for two years.

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American Icon: January & February

- ***Hiring of Kara (Production Manager).*** Simon and Paula interview Ryan, the Talent Manager, for a Production Manager job. Simon tells Ryan he is a shoe-in for the job "unless somebody better looking shows up!" The following week they meet the beautiful Kara. Paula is jealous of Kara and writes in her interview notes, "not as talented as Ryan!" Simon decides to hire Kara because of her, um, "production experience;" he also adds her to the American Icon judges' panel. After the hiring, Simon tells Paula to toss out the applications and resumes. Paula disposes of the materials, but keeps her own notes in her files. She mentions to Ryan that she thought he was the best candidate for the Production Manager job.

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American Icon: January & February

Lessons Learned:

- Complaint Procedure: Provide multiple avenues for complaints; ensure prompt investigation; take appropriate remedial action; prohibit retaliation.
  - Employees should not be required to make complaints to their direct supervisor only.
  - Follow-up with an employee after he/she makes a complaint to let him/her know the Company is investigating and taking appropriate action.
  - Do not promise complete confidentiality to the employee!
- Retention Policy: Retain paper & electronic personnel action records (hiring, promotion, termination, etc.) for at least 7 years (or longer if required by state law).
  - Companies should have a document retention policy which is actively enforced and audited.

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American Icon: January & February

Lessons Learned:

- Document the business rationale for all personnel actions.
  - If an employee is terminated for poor performance, make sure their performance reviews reflect this.
  - If two employees have the same performance issues and only one is terminated, make sure there is a lawful reason for doing so and that it is consistent with the Company's policies.
- Train managers to maintain the integrity of hiring process; making personnel decisions based on factors unrelated to the job –even if the factors are not unlawful—can create legal risk and serve as evidence of pretext.
  - Consistency is key!

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American Icon: March & April

- ***Let's Get Physical.*** During the filming of the show, Paula massages Ryan's shoulders and pats him on the behind. Simon smiles. Randy says, "Hey, get a room, get a room." Ryan tells Paula to stop. Later, Simon calls a contestant's performance "horrible, absolutely revolting and soo karaoke." The young contestant sobs and has to be carried off the set. Ryan tells Simon he is a heartless egomaniac, and walks off the set.

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American Icon: March & April

- ***Performance Reviews.*** Simon meets with Paula and Ryan to review their performance and communicate compensation decisions. Paula lacks initiative, fails to complete her work, and spends all her time fawning over the show's musical contestants. Nevertheless, Paula has a beloved following on the American Icon show, and Simon is hesitant to rock the boat. He gives her an "Outstanding" rating and a generous 20% salary increase. Ryan, on the other hand, has performed well and is highly popular as the show's host, but Simon doesn't like his snide comments. Simon gives Ryan a "Satisfactory" rating with no salary increase. Ryan is angry and complains that Simon rewards his female employees better than his male employees.

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American Icon: March & April

- ***Ryan's Complaint.*** Later, Ryan decides he has had enough of Simon. He complains to Paula that 1) Simon's hiring of Kara as Production Manager was based on gender, and 2) Simon's pay practices reflect gender discrimination as well. Ryan wants to file a harassment complaint against Paula as well, but since the EEO policy would require him to submit that complaint to her, he decides not to.

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American Icon: March & April

- ***The Investigation.*** Paula interviews Ryan and Kara. She believes that Ryan was better qualified for the job Kara got, but she is concerned that Simon will blow his stack if she finds merit in Ryan's complaint. Randy tells Paula to write up a report. Paula laughs and says "all I need to make this go away is to use my charms on Ryan." She tells Ryan that Kara was better qualified for the Production Manager position and that the pay differences between them (Paula and Ryan) are appropriate based on years of experience.

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American Icon: March & April

Lessons Learned:

- Managers who observe misconduct must report it or take appropriate remedial action.
  - According to a Spherion Workplace Snapshot Survey, more than one-third of employed U.S. adults surveyed have witnessed unethical activities at their workplace but only 47% of them are likely to report it (22% unlikely to report and 31% rated themselves as "neutral").
  - Types of misconduct most observed by employees include: abusive or intimidating behavior toward employees (21%); lying to employees, customers, vendors or the public (19%); safety regulation violations (16%); discrimination on the basis of race, color, gender, age or other categories (12%); theft (11%); and sexual harassment (9%. (*National Business Ethics Survey)*

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American Icon: March & April

Lessons Learned:

- Don't "sugarcoat" performance issues! Document and communicate them to the employee.
  - Performance reviews create a record and legally justify an adverse employment action, such as discipline or discharge; without it, the employer has no effective way of rebutting employee claims of unlawful discrimination and/or wrongful termination.
- Ensure a trustworthy internal complaint process—don't force the complainant to file external complaints!
  - Providing and enforcing a policy is part of creating a company culture that allows and encourages valid complaints.
  - According to a Washington D.C.- based Ethics Resource Center, employees in organizations that have a strong ethical culture (79%) are more likely to report misconduct than those in organizations with a weak ethical culture (48%)

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American Icon: May & June

- ***A Reduction in Force.*** Due to declining ratings, Simon decides to terminate 10% of his workforce based on performance. Simon writes a list of his least favorite employees on a napkin. The list includes Paula, Ryan, 35 male employees, and every female employee over 50. Simon bases that list solely on his whimsy and personal feelings about the employees. After Randy objects to a number of the terminations because they are Randy's friends, Simon takes 15 male employees off the list and replaces them with 15 women over age 40. Simon meets with Paula to give her the bad news, and asks her to carry out the RIF before she leaves. Simon makes no arrangements for dealing with the employee's final pay, accrued vacation time, or COBRA notices.

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American Icon: May & June

- ***Handling The Termination Meeting:*** Paula meets with each of the employees being terminated and tells them each that he/she is getting "canned", that it is "totally bogus", and that they should sue. She lets each terminated employee go back to work and leave that day, whenever they want. No final paychecks are issued pursuant to state law, and all of the former employees file complaints with the state Department of Labor.

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American Icon: May & June

- ***The Internal Investigation.*** After her termination, Paula files an EEOC charge alleging that her termination was based on gender and age. She rallies many of the other women to participate in a class action. Simon, as the representative of the company named by Paula to the EEOC, receives the charge of discrimination. Upon receiving the charge and notice that an EEOC investigator would be coming on site, Simon calls all the current female employees into his office, interviews them, takes notes, and closes the meeting by telling them they had better "play ball" and not say anything disparaging to the EEOC.

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American Icon: May & June

- ***Handling An Onsite Government Investigation.*** A week later, the EEOC investigator comes to the offices of "American Icon." Randy and Simon both decide to go on vacation that week, and tell the receptionist to set the investigator up in a conference room and provide her with whomever and whatever information she may need. The investigator meets with all the employees and goes through all the personnel files of all current and former employees at "American Icon."

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American Icon: May & June

Lessons Learned:

- Importance of establishing and documenting appropriate selection criteria for a reduction-in-force (objectivity vs. subjectivity of the criteria is a relevant consideration), while also conducting privileged statistical analysis of disparate impact.
  - Since December 2007, 5.1 million jobs have been lost, with 3.3 million lost between November 2008 through March 2009 (U.S. Department of Labor's Bureau of Labor Statistics, March 2009).
  - Employers conducting group termination programs are at significant risk of incurring discrimination claims based on age.
  - The EEOC reports that age-related discrimination claim increased 29% in the last year and overall employment discrimination claims increased 15%.

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American Icon: May & June

Lessons Learned:

- Keys include creating a plan for a RIF, communicating termination decisions, controlling access after the decisions are communications, selecting the appropriate person for communicating that plan, and addressing all legal obligations.
  - In 2005, the U.S. Supreme Court made clear that age discrimination claims under the Age Discrimination in Employment Act can be premised on the theory of disparate impact, that is, that facially neutral factors used in the selection process resulted in termination of a disproportionately high number of older workers.
  - In 2008, the U.S. Supreme Court ruled that in defending ADEA claims, employers have the burden of proving that an employment practice with a disparate impact on older workers cannot give rise to age-discrimination liability because it is "based on reasonable factors other than age."

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American Icon: May & June

Lessons Learned:

- Inappropriateness of having the alleged bad actor conduct the investigation; witnesses may feel coerced, and investigation is not protected by privilege.
  - Unbiased and thorough investigations and reports are key.
  - The investigative team may include internal legal counsel, outside counsel, experienced investigators, forensic experts, independent auditors, etc.
  - Courts consider the process of the internal investigation, the analysis conducted, the thoroughness, and the pressures exerted upon investigative counsel to determine whether the investigation was properly conducted and whether its results were supported by the facts.

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American Icon: May & June

Lessons Learned:

- Importance of managing a government investigation while the investigator is on site to ensure that witness interviews are being properly conducted and that the investigation does not exceed its proper scope.
  - When first confronted with an investigation, learn as much as possible about the agency conducting the investigation; its responsibilities; the individual investigators; and the usual methods employed in such an investigation.
  - Ensure that appropriate persons within the corporation are involved in the process from the beginning.

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American Icon: July & August

- ***Maybe Not So Much A "Full" Waiver.*** After hearing of Paula's efforts to fight back against Simon, Ryan also files a charge with the EEOC, based on gender discrimination, harassment and retaliation. Since Ryan's departure, "American Icon" has hit a number of speed-bumps. Ryan had wonderful relationships with the major talent agencies in town and "American Icon" can hardly get anyone to appear on the show now. Because Ryan is so disgruntled with "American Icon", he has not only been bad mouthing "American Icon" all over town, but he also refuses to take Simon's calls when he has questions about work Ryan left behind.

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American Icon: July & August

- ***Maybe Not So Much A "Full" Waiver (cont'd.).*** To get rid of the EEOC charge and another visit from an investigator, Randy calls Ryan directly and offers him $50,000.00 to dismiss his charge. Randy tells him that he will cut him a check today and all he has to do is bring a letter from the EEOC proving that he has dismissed his charge. Ryan brings him the letter a few days later and collects his check. He then issues a press release advising that "American Icon" had paid him $50,000.00 because his case was "just that good." In addition, he puts in an application for the Talent Manager position that "American Icon" just posted on its website. When he doesn't get the job, he files another charge of discrimination with the EEOC.

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American Icon: July & August

- ***Managing Absenteeism.*** Randy, so distressed by the turn of events with Ryan and the press coverage of the payment, goes out on FMLA leave because the emotional distress has irritated his diabetes. Simon calls Randy at home, tells him he's a "weakling" and fires him for abandoning the company in its time of need. Randy begs Simon not to fire him, and says he can come back to work if Simon lets him work from home for a few days a week, just until he's feeling better. Simon tells him he won't even consider it and that he is going to send Randy his personal items by messenger.

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American Icon: July & August

- ***Managing Absenteeism (cont'd.).*** Randy finds a lawyer and immediately files suit in federal court, claiming that Simon terminated his employment because he took FMLA leave. Simon declines his outside counsel's urgings to prepare him for his deposition to save on the legal fees. Instead, he shows up for his deposition and tells his side of the story, advising what a "complainer" Randy was and how he couldn't do his job because of his diabetes. Outside counsel estimated that after Simon's deposition, and despite the fact Simon would have had a good reason to terminate Randy given his failures on dealing with the situation with Ryan, the settlement value of the case went up by $100,000.00.

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American Icon: July & August

- ***The Paper Trail.*** Simon is so overwhelmed by all the work to do with too few staff, he calls Paula and offers her the HR Director job back. Desperate for money, Paula accepts and returns to work the next day. When asked for information by outside counsel for "American Icon", Paula hides all the documents and emails that are "bad" for the company and would be problematic during the litigation. Paula reports her efforts to Simon, who commends her.

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American Icon: July & August

- ***The Paper Trail. (cont'd.)***
  However, Kara overhears the conversation, and reports Simon and Paula's plan to the company's Board of Directors. Given Simon's popularity, the Board tries to sweep the issue under the rug, and decides to randomly drug test Kara, hoping the tabloid stories about her drug use are true. Notably, the company does not have a drug testing policy and had only sporadically tested other employees in the past, typically for reasonable suspicion. Kara refuses to take the drug test and is fired, even though other staff members had previously refused a drug test and were only suspended for a week.

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American Icon: July & August

Lessons Learned:

- When resolving a pending charge or litigation, importance of getting a full, confidential release, with a no reapplication provision, as well as terms that allow for the orderly transition of duties and non-disparagement.
  - A Minnesota district court invalidated releases signed by plaintiffs in a putative age discrimination class action because the court found the releases did not satisfy the requirement of including a "knowing and voluntary" waiver of the former employees' right to sue under the Older Workers Benefit Protection Act ("OWBPA"), holding that "substantial compliance" is not enough.
  - *Potential Retaliation Claims When Requesting a Release*: A U.S. District Court for the District of Maryland ruled that the employer's attempt to require individuals to withdraw any pending EEOC charges before receiving the stipulated payment was retaliatory and unlawful.

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American Icon: July & August

Lessons Learned:

- Need to weigh whether or not employees may be potentially disabled, engage in the interactive dialogue with employees who request accommodations, and respect protected leaves when taken, or at least consider the issues before making a termination decision.
  - In light of the Americans with Disabilities Act Amendments Act of 2008 ("ADA Amendments Act"), the definition of disability should be construed in favor of broad coverage of individuals to the maximum extent permitted by the terms of the ADA and generally shall not require extensive analysis.
  - The EEOC reports that in 2008, there were 19,453 charges filed under the ADA.

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American Icon: July & August

Lessons Learned:

- Importance of preparing witnesses for their depositions, particularly the decisionmaker. The failure to do so can be very costly.
  - Lack of proper preparation can expose the corporation to significant risk, since the employee's statements may be used later against the corporation.
- Employers should evaluate the reasons for the employee's termination, and articulate the true and proper reason for the termination. False rationales can serve as evidence of pretext.
- Consistency in discipline for the same infraction is key. To fail to be consistent raises an inference of improper animus in making the adverse action.

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American Icon: September & October

- **Kara files a lawsuit.** On Labor Day, the EEOC dropped off a "package" at the "American Icon" headquarters while Simon was enjoying a margarita on the deck of his Malibu beach house. The next day, Simon arrives at the office and finds the package on his desk. Enclosed is a complaint filed on Kara's behalf for retaliation and wrongful termination. The Board of Directors told Simon what Kara knew about the "bad" documents so this time, after receiving the lawsuit Simon deleted all emails and electronic records related to Kara and any other lawsuit.

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American Icon: September & October

- **Increasing productivity.** Simon then called Paula in and told her that "American Icon's" ratings were sliding and struggling financially. So, they needed to maximize employee output because they could not afford to hire anyone else. Paula told Simon not to worry and she would do her best. Paula then told all employees, including janitors, production crew, makeup artists, etc. that they needed to be efficient and work nonstop. Paula told them that they could take a break if they absolutely needed one but the Company needed their help and commitment to get back on track.

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American Icon: September & October

- **Delete, delete, delete….**Simon learned that Kara kept all copies of emails and other electronic documents to which she had access. Using a forensic expert, Kara's attorneys were able to prove that Simon deleted everything after receiving the complaint even though Simon claimed he deleted the information prior to the filing of the lawsuit. The court sanctioned "American Icon" for its conduct.

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American Icon: September & October

- **"No recollection."** With this new lawsuit, Simon begged Randy to come back as General Counsel and resolved their differences. Randy met with Paula because her deposition had been noticed in Kara's case and told Paula that their conversation was protected by the attorney-client privilege. During the course of their meeting, Randy told Paula that she should feel comfortable saying she "does not recall" much of anything they will ask her and that she will be in and out of deposition before she knows it.

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American Icon: September & October

Lessons learned:

- Importance of preserving and retaining electronic documents pursuant to e-discovery rules at the inception of notice of a claim and litigation hold notices.
  - Recently, the NJ District Court ruled that litigation hold letters should be produced if there has been a preliminary showing of spoliation. Counsel received a demand letter in 2003 but the first discussion of e-mail preservation was not until 2005! The letters no longer were protected by the attorney-client privilege or work product doctrine and the court found that it was reasonable to infer "that some relevant evidence was lost."
  - Learn your document retention procedures from IT and document all the steps you take to preserve, gather, filter and produce electronically stored information.
  - This includes preserving any electronic backup files, which contain deleted emails and are periodically recycled as part of the company's normal data retention procedures.

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American Icon: September & October

Lessons learned:

- Failure to comply with e-discovery rules can result in severe monetary and issue sanctions. (FRCP 37)
  - In a case out of the S.D.N.Y., the judge ordered sanctions against the company for destroying relevant email messages during the course of litigation, ordering defendant to pay plaintiff's expenses and attorneys' fees incurred in pursuing the missing emails. The Court also granted plaintiff's request for additional discovery and for a jury instruction permitting a negative inference to be drawn from missing evidence. **Result = $29.3 million verdict.**
  - In July 2004, the Washington D.C. District Court sanctioned a party **$2.75 Million Dollars** for the deletion of emails by senior executives. This sanction was issued despite a finding that there was no bad faith.
  - In 2005, a Florida jury awarded plaintiff **$1.45 billion** in damages after the trial judge found that the company failed to preserve emails by allowing email to be overwritten after 12 months.

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American Icon: September & October

Lessons learned:

- Employers should be mindful of off-the-clock work which can trigger overtime pay obligations and meal and rest periods under various state laws.
  - Time spent doing work not requested by the employer, but still allowed by the employer, is generally considered compensable, since the employer knows or has reason to believe that the employees are continuing to work off-the-clock and the employer is benefiting from the work being done.
  - A person hired to do nothing or to do nothing but wait for something to do or something to happen is still working. (The NY Times published an article in 2004 regarding a hairdresser who was forced to clock out but remain in the salon when she wasn't actually doing hair).
  - Pending issue: Using cell phone or electronic communications to conduct business after hours (Pending class action out of the E.D.N.Y, filed in July 2009, involving employees who are required to respond to work-related messages, including customer complaints, after hours)

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American Icon: September & October

Lessons learned:

- "Do not recall" responses are often over used. Such responses leave the door open for the other side to manipulate or prohibit the witness from disputing critical testimony.
  - This should not be a crutch—only use this response if you truly do not remember.
  - Be prepared for questions such as "Is there anything that would help you remember?" or "Does that mean you do not recall one way or the other?"
  - Do not provide this response if you do not understand the question—ask for clarification if necessary.

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American Icon: November & December

- **L.A. Confidential.** After reviewing all of Kara's emails, Simon learned that Kara had been communicating with Ryan ever since Ryan left to start working at America's Got Talent. In fact, Kara emailed Ryan a list of all the industry connections with contact information from "American Icon's" database. Kara also used her "American Icon" email account to send personal emails, telling her co-workers "don't worry, 'American Icon' knows we use our email addresses for everything and they don't care." When Simon called Kara to confront her about the list of connections and their contact information, Kara said that it was not confidential information and she didn't know she couldn't send it to Ryan. After all, "American Icon" posted it up all throughout the set for everyone to see for easy access.

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American Icon: November & December

- **Bah Humbug?** Simon decided that he needed to increase morale within the company so he threw a private holiday party and invited all of the employees to his Bel Air mansion. He told all employees that he hoped this was the turning point for "American Icon" and he wanted everyone to just get along. Simon even invited Ryan and Kara in an effort to make amends. The employees cheered and began drinking bottle after bottle of Simon's liquor.

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American Icon: November & December

- After a while, it became clear that everyone was getting along too well and Kara couldn't keep her hands off Ryan. Paula got jealous, and confided in her make-up artist whose deposition was scheduled for after the first of the new year. Paula told her all of the "dirt", including her conversations with Randy.

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American Icon: November & December

Lessons learned:

- Importance of having and enforcing an electronic communications policy which clearly sets forth that employees do not have a reasonable expectation of privacy in their work email.
  - Employers can impose broad restrictions, such as e-mail may only be used for work-related purposes.
  - Include the email policy in employee handbooks so you have a record of employees acknowledging receipt.
  - Send out reminders about your policy via email or memoranda.
  - Consistently discipline employees for using company email for personal reasons.
  - Remind employees that the Company is protecting itself against viruses, ensuring protection of confidential information, preventing productivity loss, preserving server space, and avoiding company liability for employees' inappropriate e-mail.

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American Icon: November & December

Lessons learned:

- Importance of having confidentiality agreements and maintaining confidentiality of trade secret information such as customer lists, contacts, etc.
  - Make reasonable efforts to maintain secrecy of confidential information.
  - Any confidential and trade secret information should not be posted on bulletin boards, in community areas, sent via mass emails, etc.
  - Make sure to label any confidential and trade secret information with "Confidential."
  - As with all policies, make sure to enforce it in a non-discriminatory manner.
  - What about return of confidential information at termination?

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American Icon: November & December

Lessons learned:

- The attorney-client privilege may be waived.
  - The privilege may be subject to waiver when the content of a confidential communication is disclosed to a third person with has no common interest in the information, even in some instances where the disclosure is inadvertent.
  - A waiver can occur where the communication takes place in public, or in some less than secure environment.
  - The waiver may also result from failure to object to the demand for disclosure in litigation.

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ACC Session #904: "A Stitch in Time: How HR Best Practices Can Help Defeat Subsequent Employment Claims"

Presented By:
Greg Watchman, Esq., Associate General Counsel, Freddie Mac
Megan Belcher, Esq., Senior Counsel, Conagra Foods, Inc.
Nicky Jatana, Esq., Partner, Jackson Lewis LLP

Sponsored by the Employment & Labor Law and Litigation Committees
Monday, October 19, 2009 4:30 p.m.

There is much that in-house employment lawyers, their HR clients and their managers can do before and when an employment dispute arises that can help litigators successfully defend the company if the employee files an administrative agency charge or court complaint. This round table session will cover best practices in conducting terminations and other personnel actions, investigating complaints, drafting policies, preparing for and responding to e-discovery requests, maintaining records and other actions that can create legal risk.

H.R. Best Practices Scenario:

Simon is the CEO of a production company that produces a hit television show called "American Icon".[1] Simon's production company, based in Burbank, California, employs 500 employees. The staff includes Paula (HR Director), Randy (General Counsel), and Ryan (Talent Manager). All three also appear with Simon in the television show, which is based on a singing competition. The individual scenarios that follow trace certain events in the company's history over the past year.

January/February

Drafting Policies. During the filming of auditions for the show, Paula grabs Ryan and kisses him. Later, Ryan complains to Simon that he is being harassed. Randy advises Simon to put some HR policies in place. Randy and Paula draft an EEO policy and a record retention policy. The EEO policy includes a complaint procedure that states that EEO and harassment complaints should be made to the head of HR. The record retention policy provides for the retention of payroll and personnel documents for two years.

Hiring of Kara (Production Manager). Simon and Paula interview Ryan, the Talent Manager, for a Production Manager job. Simon tells Ryan he is a shoe-in for the job "unless somebody better looking shows up!" The following week they meet the beautiful Kara. Paula is jealous of Kara and writes in her interview notes, "not as talented as Ryan!" Simon decides to hire Kara because of her, um, "production experience;" he also adds her to the American Icon judges' panel. After the hiring, Simon tells Paula to toss out the applications and resumes. Paula disposes of the materials, but keeps her own notes in her files. She mentions to Ryan that she thought he was the best candidate for the Production Manager job.

March/April

Let's Get Physical. During the filming of the show, Paula massages Ryan's shoulders and pats him on the behind. Simon smiles. Randy says, "Hey, get a room, get a room." Ryan tells Paula to stop. Later, Simon calls a contestant's performance "horrible, absolutely revolting and soo karaoke." The young contestant sobs and has to be carried off the set. Ryan tells Simon he is a heartless egomaniac, and walks off the set.

[1] This fictional scenario is intended for educational purposes only and not to capitalize on a reality show. Any resemblance between this fictional scenario and actual characters is purely coincidental.

Performance Reviews. Simon meets with Paula and Ryan to review their performance and communicate compensation decisions. Paula lacks initiative, fails to complete her work, and spends all her time fawning over the show's musical contestants. Nevertheless, Paula has a beloved following on the American Icon show, and Simon is hesitant to rock the boat. He gives her an "Outstanding" rating and a generous 20% salary increase. Ryan, on the other hand, has performed well and is highly popular as the show's host, but Simon doesn't like his snide comments. Simon gives Ryan a "Satisfactory" rating with no salary increase. Ryan is angry and complains that Simon rewards his female employees better than his male employees.

Ryan's Complaint. Later, Ryan decides he has had enough of Simon. He complains to Paula that 1) Simon's hiring of Kara as Production Manager was based on gender, and 2) Simon's pay practices reflect gender discrimination as well. Ryan wants to file a harassment complaint against Paula as well, but since the EEO policy would require him to submit that complaint to her, he decides not to.

The Investigation. Paula interviews Ryan and Kara. She believes that Ryan was better qualified for the job Kara got, but she is concerned that Simon will blow his stack if she finds merit in Ryan's complaint. Randy tells Paula to write up a report. Paula laughs and says "all I need to make this go away is to use my charms on Ryan." She tells Ryan that Kara was better qualified for the Production Manager position and that the pay differences between them (Paula and Ryan) are appropriate based on years of experience.

May/June

A Reduction in Force. Due to declining ratings, Simon decides to terminate 10% of his workforce based on performance. Simon writes a list of his least favorite employees on a napkin. The list includes Paula, Ryan, 35 male employees, and every female employee over 50. Simon bases that list solely on his whimsy and personal feelings about the employees. After Randy objects to a number of the terminations because they were Randy's friends, Simon takes 15 male employees off the list and replaces them with 15 women over age 40. Simon meets with Paula to give her the bad news, and asks her to carry out the RIF before she leaves. Simon makes no arrangements for dealing with the employee's final pay, accrued vacation time, or COBRA notices.

Handling The Termination Meeting: Paula meets with each of the employees being terminated, and tells them each that he/she is getting "canned", that it is "totally bogus", and that they should sue. She lets each terminated employee go back to work and leave that day, whenever they want. No final paychecks are issued pursuant to state law, and all of the former employees file complaints with the state Department of Labor.

The Internal Investigation. After her termination, Paula files an EEOC charge alleging that her termination was based on gender and age. She rallies many of the other women to participate in a class action. Simon, as the representative of the company named by Paula to the EEOC, receives the charge of discrimination. Upon receiving the charge and notice that an EEOC investigator would be coming on site, Simon calls all the current female employees into his office, interviews them, takes notes, and closes the meeting by telling them they had better "play ball" and not say anything disparaging to the EEOC.

Handling An Onsite Government Investigation. A week later, the EEOC investigator comes to the offices of "American Icon." Randy and Simon both decide to go on vacation that week, and tell the receptionist to set the investigator up in a conference room and provide her with whomever and whatever information she may need. The investigator meets with all the employees and goes through all the personnel files of all current and former employees at "American Icon."

July/August

Maybe Not So Much A "Full" Waiver. After hearing of Paula's efforts to fight back against Simon, Ryan too files a charge with the EEOC gender discrimination, harassment and retaliation. Since Ryan's departure, "American Icon" has hit a number of speed-bumps. Ryan had wonderful relationships with the major talent agencies in town and "American Icon" can hardly get anyone to appear on the show now. Because Ryan is so disgruntled with "American Icon", he has not only been bad mouthing "American Icon" all over town, but he also refuses to take Simon's calls when he has questions about work Ryan left behind.

To get rid of the EEOC charge and another visit from an investigator, Randy calls Ryan directly and offers him $50,000.00 to dismiss his charge. Randy tells him that he will cut him a check today and all he has to do is bring a letter from the EEOC proving that he has dismissed his charge. Ryan brings him the letter a few days later and collects his check. He then issues a press release advising that "American Icon" had paid him $50,000.00 because his case was "just that good." In addition, he puts in an application for the Talent Manager position that "American Icon" just posted on its website. When he doesn't get the job, he files another charge of discrimination with the EEOC.

Managing Absenteeism. Randy, so distressed by the turn of events with Ryan and the press coverage of the payment, goes out on FMLA leave because the emotional distress has irritated his diabetes. Simon calls Randy at home, tells him he's a "weakling" and fires him for abandoning the company in its time of need. Randy begs him not to fire him, and says he can come back to work if Simon lets him work from home for a few days a week, just until he's feeling better. Simon tells him he won't even consider it and that he is going to send Randy his personal items by messenger.

Randy finds a lawyer and immediately files suit in federal court, claiming that Simon terminated his employment because he took FMLA leave. Simon declines his outside counsel's urgings to prepare him for his deposition to save on the legal fees. Instead, he shows up for his depositions and tells his side of the story, advising what a "complainer" Randy was and how he couldn't do his job because of his diabetes. Outside counsel estimated that after Simon's deposition, and despite the fact Simon would have had a good reason to terminate Randy given his failures on dealing with the situation with Ryan, that the settlement value of the case went up by $100,000.00. Unfortunately, Simon's failure to rely on Randy's negligence as the reason for the termination, and his poor deposition performance, put the case in jeopardy.

The Paper Trail. Simon is so overwhelmed by all the work to do with none of the staff, he calls Paula and offers her the HR Director job back. Desperate for money, Paula accepts and returns to work the next day. When asked for information by outside counsel for "American Icon", Paula hides all the documents and emails that are "bad" for the company and would be problematic during the litigation. Paula reports her efforts to Simon, who commends her.

However, Kara overhears the conversation, and reports Simon's and Paula's plan to the company's Board of Directors. Given Simon's popularity, the Board tries to sweep the issue under the rug, and decides to randomly drug test Kara, hoping the tabloid stories about her drug use are true. Notably, the company does not have a drug testing policy and had only sporadically tested other employees in the past, typically for reasonable suspicion. Kara refuses to take the drug test and is fired, even though other staff members had previously refused a drug test and were only suspended for a week.

September/October

Kara files a lawsuit. On Labor Day, the EEOC dropped off a "package" at the "American Icon" headquarters while Simon was enjoying a margarita on the deck of his Malibu beach house. The

next day, Simon arrives at the office and finds the package on his desk. Enclosed is a complaint filed on Kara's behalf for retaliation and wrongful termination. The Board of Directors told Simon what Kara knew about the "bad" documents so this time, after receiving the lawsuit Simon deleted all emails and electronic records related to Kara and any other lawsuit.

Increasing productivity. Simon then called Paula in and told her that "American Icon's" ratings were sliding and struggling financially. So, they needed to maximize employee output because they could not afford to hire anyone else. Paula told Simon not to worry and she would do her best. Paula then told all employees, including janitors, production crew, makeup artists, etc. that they needed to be efficient and work nonstop. Paula told them that they could take a break if they absolutely needed one but the Company needed their help and commitment to get back on track.

Delete, delete, delete….Simon learned that Kara kept all copies of emails and other electronic documents to which she had access. Using a forensic expert, Kara's attorneys were able to prove that Simon deleted everything after receiving the complaint even though Simon claimed he deleted the information prior to the filing of the lawsuit. The court sanctioned "American Icon" for its conduct.

"No recollection." With this new lawsuit, Simon begged Randy to come back as General Counsel and resolved their differences. Randy met with Paula because her deposition had been noticed in Kara's case and told Paula that their conversation was protected by the attorney-client privilege. During the course of their meeting, Randy told Paula that she should feel comfortable saying she "does not recall" much of anything they will ask her and that she will be in and out of deposition before she knows it.

November/December

L.A. Confidential. After reviewing all of Kara's emails, Simon learned that Kara had been communicating with Ryan ever since Ryan left to start working at America's Got Talent. In fact, Kara emailed Ryan a list of all the industry connections with contact information from "American Icon's" database. Kara also used her "American Icon" email account to send personal emails, telling her co-workers "don't worry, "American Icon" knows we use our email addresses for everything and they don't care." When Simon called Kara to confront her about the list of connections and their contact information, Kara said that it was not confidential information and she didn't know she couldn't send it to Ryan. After all, "American Icon" posted it up all throughout the set for everyone to see for easy access.

Bah Humbug? Simon decided that he needed to increase morale within the company so he threw a private holiday party and invited all of the employees at his Bel Air mansion. He told all employees that he hoped this was the turning point for "American Icon" and he wanted everyone to just get along. Simon even invited Ryan and Kara in an effort to make amends. The employees cheered and began drinking bottle after bottle of Simon's liquor.

After a while, it became clear that everyone was getting along too well and Kara couldn't keep her hands off Ryan. Paula got jealous and confided in her make-up artist whose deposition was scheduled for after the first of the new year and told her all of the "dirt", including her conversations with Randy.

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[2] Excerpts taken from ACC InfoPAK Copyright © 2006 Jackson Lewis, LLP and Association of Corporate Counsel

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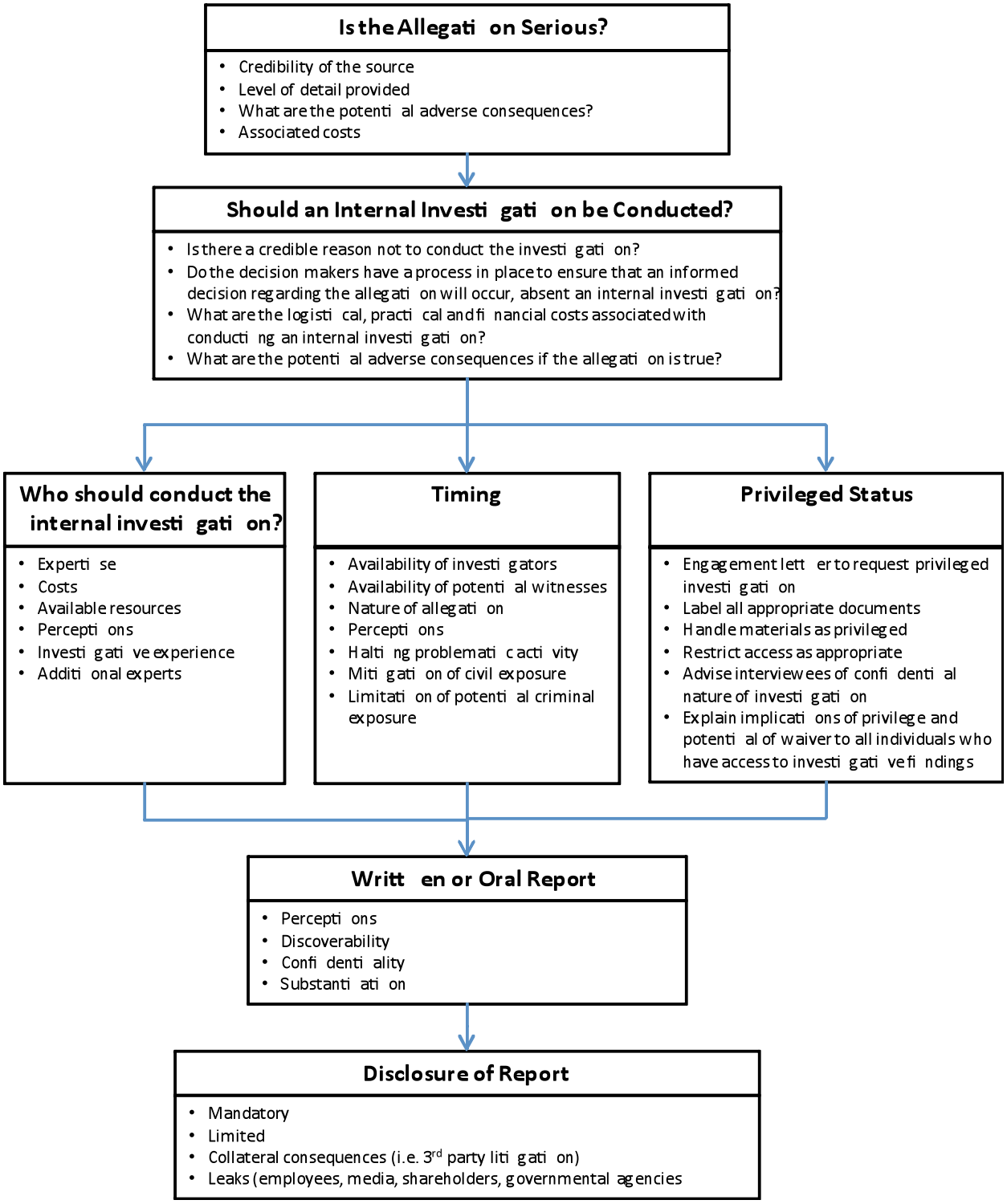
V. ELECTRONIC COMMUNICATIONS POLICIES

The Need for Internal Investigations

Internal investigations have become a necessity in today's exceedingly complex legal environment. Corporate decision makers, shareholders, and investigative governmental agencies often expect that corporations will conduct internal investigations when serious allegations of misconduct arise. Internal investigations should be considered in a variety of common circumstances. Becoming a "whistle blower" has become a lucrative goal for disgruntled employees and an increasingly litigious legal community. Regulatory investigations of corporations negatively affect companies' public relations, reputations, and employee and customer relations, no matter the outcome of an official inquiry. Debarment or exclusion actions taken by government agencies can result in the death of the corporate entity. Criminal investigations by an exceedingly aggressive law enforcement community can result in litigation that puts the corporation's very existence, as well as the liberty of its senior management, at risk. Shareholder litigation, arising from allegations of misconduct by corporate officers or agents, often threatens multi-million dollar losses for companies. Properly performed internal investigations assist in determining whether the allegations have substance, who may have been involved and what level of involvement they had, what the proper responses should be and the legal risks associated with failing to respond, how to minimize the regulatory, civil and criminal exposure of the corporation and its senior management, and what, if any, preventative measures are applicable to preclude repetition of the events in question. On the other hand, improperly performed internal investigations potentially increase corporate exposure and the corresponding risk to management personnel. The decision to initiate an internal investigation may be triggered by employee, customer or vendor complaints, subpoenas, disclosure of a grand jury investigation, auditors' concerns, civil suits or one of many other events. Often the potential consequences of the triggering events are severe, the costs of the allegations are astronomical, the preparation for responding can appear overwhelming, the tasks seem challenging, and the legal complexities increasingly daunting. However, with the rise of multi-faceted actions against corporations, including regulatory, civil, administrative and criminal investigations, failing to implement an internal investigation can waive the corporation's best opportunities for a defense and mitigating its loss, while creating additional liabilities.

Internal Investigation Considerations



Steps to Follow When You Receive A Charge

A. Review the Charge

Review the entire charge and make sure it is complete and signed. Also note whether there has been an investigator assigned to the charge by the administrative agency and the date when the response is due.

B. Notification of No-Retaliation Policy

If the Charging Party is a current employee, contact the employee, contact their supervisor or manager and notify them of the employer's "no retaliation" policy. Document this conversation. Limit information to only those with a need-to-know. Ask the managers or supervisors who work or worked with the employee, if they are involved, not discuss the charge with anyone without an absolute need-to know. Supervisors and managers should be directed not to discuss the matter with anyone except the person responsible for investigating or responding to the charge.

C. Contact with the Agency Investigator

Only a human resources representative or other individual responsible for preparing a response to the charge should take calls from the administrative agency representative. Inform supervisors and managers that if the agency contacts them or anyone else at the location (except non-supervisory hourly employees) that the agency should contact the individual responsible for the investigation and response. The person responsible for responding to the charge should refrain from discussing the employer's position with respect to the charge with anyone until the investigation and response are completed.

D. Initial Contact with Agency Investigator

If an agency investigator has been assigned to the charge, contact the investigator by telephone and introduce yourself. Be cordial and cooperative. Do not argue the merits of the charge. If possible, ask the investigator whether the Charging Party has an attorney and request specifics regarding the allegations of the charge. If you need an extension of time to respond to the charge, which is usually the case, ask the investigator for an extension at this time. The more cooperative and cordial you are during this discussion, the more likely the investigator will agree to an extension of time to respond.

E. Document all Contact with Agency

Always follow your discussion with the agency investigator or other agency representative with a letter confirming, for example, the agreement to an extension of time to respond to the charge. Provide your contact information in the letter.

F. Determine Basis for Charge and Scope of Investigation

Determine the basis of the charge and review the text of the charge in detail. Is the charge alleging discrimination based on race, color, sex, religion, national origin, age, disability, retaliation or some other basis? Review the boxes checked on the charge form regarding the type of discrimination alleged. The type of claim will determine the type of information and documentation you need to obtain to provide in the response.

G. Determine Timeliness of Charge

Check for timeliness of the charge. If the charge is filed more than 180 days (in states without a FEPA or state deferral agency) or 300 days (in states with FEPA or state deferral agencies) following the last alleged discriminatory event (i.e., termination, lack of promotion), some or all of the allegations in the charge may be time barred. Contact legal counsel to determine whether the charge is time-barred in your jurisdiction. If so, you may choose to respond to the charge with a short letter raising the time-bar defense, instead of providing a detailed position statement. The agency may agree with your position and dismiss the charge or decide to continue the investigation despite the time-barred claims.

H. Agency Requests for Documents

Does the charge documentation received from the agency contain a separate request for information/documents? If so, review the request for information and use it as a general guide regarding the type of information the agency will be looking for in response to the charge. Sometimes the agency uses a form to request documents to accompany the position statement and the information requested by the agency is beyond the scope of the information necessary to address the claims in the charge. Begin to gather the information requested by the agency, to the extent possible, and discuss the scope of the information requested with legal counsel. As a general rule, it is better to provide enough information to the agency in the position statement (with attachments) to defend the allegations in the charge only, without providing too much information.

I. Litigation Hold

Following receipt of a charge of discrimination, the employer may want to consider implementing what is referred to as a "litigation hold." A "litigation hold" prevents the employer and any relevant departments or employees from destroying or discarding potential evidence related to the employee or the employee's claims. If the employer has a document retention policy and certain documents or computer files are regularly scheduled for purging, a "litigation hold" may prevent those documents or files from being discarded. Document retention, especially electronic document retention, is becoming increasingly important in litigation across the country and is often the subject of costly discovery disputes in employment litigation that results from a charge of discrimination.

J. Importance of a Well Prepared Response to the Charge

Remember, the position statement and accompanying documents are the employer's official response to the Charging Party's allegations. Anything included in the response will likely be fair game in any future litigation.

Investigation of the Facts Underlying the Charge and Conducting the Investigation

I. INVESTIGATION OF THE FACTS UNDERLYING THE CHARGE

A. Factual Investigation

The first task facing the individual responsible for responding to the charge after it receives notice of a charge of discrimination or retaliation is to commence a factual investigation. As the individual responsible, you may already be familiar with the facts underlying the charge or may have already conducted an investigation. The following are some guidelines to follow for the investigation of allegations of discrimination, harassment or retaliation both before and after receipt of a charge of discrimination.

B. Why Investigate?

The primary reason to perform a factual investigation is to determine whether there has been inappropriate conduct, and if so, whether effective remedial and preventive action has been taken. An equally important reason is to access the employer's potential liability and exposure, gather the evidence expected to be necessary to defend a potential lawsuit, and determine whether an early resolution of the claim is possible.

C. The Goals of the Investigation

1. Determine whether the facts alleged in the charge are correct and, if not, what are the facts surrounding the charge;

2. Ascertain all of the pertinent facts that rebut the allegations of discrimination or retaliation;

3. Document the company’s prompt corrective action if the Charging Party made an internal complaint of discrimination or other misconduct;

4. Show that the Charging Party and other similarly situated employees who have engaged in comparable misconduct or violations of work rules have been treated in a consistent manner;

5. Develop written statements or other proof before employees leave the company and become unavailable to provide information; and

6. Permit the investigator to analyze its potential risks in any administrative or litigation proceeding related to the Charging Party’s allegations.

II. CONDUCTING THE INVESTIGATION

A. Who Should Conduct the Investigation?

The person conducting the investigation should be impartial and should not be directly involved as a participant in the challenged conduct or decisions. Also, the individual conducting the investigation should not be a person that you do not want as a witness in any subsequent litigation. For example, if you assign outside counsel with the task of investigating the facts underlying a charge, they could later be considered a witness in subsequent litigation, thereby disqualifying them from representing you in the litigation and potentially waiving any privilege with respect to any legal advice that was rendered. This same principle applies to in house counsel. If in house counsel investigates the underlying facts, and the employer intends to rely on this investigation as part of its defense, in house counsel could become a witness in the litigation. This is normally not intended by the employer as in house counsel may have also given privileged legal advice regarding the charge. That privilege could be waived by counsel by participation in the initial fact investigation. Close consideration should be given to who will conduct the internal investigation of the underlying facts based on these and other considerations.

B. Investigator Selection Criteria

The person selected to conduct the investigation should:

1. Understand the purpose of the investigation.
2. Know the issues involved in the investigation.
3. Be very familiar with the employer's policies.
4. Have good interviewing skills.
5. Be able to maintain confidentiality.
6. Have credibility to employees involved.
7. Be able to prepare a complete and accurate report.

C. What the Investigator Should Know

1. Aim of the Investigation.

The aim of the investigation is: to find out the who, what, when, where and why pertaining to the Charging Party's allegations.

2. Who to Notify of the Charge and Why.

At the outset, the Charging Party's immediate supervisors or managers should be notified of the charge. The investigator should inform the manager or supervisor to begin collecting all relevant documents pertaining to the Charging Party's claims such as supervisor's files, work samples, disciplinary actions, e-mails, logs, schedules, attendance records, notes, handwritten or typed statements, and lists of potential witnesses. Again, the investigator should emphasize the importance of discretion and not discussing the charge with employees except on a "need to know" basis.

3. Investigation Essentials

a. Review of the relevant documents.

b. Interview of the Charging Party, if still employed.

c. Interview of the alleged wrongdoer or the managers or supervisors involved in the challenged decision or actions.

d. Interview of all individuals identified as witnesses who may have knowledge or information concerning the alleged discrimination.

e. Interviews should be conducted in private to prevent others who are not involved in the investigative process from overhearing any statements.

Preparing the Position Statement

A. Introductory Material

In responding to the charge, the position statement should present the employer's case in a persuasive manner and request the agency to issue a "no probable cause" or "no reasonable cause" determination dismissing the case. Generally, the position statement should include an introductory section describing the nature of the employer's business and summarizing the Charging Party's job duties. In addition, the position statement should highlight the employer's EEO policies or Harassment Policy and any other policies or practices relevant to the facts at issue in the charge. It is also helpful to include information regarding any training that employees or managers receive that is relevant to the claims made in the charge. Many employers also like to include some legal analysis in their position statements by including citations to applicable case law. Use of legal analysis is not necessary and is not always persuasive to the investigating agency. Prior to including legal analysis, make sure the case law is binding authority in the jurisdiction and focus only on case law that sets forth the relevant burdens of proof for the type of claim in the charge. Avoid comparative decisions by courts outside your jurisdiction. Also, keep in mind that the position statement and any material submitted in support of the employer's response will become available to opposing counsel through a FOIA request once the agency has completed its investigation.

B. Charging Party's Employment History

After this introductory material, the position statement should describe information about the Charging Party's employment that is relevant to the analysis of his or her claims. Examples of such information include the Charging Party's date of hire, job progression, promotions, salary increases, transfers and disciplinary record.

C. Explain Legitimate, Non-Discriminatory Reason for Disputed Decision

Next, the position statement should describe, in narrative form, pertinent facts regarding the adverse employment actions about which the Charging Party complains.

Type of claim	Charging party must establish	Possible defenses	Relevant documents
Discrimination based upon: Race, Color, Sex, National origin, Pregnancy	(1) He/she is a member of a protected class; (2) He/she experienced an adverse employment	• Demonstrate that Charging Party is unable to establish the required	• Charging Party's personnel file • Charging Party's job description Personnel files of similarly

Type of claim	Charging party must establish	Possible defenses	Relevant documents
	action; and (3) He/she was treated differently than similarly situated individuals not in his/her protected class under similar circumstances.	elements of his/her claim. For example, he/she did not suffer an adverse employment action or he/she was treated the same as all other similarly situated employees. Dispute any of Charging Party's factual allegations. Establish a legitimate non-discriminatory business reason for the adverse employment action.	situated employees • Job descriptions of similarly situated employees • All documents regarding the adverse employment action • Employee handbook • All documents supporting the Employer's legitimate non-discriminatory business reason • Employer's equal opportunity policy • Employer's procedure for employee complaints • All other applicable policies
AGE DISCRIMINATION	1. Charging Party is at least forty (40) years old; 2. Charging Party was subjected to an adverse employment action; and 3. Someone younger and similarly situated was treated more favorably.	• Demonstrate that Charging Party is unable to establish the required elements of his/her claim. • Dispute any of Charging Party's factual allegations. • Establish a legitimate non-discriminatory business reason for the adverse employment action.	• Charging Party's personnel file • Personnel files of younger similarly situated employees Job descriptions of similarly situated employees. • All documents regarding the adverse employment action. • Employee handbook All documents supporting the Employer's legitimate non-discriminatory business reason • Employer's equal opportunity policy • Employer's procedure for employee complaints • All other applicable policies
DISABILITY DISCRIMINATION	1. The Charging Party is an individual with a disability, which includes: a. a physical or mental impairment that substantially limits one or more of the person's major life activities; b. a record of such an impairment; or c. is regarded as having such an	• Demonstrate that Charging Party is unable to establish the required elements of his/her claim. • Demonstrate made a reasonable accommodation and/or was unable to accommodate due to undue	• Charging Party's personnel file • Any documents pertaining to Charging Party's alleged disability • Any documents pertaining to Employer's efforts to accommodate Charging Party • Charging Party's job description • Any documents pertaining to Charging Party's job performance

Type of claim	Charging party must establish	Possible defenses	Relevant documents
	impairment; 2. He/she can perform the essential functions of the job with or without accommodation; and 3. Charging Party suffered an adverse employment action because of his/her disability, and/or failed to accommodate Charging Party's disability	hardship. • Demonstrate a direct threat to health or safety to Charging Party or others in the workplace. • Establish a legitimate non-discriminatory business reason for the adverse employment action.	• All documents regarding the adverse employment action. • Employee handbook • All documents supporting the Employer's legitimate non-discriminatory business reason • Employer's equal opportunity policy • Employer's policy for reporting and resolving complaints • All other applicable policies.
SEXUAL HARASSMENT w/a tangible employment action by a supervisor (formerly Quid Pro Quo)	1. Charging Party is a member of a protected group; 2. Charging Party was subjected to unwelcome sexual advances or other illegal harassment by a supervisor; 3. The sexual advance was because of the Charging Party's sex; 4. Charging Party experienced an employment action affecting a tangible aspect of the Charging Party's terms, conditions, or privileges of employment and based on rejecting or accepting the sexual advance	• Demonstrate that Charging Party is unable to establish the required elements of his/her claim. For example, no sexual advances occurred. • Establish a legitimate non-discriminatory business reason for the tangible employment action.	• Charging Party's personnel file • Any complaints of sexual harassment by Charging Party, if any • Any documents pertaining to Employer's investigation and response to Charging Party's complaints of sexual harassment • All documents regarding the adverse employment action. • Employee handbook • All documents supporting the Employer's legitimate non-discriminatory business reason • Employer's equal opportunity policy • Employer's sexual harassment and non-retaliation policy • Employer's policy for reporting sexual harassment complaints • All other applicable policies.
SEXUAL HARASSMENT (Hostile Work Environment) (Also applies to claims of harassment based on other protected status, i.e., race, national origin, age, etc.).	1. Charging Party is a member of a protected group; 2. Charging Party was subject to unwelcome harassment, i.e., sexual advances, requests for sexual favors, or other conduct of a sexual nature;	• Demonstrate that Charging Party is unable to establish the required elements of his/her claim. • (1) Establish the has provided a readily accessible and	• Charging Party's personnel file • Any complaints of sexual or other harassment by Charging Party if any. • Any documents pertaining to the Employer's investigation and response to Charging Party's complaints of sexual

Type of claim	Charging party must establish	Possible defenses	Relevant documents
	3. Harassment was based on Charging Party's sex or other protected status; 4. The harassment was sufficiently severe or pervasive to alter terms and conditions of employment and create a discriminatorily abusive working environment; and 5. They knew or should have known about the alleged harassment and failed to take prompt remedial action to correct (if harasser is supervisor, knowledge is presumed).	effective policy for reporting and resolving complaints of harassment; and • (2) Charging Party unreasonably failed to avail herself of that policy, or to otherwise avoid harm.	harassment. • Employee handbook Employer's equal opportunity policy • Employer's sexual harassment and non-retaliation policy • Employer's policy for reporting sexual harassment complaints • All other applicable policies.
RETALIATION	1. Charging Party engaged in a statutorily protected expression; 2. Charging Party suffered an adverse employment action; 3. There is a causal relationship between the two events.	• Demonstrate that Charging Party is unable to establish the required elements of his/her claim. For example, Charging Party did not engage in a statutorily protected expression or there is no causal connection between the two events. • Establish a legitimate non-retaliatory business reason for the adverse employment action.	• Charging Party's personnel file • Any complaints made by Charging Party • Any documents pertaining to Charging Party's statutorily protected expression. • Personnel files of similarly situated employees • All documents regarding the adverse employment action. • Employee handbook • All documents supporting the Employer's legitimate non-retaliatory business reason • Employer's equal opportunity policy • Employer's policy for reporting complaints • Employer's non-retaliation policy • All other applicable policies
RETALIATION	1. Charging Party was paid a lower wage than the wage paid to male employees; 2. For performing jobs which required equal skill, effort, and	• Demonstrate that Charging Party is unable to establish the required elements of his/her claim. For example,	• Charging Party's personnel file • Charging Party's pay records • Personnel files and pay records of similarly situated employees • The job description of Charging

Type of claim	Charging party must establish	Possible defenses	Relevant documents
	responsibility, and 3. Which were performed under similar working conditions.	Charging Party was performing a job that was not similar to the employee being paid a higher wage. • Demonstrate that the pay differences were based on (1) a seniority system; (2) a merit system; (3) a system which measures earning by quantity or quality of production; or (4) any other factor other than sex.	Party and similarly situated employees • Employee handbook • All documents supporting the Employer's reason for the pay differences • Employer's equal opportunity policy • Employer's policy for reporting complaints • Any pay policies • All other applicable policies
RELIGIOUS DISCRIMINATION	1) He/she had a bona fide religious belief which conflicted with an employment duty; 2) He/she informed his of the belief and conflict; and 3) The religious practice was the basis for an adverse employment action and/or the failed to accommodate the practice.	• Demonstrate that Charging Party is unable to establish the required elements of his/her claim. For example, Charging Party never notified of religious belief. • Negotiated with the employee in a reasonable effort to accommodate the employee's religious beliefs; and they would suffer undue hardship were it to accept the employee's proposal. • Establish a legitimate non-discriminatory business reason for the adverse employment action.	• Charging Party's personnel file • Any documents pertaining to Charging Party's religious belief • Any documents pertaining to 's efforts to accommodate Charging Party • Personnel files of similarly situated employees • All documents regarding the adverse employment action. • Employee handbook • All documents supporting the Employer's legitimate non-discriminatory business reason • Employer's equal opportunity policy • Employer's policy for reporting complaints • All other applicable policies

In disciplinary cases, it is helpful to:

1. Explain the oral and written counseling the Charging Party received.

2. Attach as exhibits to the position statement copies of documents memorializing such counseling, including performance evaluations, warnings and termination notices. Information and documentation of this nature is useful in establishing that the employer had a legitimate, job-related rationale for its actions.

D. Use of Comparative Data

To further demonstrate that the treated the Charging Party in a nondiscriminatory manner, the position statement should include data comparing the Charging Party's status with employment decisions affecting "similarly situated" individuals outside the Charging Party's protected classification. Usually, comparisons should be limited to the smallest work unit of employees who hold positions comparable to the Charging Party's position, such as department or facility location. However, if such a comparison renders unpersuasive results, the comparators can be expanded to provide the agency with a broader perspective of the employer's practices, such as district or regional data. Generally, it is best to provide the least amount of information necessary to defend the charge.

E. Response to Each Allegation in the Charge

In addition, the written response to the EEOC should provide responsive information to each of the Charging Party's specific allegations. The response could be as simple as a denial or could be a more detailed explanation as to the employer's position with respect to the allegations.

F. Conclusion

Finally, the position statement should include a conclusion which summarizes the major aspects of the employer's position. Assuming the narrative recitation set forth in the position statement is comprehensive, it usually is unnecessary to submit sworn affidavits to the agency (even if such affidavits are initially requested by the agency).

G. Chart of Claims, Defenses and Relevant Documents

The following are some basic guidelines for responding to an administrative charge based on the nature of the Charging Party's allegations. It should be noted that there are

many different types of discrimination claims, legal burdens of proof and possible defenses. The following information is intended to assist the investigator in providing pertinent information in response to a charge of discrimination for review by the employer's legal counsel or human resources manager and is not intended to cover every possible administrative charge scenario.

Every administrative charge is different and the amount of information required in a response varies greatly depending on the facts alleged.

Jackson Lewis RIF Checklist

1. Consider cost-saving alternatives to conducting group termination programs. Management's options for reducing expenses without reducing headcount include: (a) hiring freezes; (b) wage and bonus freezes; (c) bonus reductions; (d) postponement of wage increases; (e) fringe benefit reductions; (f) job sharing; (g) employee transfers; (h) work furloughs of limited duration; (i) reducing work hours with proportionate pay cuts; and (j) discontinuing the use of temporary and part-time employees and redistributing their work.

2. Articulate management's legitimate business reasons. The need for cost savings or a reduction in the number of full time positions are among the most common reasons for a reduction in force ("RIF"). All levels of management should understand the benefit of the downsizing because in defense of a discrimination charge, the employer may have to produce witnesses who can articulate a legitimate business reason for the reduction. Before implementing a workforce reduction program, the employer should ensure there is a demonstrable economic or other business need to lay off employees. Whenever possible, the employer should prepare an internal memorandum explaining the economic and other business considerations necessitating the reduction in force.

3. Review any prior written policies for conducting reductions in force. If there have been prior layoffs, the employer should be aware of any existing policies and procedures that define the criteria for making layoff selections or identify the severance benefits to be provided. Disciplinary and termination policies in employee handbooks should also be reviewed. While the employer may want to change its prior policies or procedures, it should not assume that existing policies and procedures can be ignored. Employees may raise issues in reliance on existing policies and procedures which previously have been distributed to them. Utilizing reduction procedures and benefits that are consistent with past practice can minimize employee resentment and claims of unfair treatment based on comparisons to the manner in which prior workforce reductions were implemented.

4. Consider implementing voluntary attrition programs before terminating employees involuntarily. Employers often offer early retirement incentive programs and voluntary resignation incentive programs to avoid or minimize the need to discharge employees. If enhanced pension and health care benefits (including retiree health benefits) are offered

in connection with such programs, the employer must review and if need be amend its pension and group health insurance plans to ensure those benefits can be made available to eligible employees. Employers sponsoring voluntary attrition programs must also create a timetable for the sequencing and implementation of one or more group termination programs.

5. Determine whether to obtain waivers and releases. Whenever possible, employers should obtain general releases from employees who participate in voluntary and involuntary termination programs. Attainment of such waivers dramatically reduces employer exposure to individual and class-wide claims of discriminatory discharge. If employees selected for layoff are 40 years of age or older, any releases of federal age discrimination claims under the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. ("ADEA"), must comply with the Older Workers Benefit Protection Act, 29 U.S.C. § 626(f) ("OWBPA"). This will affect the timing of the reduction program, because employees who participate in group termination programs must be given 45 days to consider the release of ADEA claims. To be enforceable, releases must be supported by consideration over and above any benefits to which employees are entitled as a matter of policy or past practice. From a practical perspective, the consideration must be sufficient to provide affected employees with a meaningful incentive for releasing their right to pursue legal claims against the employer. Conversely, the employer should confirm it can afford the aggregate cost of the anticipated consideration for any group termination program before offering the program to its employees.

6. Ascertain any notice requirements for plant closings and/or mass layoffs. Determine whether the number of employees to be reduced will trigger the notice requirements of the Worker Adjustment Retraining and Notification Act, 29 U.S.C. §§ 2101-2109 ("WARN"), or any state plant closing statutes. If WARN is implicated, the timetables for notifying employees of their terminations will be affected.

7. Determine the benefits to be offered to employees being laid off. Any existing employment contracts, benefit plans, employee handbooks and other policy statements addressing the amount and formula for calculating severance pay and benefits must be reviewed. For example, severance plans should be reviewed and ambiguities regarding benefit calculations should be eliminated. If receipt of severance pay is not conditioned upon the execution of a general release, consider amending the severance plan or policy

to apply this condition to all employees who become eligible for severance benefits. Incentive compensation plans should be reviewed and ambiguities regarding pro rata payments, employer discretion and eligibility conditions should be eliminated. Employee loan agreements should be reviewed to ensure payment can be accelerated and offset from severance pay. After applicable benefit plans and policies have been reviewed, management must decide which benefits will be offered to affected employees, such as severance pay, outplacement services and/or continuation of medical benefits. Management should also contact outplacement companies to determine the services they offer and the costs of those services.

8. Determine where the layoffs will occur. Generally, layoffs will occur in the departments or units of the company most significantly affected by the underlying reason for the reduction. However, it may be necessary or desirable to implement company-wide reductions. Obviously, this decision should be made in the initial planning stage.

9. Review collective bargaining agreements for procedural requirements and consider bargaining obligations. If unionized employees are selected for layoff, review applicable collective bargaining agreements for clauses governing selection procedures and recall rights. If the employer wishes to offer union employees the right to participate in a voluntary attrition program, or wishes to lay off unionized employees who are not covered by a collective bargaining agreement, the employer has a duty to bargain with the union. If the decision to conduct voluntary or involuntary layoffs can be influenced by labor costs, the employer must bargain with the union over the decision to implement the program. If the decision cannot be influenced by labor costs (e.g., the employer is going out of a line of business), the employer must bargain with the union over the effects of the decision to implement the program (e.g., the benefits being offered). If the employer bargains in good faith to impasse, it can unilaterally implement its final offer to the union.

10. Consider establishing a layoff committee. There are multiple tasks involved in implementing a successful workforce reduction. It is helpful to have a layoff committee or task force to assume responsibility and take the necessary steps to accomplish the reduction. It is desirable to select individuals who are members of classifications protected by law (e.g., race, gender, age) to serve on the committee. This can help ensure fairness and negate an inference of bias in the decision-making process.

11. Determine criteria for layoff selection. It is imperative to have a written plan or guidelines outlining how individuals will be selected for layoff. Adherence to objective selection criteria will infuse the process with consistency, especially when employees are being selected from units or departments throughout the company. Permissible criteria commonly used to evaluate and select employees for reductions in force include: (a) length of service or seniority; (b) category (e.g., first eliminate all temporary, part-time or contract employees); (c) strict use of pre-existing job performance data; and (d) ability to perform work functions remaining after a layoff (and any consequent reorganization) is completed. When job performance is used as criterion, whenever possible employers should assess performance based on written performance evaluations and counseling notices. When ability to perform remaining work is used as a criterion, employers should identify the essential functions of each available job and the skills best suited to that position.

12. Determine whether to offer protections against layoff. Sometimes employers offer employees protection against layoff, such as: (a) allowing affected employees to transfer to other vacant positions within the organization; (b) allowing affected employees to bump other employees; (c) permitting managers to transfer to non-managerial positions; and (d) providing high-level management review for certain employees (e.g., high salary or long-service employees). The decision to offer such protection should be made prior to implementing the layoff.

13. Review proposed layoff selections prior to implementation. It is critical the process include a review of each layoff decision to assess the justification for each selection and the risk of any adverse impact against members of classifications protected by law. It is also important to determine if an employee slated for termination can allege a claim for retaliatory discharge based on his or her expression of opposition to employer practices, participation in administrative agency proceedings or utilization of legally protected leave of absence. Legal counsel should be involved in this phase of the process.

14. Ensure selection decisions are supported by adequate documentation. In addition to utilizing written selection guidelines, documented evidence of relative job performance and documented confirmation of essential job functions and skills, document the rationale for each selection decision whenever possible. If a terminated employee refuses to sign a

release and attempts to challenge the employer's termination decisions, proper documentation enhances the objectivity of the selection process and provides an evidentiary basis for proving the employer had legitimate, nondiscriminatory reasons for its actions.

15. Prepare a script for communicating layoffs. The layoff committee should prepare a script or outline of points that management should make when meeting with employees selected for layoff. Whenever possible, teams of two management officials should meet with selected employees individually to convey the layoff decision. Notes of each interview should be written and retained to help the participants subsequently remember what took place, if necessary. In conducting the interviews, keep to the point and: (a) be brief, consistent, direct and firm as to the layoff decision and explanation; (b) specify whether the layoff is permanent or temporary — explain any available recall or rehire rights; (c) explain any available severance benefits, health insurance conversion rights and other termination benefits; (d) discuss any outplacement services and other transitional services that will be offered; (e) give employees written information about their termination benefits and be prepared to respond to questions regarding unemployment insurance benefits; (f) anticipate employees' shock, surprise, and difficulty absorbing the information; (g) describe final paychecks, including pay for accrued vacation and sick time; and (h) make realistic arrangements for the return of company property.

16. Comply with legal requirements for terminating the employment relationship. Before communicating termination decisions, employers should review state law requirements for tendering final paychecks, paying accrued but unused vacation and sick time, paying earned bonuses and other earned incentive compensation, and deducting monies owed to the employer from the employees' final paychecks.

17. Have a procedure for following up during the layoff process. Employees who have been laid off should be afforded respect and concern in the time following the layoff announcement, particularly when communicating the details of benefits, job references, etc. Affected employees should be directed to contact a designated employee relations official with follow-up questions. Other supervisors should be advised to refer questions from laid off employees to the designated contact person.

18. Decide whether references will be given. A determination should be made whether, and if so, how, references will be provided. Requests for references should be answered in a consistent manner.

19. Assess any potential risk of harm to co-workers and company property. Employees with sensitive positions or who pose a risk of harm or sabotage to other employees or company property may require special treatment. Determine whether there are any employees who pose potential problems and plan their interviews to afford the least opportunity for disruption or subsequent misconduct. Alert security personnel and revoke the employees' access to company property, such as computer systems, as soon as possible. Employees who are determined to pose a risk of sabotage can be accompanied by an escort out of the facility after their interviews. The need or desire to escort a terminated employee from the premises should be balanced against the employee's sense of dignity and self-respect. An employee who believes he or she was treated disrespectfully may be more likely to bring a legal claim against the employer. Therefore, implement all extra security measures as discreetly and respectfully as possible.

20. Heighten management awareness to the sensitivity of all employees. Reductions in force have a significant impact on all employees, those laid off and those remaining. Employers should be sensitive to the importance of treating employees fairly and with respect. Those involved in the decision-making process must prevent any premature disclosure or leaks of information.

21. Consider potential immigration issues pertaining to laid off employees. Employers should review employee records and Forms I-9 to determine whether any employees affected by a reduction in force are on temporary employment visas (e.g. H-1B, L-1, E-1/E-2 or other temporary visas). Note that employees who have a Permanent Resident Card (also known as an Alien Registration Receipt Card), or an Employment Authorization Card, have unrestricted employment authorization and are not in the same situation as employees on temporary visas.

22. Consider structuring severance payments to address potential immigration issues. If severance pay is given, decide whether aliens on temporary visas will receive severance in lieu of salary. If appropriate, consider whether to structure the extension of payroll time with aliens on temporary visas.

23. When appropriate, notify USCIS. At the appropriate time, notify the U.S. Citizenship and Immigration Service ("USCIS") of the termination of a temporary alien's visa petition.

24. If necessary, reimburse travel expenses for temporary aliens with H-1B visas who must return to their permanent residence after their employment ceases. If a temporary alien on H-1B visa status who is laid off prior to the expiration of the visa term is unable to locate another employer in the United States that will sponsor his or her visa, the employer must reimburse the employee's one-way travel to his or her permanent residence. If the temporary alien obtains alternate employment, the original employer should: (a) offer the temporary alien an airplane ticket; and (b) confirm the ticket offer, and the employee's rejection of the ticket offer, in writing.

25. Review the visa status of alien employees selected for layoff. The employer should determine whether any of alien employees selected for layoff are in the process of obtaining an employment-based immigrant visa. If the employee is scheduled for termination prior to the 181st day of his or her Adjustment of Status, he or she will be at risk of losing the benefits of the immigrant visa. In this situation, the employer should determine whether it wishes to accommodate the employee by preserving his or her employment until after the 181 day period expires. In deciding whether to make such an accommodation, the employer must be careful to avoid creating a basis for a claim of nationality or citizenship discrimination.

Best Practices for Avoiding Age Discrimination Lawsuits and Claims in RIFs

May 5, 2009

Since the start of the recession in December 2007, 5.1 million jobs have been lost, according to March 2009 figures from the U.S. Department of Labor's Bureau of Labor Statistics. Almost two-thirds (3.3 million) of losses occurred November 2008 through March 2009. Additionally, figures from the federal Equal Employment Opportunity Commission (EEOC) show that age-related discrimination allegations by employees are at a record high, vaulting 29% to 24,582 charges filed in the year ending September 30, 2008, up from 19,103 in 2007. While EEOC figures show overall employment discrimination complaints are also at a high (up 15% to 95,402 complaints), age-related complaints had the most remarkable increase.

That this spike coincides with employers announcing widespread layoffs and reductions-in-force (RIFs) is not surprising. Companies recently grabbing headlines as being targets of age-related discrimination complaints include the Lawrence Livermore National Laboratory in California, where more than 98 laid-off employees alleged they were targeted in a mass layoff because of age; 3M Company, where more than 4,900 employees filed an age discrimination lawsuit; and Dell Inc., where four former human resources employees filed a $500 million age discrimination lawsuit.

In a poor economy such as this, employers considering workforce restructuring should weigh the risks of incurring employee lawsuits, agency charges, and other potential liability.

Best Practices to Consider

Among the tools available for employers to avoid age-related claims, many comprise a best practices approach — both in terms of planning for a reduction-in-force and for selecting employees during a layoff — that include:

- **Review for Possible Disparate Impact**. Prior to implementation of a plan for a RIF, initial selection decisions should be evaluated to see if there will be any disproportionate effect on minorities, women, or workers 40 or older. If there will be, the employer should evaluate whether the selection of these individuals can be justified by business necessity, or in the case of older workers, by reasonable factors other than age (RFOTA). If justification is lacking, alternative selections of individuals who are outside the

protected classifications should be considered. It is also important to determine if an employee slated for termination has any basis for alleging retaliation.

- **Use RFOTAs and Statistical Analysis to Spot Potential Bias in Selections for Layoff.** Employers conducting group termination programs are at significant risk of incurring discrimination claims based on age. In 2005, the U.S. Supreme Court made clear that age discrimination claims under the Age Discrimination in Employment Act can be premised on the theory of disparate impact, that is, that facially neutral factors used in the selection process resulted in termination of a disproportionately high number of older workers. *Smith v. City of Jackson*, 544 U.S. 228 (2005). And, on June 19, 2008, the Court ruled in *Meacham v. Knolls Atomic Power Laboratory* that in defending ADEA claims, employers has the burden of proving that an employment practice with a disparate impact on older workers cannot give rise to age-discrimination liability because it is "based on reasonable factors other than age."

Tips for a Layoff or Reduction in Force in Troubled Times

January 9, 2009

When laid-off workers have a difficult time finding a new job, they are more inclined to sue their former employers. Such suits may be more prevalent in the current economic downturn than in more prosperous times. Meanwhile, according to a recent Society for Human Resource Management (SHRM) poll of public and private company human resources executives, about 60% of employers are likely to institute layoffs in the next year, and 48% have done so in the past year.

"The current global financial crisis has sent shockwaves throughout virtually every sector of the economy. Employers across the country have responded to this unprecedented climate of economic uncertainty by implementing cost-saving measures designed to increase operational efficiency," notes Jackson Lewis LLP's Scott Baken, a Partner who counsels employers on the legal and practical issues involved with reducing labor costs through workforce reductions. The situation is not an easy one for employers seeking to cut costs while minimizing their legal risks. "If not carefully planned in advance, a workforce reduction can result in considerable liability offsetting any initial savings the employer achieves," Mr. Baken adds.

Employers considering workforce reductions should keep the following suggestions in mind:

Planning for a Reduction in Force (RIF)

A successful workforce reduction process requires careful and early planning. It may take several months from start to finish. However, challenging economic conditions have made extended time for planning a luxury many employers can no longer afford. To cope with the increased pressures created by the present environment, employers should develop policies for periodically evaluating their staffing levels.

- **Consider the feasibility of voluntary attrition programs** – Determine whether a voluntary resignation program is a viable alternative to implementing involuntary layoffs. Factors influencing the success of voluntary attrition programs include time constraints, business conditions and the availability of sufficient incentives for program participation. You can retain discretion to deny resignation requests from mission-critical employees under certain circumstances.

- **Plan for continuous operations and sustained morale** – Early in the reduction planning process, evaluate job functions and skills. Decide whether they are essential or may be eliminated or consolidated. Conduct the process as quickly as business conditions permit to maintain acceptable productivity levels and employee morale. Human resource administration should continue as normally as possible, administering performance reviews and counseling notices. Do not use selection for layoff as a substitute for incomplete performance management.

- **Ensure compliance with obligations under state laws** – Recognize a workforce reduction may trigger compliance obligations under various state laws governing payment of wages, insurance and severance benefits continuation, personnel record access, plant closings, layoffs, and involuntary termination. Plot these obligations on a timeline as they often involve notice requirements.

- **Determine impact on pension and benefit plans** – Before taking action, investigate whether a layoff will trigger the vesting of pension or benefit plans for some employees. Conversely, it may be prudent to avoid selecting employees for layoff shortly before they are scheduled to become vested in substantial employee benefits. Realize that a partial termination of a pension or benefit plan may be a reportable event under ERISA. Understand that terminations may constitute withdrawal from a multi-employer pension plan and cause employers to incur substantial liability.

- **Assess eligibility criteria and plan requirements** – Assure the clarity of eligibility criteria for receiving severance benefits and the variables for calculating such benefits. Also, make plain in policies that employees' receipt of severance benefits beyond those to which they already may be entitled is conditioned on the signing of a general release of claims.

- **Consider "WARN" and contract obligations** – Realize that, if triggered, the federal Worker Adjustment and Retraining Notification Act (WARN) and comparable state laws provide specific time limits and notice requirements for certain group termination programs. Assess existing limitations, liabilities and/or bargaining obligations related to layoffs created by collective bargaining agreements and other types of contractual employment obligations.

Selecting Employees for Layoff

A critical aspect of any layoff is identifying the criteria by which employees will be selected for termination. In the easiest cases, the decision is guided by the nature of and necessity for the work performed (e.g., where a particular position or product line is being eliminated). In other cases, management must determine job-related selection criteria that can pass muster if the reduction program is subject to legal challenge.

- **Prioritize selection factors** – Base selection on quantifiable and objective factors, such as: 1) length of service or seniority; 2) elimination of unnecessary job classifications; 3) elimination of certain categories of employees, e.g., temporary, part-time, or contract workers; 4) pre-existing job appraisal data related to successful performance of critical post-reduction functions; and 5) disciplinary actions taken for severe or persistent performance problems.

- **Strive for objectivity** – Identify the individual abilities of similarly-situated employees in necessary positions to perform essential job duties. Analyze the comparative performance and skills of employees with emphasis on fulfilling the post-reduction job functions and requirements. Whenever possible, base performance comparisons on current or prior performance appraisals.

- **Review for possible disparate impact** – Evaluate initial selection decisions prior to implementing layoffs. See if there will be any disproportionate effect on minorities, women, or workers 40 years of age or older. If so, evaluate whether the selection of these individuals can be justified by business necessity, or in the case of older workers, by reasonable factors other than age. If not, consider alternative selections of individuals who are outside the protected classifications.

- **Craft releases to comply with statutory requirements** – Employers can reduce their exposure to individual and class-wide claims of discrimination dramatically by obtaining releases of such claims from employees who participate in voluntary and involuntary workforce reduction programs. Strict compliance with legal requirements is critical to the effectiveness of any release. For example, to be enforceable, waivers of federal Age Discrimination in Employment Act (ADEA) claims must comply with various procedural requirements established by the Older Workers Benefit Protection Act (OWBPA). These provisions require employers to give employees sufficient time and information to

evaluate the potential claims they are releasing under the ADEA on a knowing and voluntary basis.

A Clean Break: Best Practices in Negotiating and Drafting Severance Agreements

Making the Decision and Executing the Plan

As a preliminary matter, if your company makes the decision to terminate an employee, then ensure you have your ducks in a row before you begin executing any decision for a potential severance arrangement. That does not just mean sitting down with the decision makers and human resource personnel to discuss the reasons for the termination and weighing potential risks, although that is certainly a very important process. Too many times employers go awry with the important details.

Ensure you are, in advance of executing the employee termination, evaluating the existence and effect of any other employment-related agreements executed by the severed employee. Work with your human resource contact so he/she knows when the employee's final pay needs to be issued. Check the state law and/or under your company's own policies to determine if vacation pay is owed to the employee. Ferret out any un- paid wage or deduction issues in advance, and work them out in compliance with state and federal law. Also, make sure you comply with state requirements on termination notices and provide the appropriate Consolidated Omnibus Budget Reconciliation Act (COBRA) information.

In terms of evaluating what may be owed to the company, pull the employee's most up to date company credit card and expense reports to confirm that he or she does not owe your company for any personal purchases that will need to be considered in any offer of severance. Similarly, as the employer, consider any monies the company may owe to the employee as the result of the termination like tuition reimbursement, sign-on bonuses, and relocation expenses.

Finally, evaluate whether your company has a severance plan in place, and whether that plan is triggered by the termination of this employee. Although most plans will indicate that the severance amount is in the sole discretion of the employer, employers need to be consistent in their application and interpretation of any severance policy. Regardless of whether a plan is implicated and/or applied to the particular employee, ensure that you have some justification for the amount you are offering to the employee that you can tie to solid explanations and facts (e.g., one week per year of service).

Calculating and Structuring the Payout

If your company determines that it will offer the employee monies in exchange for a release of claims, then consider in advance and when negotiating, how you are going to structure the payments from a timing and tax perspective. Will the payment be a lump sum or spread out over time? If the parting is not amicable, usually the company prefers to pay the employee with a lump sum payment. However, in a group termination context or for higher dollar severance arrangements, it may be financially beneficial for the employer to make the payments over a period of time. How you characterize the payment(s) from a tax perspective will have an effect on what the amount will cost the company and how much money the former employee will see upon payout.

Moreover, unlike in the context of settling an employee dispute that comes in the form of an administrative charge or litigation, severance agreements will usually not contain an element of non-wage payments, unless it is for health insurance reimbursement. Typically, those agreements should structure payments in W-2 wages, unless the company is comfortable it can justify any non-wage payments, say in the form of legitimate consulting fees and/or an employee's claim for "soft" damages as a result of the severance (e.g., emotional distress). If the payments will be wage payments, be sure to specifically indicate in the agreement when the amount is the gross amount to be paid, and that the ultimate amount paid to the employee will be "less withholding." For any deferred compensation related payments, do not forget to explore any 409A issues. On a related note, remember to indicate in the agreement that the company is not providing tax advice, and that the employee is responsible for all taxes on his/her end.

Remember, the severance arrangement could potentially not involve a payout at all. The employer may decide to forgive the repayment of monies the employee owes to the company, perhaps in the form of a sign-on bonus or tuition reimbursement that must be repaid if the employee leaves within a certain amount of time. The forgiveness of that repayment could certainly act as sufficient consideration to support a waiver. Get creative with the structure of the consideration, for example making payments to a Section 529 plan on the employee's behalf, if it ultimately serves the business purpose of limiting liability.

The Big Picture Terms

Obviously, the terms are the crux of the severance agreement. Without the appropriate basic terms, the company could get very little for its consideration. First, if the company decides to

offer the employee a severance arrangement, then the company should get that for which it is paying, specifically limitation of liability. If the company, upon termination, offers the employee some additional consideration, then the company should get a waiver and release of liability in exchange. Too many times, employers give the departing employee monies or waive the employee's obligations to the employer, without getting a very valuable waiver of liability. Although the employer's desire to be altruistic and assist the employee in his transition out of his job is understandable, that desire will become sharp regret if the employee later decides to file suit based upon his termination.

That waiver should include a full accounting of claims under federal and state law, particularly employment laws. The waiver clause should be very specific and comprehensive in its listing, but also include more general clauses that will cover the bases (e.g., "and claims under any other federal, state, or local law, including, but not limited to, any federal, state, or local common law"). Remember to include specific reference to the Age Discrimination in Employment Act, if appropriate. Similarly, check your state human rights act to determine if you are required to include any other specific language.

Remember, employees cannot waive certain claims by law through private agreement, such as unpaid wage claims, workers' compensation claims, and now Family and Medical Leave Act (FMLA) claims. However, that does not prevent the employer from getting beneficial assertions from the employee. In the agreement, have the employee assert if applicable that he or she:

- has not suffered a work-related injury that the employee has not properly disclosed to the employer;
- has been paid in full all wages due and owing to the employee for any and all work performed for the company; and
- that the employee does not have knowledge of any facts that would give rise to a claim under the FMLA.

In addition, have the employee agree he/she has not exercised any actual or apparent authority by or on behalf of the company that the employee has not specifically disclosed to the employer. Similarly, if the employee was in a position of authority, have the employee assert he/she has not entered into any agreements, whether written or otherwise, with any of the company's employees (current and former) and/or third parties that could legally bind the company.

Also, ensure that you are protecting any confidential information the employee may have had in his/her possession or to which the employee had access. Get an agreement from the employee for a return of company property, documents, and electronic information. Have the employee acknowledge he/she has held positions of trust within the company, giving him/her exposure to confidential, proprietary information. Obtain the employee's agreement that the disclosure of that information would be damaging to the company, and that the employee will not use or disclose that information. Provide an "including, but not limited to," listing of the types of information that includes general classifications of information, as well as those that are specific to your industry. Finally, include an agreement that if the employee is required to disclose information pursuant to a court order or other government process, then the employee shall:

- notify the company promptly before any such disclosure is made;
- at the company's request and expense, take all reasonably necessary steps to defend against such process or claims; and
- permit the company to participate with counsel of its choice in any proceeding relating to any such court order, other government process or claims.

Also include a provision that the employee is agreeing to assign any intellectual property rights to property that may have been developed as part of the employee's employment with the company. Work with your IT department to insure that the employee has not, in advance of the termination, been downloading large amounts of information or improperly accessing confidential and proprietary information. Make sure the employee's access to electronic and other resources is turned off in a timely manner to prevent any improper access.

In addition to its confidential and proprietary information, the company should also seek to protect its good name. Obtain a non-disparagement agreement from the employee. If the request for a reciprocal agreement is made by the employee during the negotiations, a good middle ground is to agree to provide neutral information, like title, dates of employment, and pay information, to requesting prospective employers, or information the employer would have to provide under the state's service letter statute. A best practice to implement—from a tort liability standpoint—is to only offer this information, regardless. In certain situations, when the employee has been violent or engaged in other dangerous behavior, avoid limiting what you can say such that you can avoid potential third party liability with a failure to appropriately warn a future employer.

Similarly, get an agreement that the terms will be confidential and ensure that the employee's obligation is tied to some penalty to the employee if he/she fails to maintain the confidentiality. The agreement should complete the company's relationship with the employee. If appropriate, ensure you are obtaining an agreement that the employee will not reapply with the company. That agreement should include a statement that the employer may decline any application with impunity and without claim of retaliation. Although the employee cannot waive a future retaliation claim, the clause could be a valuable admission by the employee in any such claim, and also a breach of the agreement that can carry penalties.

That being said, it is important to obtain the employee's agreement that he/she will assist if matters come up after the termination of their employment. Get the employee to agree that, upon reasonable request by the company, the employee will participate in the investigation, prosecution, or defense of any matter involving the company. The company should agree, in the same provision, to reimburse the employee for any reasonable travel and out-of-pocket expenses incurred in providing such participation, although the company should indicate the reimbursement is to avoid cost to employee and not to influence the employee's participation.

To avoid any litigation arising out of the agreement itself, consider including an arbitration clause. You can include a provision requiring that any disputes be submitted to arbitration. However, make sure you are fitting within the bounds of arbitration clauses under the current state of the law. Further, many states' arbitration acts, like Nebraska, require specific language notifying the signatory that the agreement contains an arbitration provision. Although there is some question as to whether the Federal Arbitration Act preempts those requirements, ensure that you have the state law requirements covered so that there is no question.

Most companies will also want to prevent employees with specialized knowledge or training from going to competitors, and using that information to compete with the company. Similarly, companies should prevent departing employees from raiding the company's workforce. Consequently, include appropriately tailored non-competition and non-solicitation clauses in your severance agreements. However, the restrictions on the breadth of those restrictive covenants are heavily reliant on state law. You will want to double check your applicable state's statutes and common law if you are unfamiliar with them.

Finally, do not forget your basic contract provisions. For example, you will want to include your standard choice of law provision, a savings clause if a provision other than the release clause should be declared invalid, and other standard language. Ensure you are asserting that the

agreement does not indicate any admission of liability. Further, if you select not to include an arbitration provision, you will want to draft a forum selection clause.

The Devil Is in the Details

As the discussion of the general terms of the agreement indicated, each employee's agreement will likely need to be tweaked to include specific provision for specific employees. However, you need to keep in mind more detailed provisions for special groups of employees.

Special provisions will need to be drafted into agreement for employees over the age of 40 under the Older Workers Benefit Protection Act (OWBPA). The OWBPA requires a waiver of rights, of individuals protected by the Age Discrimination in Employment Act of 1967 (ADEA), to be knowing and voluntary. The OWBPA sets forth very clear standards for the definition of knowing and voluntary:

- the agreement must be written in a manner that can be understood by the individual waiving his/her rights, or by the average employee who can participate in the waiver;
- the waiver must specifically advise that the executing employee is waiving his/her rights under the ADEA;
- the waiver can only involve claims arising before the date of the waiver;
- the waiver must, like any contract, be supported by adequate consideration;
- if the waiver is for a single employee, the individual must be given at least 21 days to consider the agreement, although note that rule is a bit different in a group termination, discussed below;
- the agreement must provide at least seven days for the employee to revoke the waiver, if they so choose, but note if you are in Minnesota, state law requires a 15 day revocation period; and
- avoid including any tender back provision as it can invalidate the ADEA waiver.

If you are terminating a group of employees arising out of a reduction in force, or other group termination based on the same decision, your obligations under the OWBPA become significantly greater. In addition to all of the requirements above, the employees over 40 in the

group must be provided with 45 days to consider the waiver. In addition, the agreement for employees over the age of 40 must be accompanied with an exhibit stating the eligibility factors for participation in the severance program, any time limits on the program, and the job titles and ages of any individual selected for the program, as well as the ages of all individuals in the same job classification or unit who are not eligible or selected for the program. Although unrelated to the severance agreement itself, do not forget about the Worker Adjustment and Retraining Notification Act in group termination decisions, and/or the reciprocal state "baby" WARN.

Remember when drafting the severance agreement and its waiver provision that coping with pending or future administrative charges is a bit more complex than it used to be. Under recent case law, an employer could potentially be hit with a retaliation claim if it ties the receipt of severance to the withdrawal of a pending administrative charge. Similarly, the employer may not be able to enforce a waiver against an employee who does file an administrative charge, although the employer could enforce the employee's ability to file a court action or recover any damages. Finally, it may be retaliatory for the employer to require an employee to return severance payments if they file an administrative charge after executing the agreement.

Counsel should consider the appropriateness of including a charge waiver clause as the employer may be hit with a retaliation claim if you hang severance on withdrawing a pending administrative charge, and you may not be able to enforce the waiver against an employee who does file an administrative charge with regard to that charge. Remember, although the employee may still be able to proceed with the administrative agency, he/she will not be entitled to file a claim in court once they obtain a right to sue from the handling administrative agency, or recover any monetary benefit from the charge.

The Timing

In terms of timing, ensure the employee is executing the agreement *after* the termination occurs. The employee cannot waive future claims. Too many times, employees are provided with, and sign, the severance agreement before their actual terminations, leaving the door open for a potential claim based on the employee's termination. In a reduction in force situation, if the employer wants to educate employees on their potential severance benefit, summarize those benefits in a separate document. Hold off on providing the actual agreement until the time of the termination. If, for some reason, you do need to issue the agreement early, include a term stating if the employee signs the agreement before his/her termination date, the agreement shall be invalid.

Always Be the Better "Person"

As a final note on best practices on severance arrangements, I offer words of wisdom direct from my mother; always be the "better person." Employee terminations are always emotional and heated situations that often times evolve into litigation. Ensure you are handling the decision-making, negotiation, and execution of those decisions in a professional and organized manner while also assisting your employees in what will no doubt be a stressful life transition. Remember that each of your actions could potentially be the focus of a future deposition question or trial exhibit if the employee ultimately chooses not to accept the severance and sign the waiver. With each step and interaction, leave with a comfort level that you did everything you could to be fair, reasonable, and appropriate. By following that philosophy and engaging in the best drafting practices, you can keep your company healthy, wealthy, and (almost) liability free.

Court Invalidates Group Termination Releases, Requiring Strict Compliance with OWBPA

June 6, 2008

Releases can give employers peace of mind and limit liability, but they must be properly drafted and implemented. A district court in Minnesota has invalidated releases signed by the plaintiffs in a putative age discrimination class action because the court found the releases did not satisfy the requirement of including a "knowing and voluntary" waiver of the former employees' right to sue under the Older Workers Benefit Protection Act ("OWBPA"). *Peterson, et al. v. Seagate U.S. LLC*, 2008 U.S. Dist. LEXIS 42179 (May 28, 2008). Plaintiffs, who signed releases when they were terminated during a reduction in force ("RIF"), alleged the company violated the Age Discrimination in Employment Act ("ADEA") by disproportionately terminating older workers during the RIF.

The OWBPA was enacted to "protect the rights and benefits of older workers" who are being laid off. The U.S. Supreme Court has interpreted the statute as requiring "'strict, unqualified statutory stricture on waivers'" executed by these workers in exchange for compensation and benefits. The party defending a release's validity bears the burden of proving compliance with the OWBPA's statutory prerequisites, Judge Michael J. Davis of the U.S. District Court for the District of Minnesota said. Because the ADEA waivers in issue misrepresented the total number of terminated employees, failed to clearly identify the job categories of the employees who were selected for termination, and required employees to waive their right to file charges with the Equal Employment Opportunity Commission ("EEOC"), Judge Davis found them invalid.

The OWBPA provides that a waiver of an individual's rights under the ADEA must be "knowing and voluntary." The statute specifies that, at a minimum, a release must:

1. be "written in a manner calculated to be understood" by the employee;
2. refer specifically to rights and claims available under the statute;
3. not waive prospective claims;
4. provide consideration in exchange for the release beyond something of value the employee is already entitled to;
5. advise the employee, in writing, to consult with an attorney;
6. give the employee at least 21 days to consider the agreement (or at least 45 days in the case of an exit incentive or other group termination program such as a RIF);

7. give the employee at least seven days to revoke the agreement; and
8. in the case of an exit incentive or other group termination program, contain information regarding: (a) the "job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program;" (b) any eligibility factors for the program; and (c) any time limits applicable to the program.

Emphasizing that "substantial compliance" is not enough under the statute, Judge Davis ruled that some of the waivers were legally invalid because they inaccurately stated that 154 employees were separated at one RIF location when, in fact, only 152 employees at the location were terminated. Judge Davis also ruled that the company's listing in its disclosure of four different job codes for engineers, which were not grouped together and did not include any definitions or explanations for the codes, was too confusing and failed to "provide information in a manner calculated to be understood by the individual employees."

Judge Davis also held that a provision prohibiting employees from filing an EEOC charge or participating in an EEOC investigation was unlawful, although it was not so misleading as to render the releases entirely invalid. Because the prohibition on EEOC waivers is not expressed in the OWBPA, "the inclusion of a restriction to communicate with the EEOC does not automatically invalidate [a] release in its entirety," Judge Davis said. Instead, he said, when there is a restriction on filing EEOC charges, the court must look at the totality of the circumstances to determine, as directed by a federal regulation, whether the restriction has "the effect of misleading, misinforming, or failing to inform participants and affected individuals" to such an extent as to render the entire agreement invalid.

This decision serves as a reminder for employers that group termination release provisions and OWBPA exhibits must be completely accurate and explicit to have their intended effect. As the court made clear in this case, the standard is very high and "substantial compliance" with OWBPA is not enough.

E-Discovery Update: What's Happened Since the Rules Were Amended

October 22, 2007

On December 1, 2006, Congress amended the Federal Rules of Civil Procedure to address the developing area of electronic discovery ("e-discovery"). The amendments were designed to modernize the Rules and provide guidance to litigants and attorneys on their obligations to preserve and produce electronic documents.

Most significantly, the amendments reinforce that "electronically stored information," much like traditional evidence, is discoverable in litigation. Furthermore, to ensure that parties do not ignore their e-discovery obligations until late in litigation - when relevant information is less likely to exist - the amendments require the parties to discuss their e-discovery needs early in the discovery process. A party's failure to act promptly may preclude it from advancing (or defending) a spoliation claim later in the litigation. The amended rules also provide limited protections for parties that lose electronically stored information in the course of routine business operations so long as the operations are carried out in good faith.

During the nine months since the e-discovery amendments became operative, a number of decisions have interpreted the new rules and highlighted the dangers of non-compliance. Not surprisingly, most of the cases involve workplace law. The following is a summary of some of the more significant e-discovery decisions:

Non-Monetary Sanctions

- In *Teague v. Target Corp.*, 2007 U.S. Dist. LEXIS 25368 (W.D.N.C. 2007), the plaintiff alleged the defendant terminated her because of her gender. She sought damages, including lost wages, against her former employer. The defendant claimed the plaintiff failed to mitigate her damages by seeking employment after her termination. During discovery, the plaintiff admitted that she recently discarded the home computer on which she conducted her job searches for nearly ten years. Thus, the defendant was unable to corroborate the plaintiff's representations regarding her job search efforts. It asked the court to sanction the plaintiff for spoliation of evidence. The court granted the defendant's request and issued a jury instruction adverse to the plaintiff's interest. The court found the plaintiff had a duty to preserve such evidence, that she had a "culpable state of mind" in not preserving the evidence, and that the evidence could have supported the defendant's mitigation of damages defense.

- In *May v. Pilot Travel Centers*, 2006 U.S. Dist. LEXIS 94507 (S.D. Ohio 2006), the plaintiff, a former employee of the defendant, brought a retaliation claim under the Family and Medical Leave Act. The plaintiff sought sanctions against the defendant for failing to produce electronic evidence. The court found the defendant altered its computer system by destroying or losing invoices relevant to its decision to terminate the plaintiff after it knew litigation was pending. The defendant had no satisfactory reason for its failure to produce the requested information. The court ordered the defendant to produce the requested information, or account for its absence, and warned that failure to abide by the order would result in further sanctions. Not only was the defendant ordered to produce e-mails and investigation notes, items typically expected to be preserved in an employment-related case, but it also was ordered to produce invoices, month-end invoice reports, and time and payroll records.

Monetary Sanctions

- In *In re September 11th Liab. Ins. Coverage Cases*, 2007 U.S. Dist. LEXIS 43734 (S.D.N.Y. 2007), an insurance company deleted an electronic version of a document that it was obligated to produce during discovery. The court found the insurance company exercised control over the document, was obligated to produce the document, and, with a culpable state of mind, failed to produce the document in a timely fashion. The court also found the document relevant to the opposing parties' claims. In granting the application for sanctions, the court ordered the insurance company to pay $500,000 to its adversaries to cover costs related to the company's failure to fulfill its discovery obligations and to deter future discovery violations.
- In *Claredi Corp. v. SeeBeyond Tech. Corp.*, 2007 U.S. Dist. LEXIS 16593 (E.D. Mo. 2007), the defendant failed to produce certain electronic communications between the defendant and various third parties. While the plaintiff was able to retrieve the communications from third parties, because the communications were important pieces of evidence and the defendant failed to satisfy its discovery obligations by not preserving the communications, the court awarded the plaintiff $54,000 in costs. Moreover, the court ordered the defendant to pay the court an additional $20,000 for abusing the discovery process as its actions "unnecessarily prolong[ed] and increase[ed] the expense of this litigation."
- In *Google Inc. v. Am. Blind & Wallpaper Factory, Inc.*, 2007 U.S. Dist. LEXIS 48309 (N.D. Cal. 2007), the plaintiff was awarded $15,000 in monetary sanctions because the

defendant did not conduct an adequate search of its e-mail system for documents requested during discovery. The court reasoned that the penalty should reimburse the plaintiff for a portion of its expenses in bringing the action and deter future violations while avoiding an undue financial hardship on the defendant.

- In *PML N. Am., LLC v. Hartford Underwriters Ins. Co.*, 2006 U.S. Dist. LEXIS 94456 (E.D. Mich. 2006), the defendant failed to produce electronic information from a USB drive and backup servers. Furthermore, it produced for inspection a hard drive that was badly tampered with, which prevented experts from salvaging any information. (The hard drive had been reformatted and was missing screws, caps and pads.) Since the defendant failed to provide a credible reason for the damage, and because the hard drive contained valuable information, the court granted default judgment, and ordered the defendant to pay all of plaintiff's costs related to the litigation. The court stated that such a penalty was warranted due to the defendant's willful and intentional destruction of key evidence.
- In *United Medical Supply Co., Inc. v. United States*, No. 03-289C (Fed. Cl. 2007), the court ordered the defendant to pay the plaintiff for costs related to the defendant's failure to preserve documents relevant to a contract dispute. The court found the defendant's failure to preserve, while not intentional, was "reckless" enough to warrant monetary sanctions.
- In *Wachtel v. Health Net, Inc.*, 2006 U.S. Dist. LEXIS 88563 (D.N.J. 2006), the defendant failed to locate, preserve, and provide electronic evidence to the plaintiffs. Additionally, the defendant did not comply with discovery orders related to the production of electronic documents. The plaintiffs asked the court to issue a default judgment in their favor and sanctions against the defendant for abusing the discovery process. Although the court did not issue a default judgment, it imposed monetary sanctions against the defendant. The court stated that it would wait until it reviewed the defendant's financial records before providing a specific monetary amount for the penalty.

Denial of Sanctions

- In *Columbia Pictures Industries v. Bunnell*, 2007 U.S. Dist. LEXIS 46364 (C.D. Cal. 2007), a copyright infringement action, at issue was whether the defendant, an Internet website operator, had a duty to preserve data stored on his website's servers in random access memory (RAM). (RAM is temporary memory, as opposed to permanent memory stored on a computer's hard drive.) The defendant asserted he was not obligated to

preserve the data because: (1) the temporary data was not under his control; (2) obtaining the data would be unduly burdensome; and (3) handing such data over to the plaintiff would violate his website users' privacy rights. Ultimately, the court ordered the defendant to preserve and produce the RAM data and to mask the users' IP addresses to protect their privacy. However, it did not sanction the defendant or order him to pay the plaintiff's litigation costs. It reasoned that the lack of precedents regarding discovery requirements of RAM data failed to provide the defendant with sufficient notice that RAM data was discoverable. However, this case signals to future litigants that RAM data may have to be preserved for litigation.

- In *Floeter v. City of Orlando*, 2007 U.S. Dist. LEXIS 9527 (M.D. Fla. 2007), a sexual harassment case, the plaintiff sought sanctions against the defendant for spoliation because it removed the hard drive from a company computer, which, the plaintiff argued, contained key evidentiary documents. The court decided that for sanctions to apply: (1) the evidentiary documents must have existed at one time; (2) the defendant must have had a duty to preserve the documents; (3) the documents must have been crucial to the plaintiff's *prima facie* case of sexual harassment; and (4) the defendant must have had acted in bad faith in not producing the documents. The court ultimately denied sanctions because it found the defendant had removed the hard drive pursuant to its standard operating procedures and not to thwart the discovery of evidence.
- In *Anadarko Petroleum Corp. v. Davis*, 2006 U.S. Dist. LEXIS 93594 (S.D. Tex. 2006), the defendant, a former employee of the plaintiff, resigned to work for a competitor. The plaintiff accused the defendant of stealing trade secrets from its computer system. Following his attorney's advice, the defendant transferred all information he took from the plaintiff's computer system to a USB drive and deleted the information from the hard drive of the computer he used. The plaintiff then alleged that the defendant transferred only one of seven gigabytes stored on the hard drive. The defendant accounted for the missing data by claiming that he deleted duplicate documents prior to the transfer. The court denied the plaintiff's request to sanction the defendant for spoliation of evidence, stating that there was not enough information before the court to show the defendant had destroyed the information in bad faith. Rather, the court found the defendant merely deleted files he thought were duplicates. The court did note, however, that sanctions might be appropriate should a forensic investigation later reveal the defendant acted in bad faith.

Avoiding Gotcha! Are You Ready for the New Rules on Preserving Electronic Information?

February 6, 2007

The Amendments to The Federal Rules of Civil Procedure

The Federal Rules of Civil Procedure regarding electronic discovery, effective December 1, 2006, may induce employers who are unprepared for today's litigation to settle otherwise defensible claims, since the costs of electronic discovery can be considerable, the failure to preserve electronic information can result in severe sanctions, and the publicity given the new rules will heighten the plaintiff bar's awareness of defendants' information retention requirements. The new rules have received widespread coverage in legal, HR and the traditional news media, so their impact is expected to be considerable, even though they do not substantively change an employers' obligation to appropriately preserve information (electronic, paper or otherwise) when notified of a potential claim. As we discuss below, the rules therefore provide an important incentive for employers to implement practical electronic information retention policy, design and deploy effective litigation hold procedures and conduct supervisory and staff training to ensure policy compliance.

The 2006 Federal Rules amendments address six key points by:

- Defining a new form of information covered by discovery called Electronically Stored Information (ESI), which a party must preserve and consider in discovery;
- Requiring parties to discuss electronic discovery issues during the initial case planning conference;
- Providing that ESI will be produced as it is "ordinarily maintained or reasonably usable" absent agreement to the contrary);
- Creating a limited exception to discovery, when ESI is "not accessible because of undue burden or cost;"
- Establishing a safe harbor from sanctions where a party fails to preserve ESI as a result of the routine, good-faith operation of its electronic information systems; and
- Adding protection in case of inadvertently disclosed privileged information contained in ESI.

While these rules apply only to federal cases, the new rules also will apply in states which follow the federal rules in state civil procedure and will provide a model for the remaining states.

The Costs of E-Discovery

According to some studies, over 90 percent of business information is maintained in an electronic rather than paper form. E-discovery is further complicated by the fact that many organizations do not maintain all electronic information in a formal organized manner where it can be easily preserved and retrieved. Not surprisingly, expanding discovery information by several fold can significantly increase the costs associated with the discovery process.

Indeed, even before the new rules became effective, the potential costs of e-discovery were enormous. These costs fall into two categories: (1) the direct financial cost associated with preserving, identifying, searching and managing e-discovery, and (2) penalties imposed on employers who failed to preserve e-discovery.

The direct financial cost of electronic discovery can be huge in terms of time and money. The cost of restoring one backup tape may exceed $1,000 and the cost of extensive e-discovery in a single case will be in the tens of thousands of dollars. A recent survey indicates that the global costs of e-discovery in 2008 will exceed $1 billion.[1] Another survey indicates the costs for a company with $1 billion in sales will be between $2.5 and $4 million per year.[2] These costs will certainly grow with the increased focus on e-discovery from the new federal rules.

The cost of failing to produce relevant electronic evidence when an employer is on notice of a potential claim can be catastrophic. For example, in several highly-publicized cases, trial courts have directed verdicts against organizational defendants which resulted in verdicts as high as $1.5 billion. Several other less publicized cases have also resulted in penalties ranging from a jury instruction that the loss of evidence should result in an adverse inference against the party failing to produce the evidence that it would have been harmful to the party's case to a requirement that the organizational defendant pay attorneys' fees or expert witness costs.

Best Practices for Reducing the Risk and Cost of E-Discovery

Ten years ago and more, most organizations recognized the issues associated with sexual and other unlawful harassment. Five years ago, most organizations recognized the issues associated with unethical conduct and ineffective compliance programs. The key to addressing these issues was to implement effective systems, training and investigation procedures to minimize risk and identify problems early.

As with harassment and compliance issues, the way to reduce this newer risk is to implement systems to address e-discovery and train appropriate staff on such systems. Proactive steps now can reduce the total cost of e-discovery and reduce the risk of spoliation or destruction of evidence and attendant sanctions.

A. **Electronic Information Systems**

Update Technology/Electronic Communications Policies

Technology changes rapidly. Many companies, however, are using electronic communication policies that do not properly reflect today's technology. Up to date policies are critical to make appropriate and prudent use of an employer's technology systems and to reduce employees' expectations of privacy when using companies' systems.

Organizations should review and update their technology use/electronic communications policies to ensure they are tailored to the company in terms of operations, technology advancements and culture. For example, many policies today do not address instant messaging, use of networks to access personal web-based email voicemail, blogging, instant messaging, flash drives, pdas, other portable storage devices, use of home computers to conduct business, or remote access, often wireless, from public areas such as coffee shops. Each of these electronic capabilities exposes the employer to the inappropriate use of systems by employees and potentially expands the universe of e-discovery obligations. Moreover, information technology (IT) safeguards must be in place to enforce compliance with policies, i.e., if instant messaging is not permitted under the written policy, networks should be configured to block access to common instant messaging systems.

Establish – and Follow – an Electronic Information Retention and Destruction Policy

There is no one-size-fits-all electronic information retention and destruction policy. Such policies must be tailored to each organization's operations, culture and legal obligations. The most effective policies are developed through a team approach which has senior leadership buy-in and includes legal (inside and/or outside counsel), IT, human resources (HR), finance, and operations staff. The need for IT involvement is vital, for only IT can

ensure that electronic information: (i) is maintained in an easily accessible manner that can reduce e-discovery costs; and (ii) is truly deleted from electronic information systems.

The team should assess the universe of available information (potentially physical and electronic information), and determine what records should be kept for legal and/or operational reasons. It also should decide how long and in what form such records should be maintained. The team should address methods for destruction of information, as well. The need for destruction protocols is underscored by the growth of federal and state statutes forcing employers to destroy certain personal information, such as social security numbers, in order to protect employees and others from identity theft. As discussed below, the policy should also identify the need to preserve electronic information during a "litigation hold," discussed below. After completing this analysis, the team should prepare an electronic information retention and destruction policy which accurately reflects how the company will operate. This policy should be supplemented by detailed internal procedures. Further, to the extent feasible, companies should automate the retention process.

An effective Electronic Information Retention and Destruction Policy is a vital action item under the new e-discovery rules. The rules specifically provide that "[a]bsent exceptional circumstances, a court may not impose sanctions … on a party for failing to provide electronically stored information lost as a result of the routine, good faith operation of an electronic information system." Thus, for example, if an employer determines that certain business records or internal communications do not need to be maintained past a certain period of time due to legal or operational requirements, such information should be regularly deleted from the systems. This will result in lower production costs and possibly limit the scope of information that employees could gather through the discovery process to support their claims against the employer.

Establish a Formalized Litigation Hold Procedure

Companies have the obligation to preserve relevant evidence when they are on notice of actual or anticipated litigation. Complaints or demand letters obviously put a company on such notice but companies also are on notice when relevant managers actually anticipate litigation even in the absence of a lawsuit, charge or attorney demand letter. Once an organization is on notice, the litigation hold procedure should be initiated.

A formalized litigation hold procedure is a critical system necessary to fall within the safe harbor provisions of the Federal rules. A litigation hold procedure should also be an efficient way of handling electronic information on a routine basis. Indeed, in the vast majority of cases, opposing parties will likely be satisfied with a company's preservation efforts when it can demonstrate that it has followed a routine and reasonable litigation hold procedure.

While litigation hold procedures should be tailored to an individual company's needs, there are elements which should be included in most cases. In addition, as with the development of an electronic information policy, a litigation hold procedure is generally most effective when a company uses a team approach involving IT, legal, HR and key business leaders. Other key elements of a litigation hold procedure generally include:

- Records of team meetings;
- Records of actions by relevant custodians to suspend the destruction of relevant electronic and paper information;
- Written communications to relevant employees to preserve information – including ongoing relevant information;
- Records of what evidence has been preserved; and
- Cessation of the litigation hold when litigation no longer is anticipated.

In many cases, it may be appropriate to establish a dedicated server for the purpose of archiving litigation hold information. Some organizations routinely face similar litigation and it may also make sense to establish an archive of relevant materials in advance of litigation. For example, many employers maintain historical records of employee handbooks and policies to establish the relevant policies at a given point in time.

B. **Training Issues**

Most employers include technology/electronic communication policies in employee manuals and many require employees to sign acknowledgements of such policies. Far fewer companies, however, include electronic information retention policies in employee manuals. We recommend they do so. These policies should also be distributed throughout an organization periodically through email reminders.

Employers also should consider providing workplace training specifically to address technology/electronic communications and electronic information retention policies. Unfortunately, the casual and seemingly personal nature of e-mail often leads employees to send e-mails containing messages that they would not make in a meeting or in a more formal communication. Such inappropriate e-mails frequently are used as evidence of improper conduct or motive and can result in significant monetary judgments. Such training can also emphasize the important of complying with information retention policies.

C. **Audits and Investigations**

Audits and investigations are important to any compliance system, including a system to handle e-discovery procedures. Employers should routinely audit their practices to verify they are complying with information retention policies and litigation hold procedures. Investigations are also appropriate to identify and correct problems as well as to demonstrate a company's good faith.

An audit of backup tapes can be particularly cost-effective. Most companies have established rotations of backup tapes which are regularly recycled and reused. Still, in many companies, dozens of backup tapes which are no longer in the "rotation" are sitting in the computer room collecting dust. These excess backup tapes may not be properly labeled and may contain information in a format no longer in use. The cost of restoring and examining such tapes can be extremely expensive and companies should audit their IT departments to determine whether there are excess backup tapes. If the information on those backup tapes is not needed because of business reasons or anticipated litigation, companies should catalogue the nature of information on the backup tape and strongly consider destroying the tapes.

Employee Communications with Attorney through Personal E-mail Account from Work are Privileged

July 7, 2009

E-mail messages exchanged between an employee and her attorney through the employee's personal e-mail account are protected by the attorney-client privilege, despite being sent through her employer's computer and internet server, a New Jersey appeals court has ruled. *Stengart v. Loving Care Agency, Inc. et al.,* No. A-3506-08T1 (June 26, 2009). Reversing the trial court, the Appellate Division of the Superior Court of New Jersey held that the company's electronic communications policy did not transform the employee's private e-mails with her attorney into the company's property.

In February 2008, after resigning, Marina Stengart sued her former employer, alleging discrimination based on a hostile work environment in violation of Title VII. In order to preserve the information stored on Stengart's employer-issued laptop computer, the company "imaged" the computer's hard drive. The forensic recovery process uncovered personal e-mail messages sent by Stengart to her attorney relating to her anticipated lawsuit against the company.

The company's employee handbook's "Electronic Communication" policy governed employees' use of company computers. The policy stated, among other things, that "internet use and communication… are considered part of the company's business" and "such communications are not to be considered private or personal to any individual employee." However, as noted by the appeals court, the policy also provided that "[o]ccasional personal use is permitted."

Stengart sought a court order to compel the company to turn over the e-mail messages, asserting they were protected by the attorney-client privilege, and disqualify the company's attorneys for reviewing the messages. The company argued, however, that the plaintiff waived the attorney-client privilege when she used the company's computer and internet server to communicate with her attorney. The trial court agreed, holding, "[T]he e-mails were not protected by the attorney-client privilege because the company's electronic communications policy put plaintiff on sufficient notice that her e-mails would be viewed as company property."

The appellate court reversed. It concluded that the interests underlying the attorney-client privilege substantially outweighed the employer's interest in enforcing its "unilateral"

electronic communications policy. The court explained that the company's ownership of the computer is not determinative as to whether an employee's personal e-mails, sent using a web-based, personal, password-protected e-mail account, can become company property.

Analyzing the company's electronic communication policy, the court found there were questions as to whether the policy ever actually was finalized, formally adopted or disseminated to employees at the time the plaintiff resigned from the company. The court also found questions regarding the meaning and scope of the policy, specifically, whether it covered the circumstances in this case.

The court's analysis hinged on whether an objective reader would conclude the policy applied here. For example, the court noted that the policy, which contained the phrases "media systems and services" and "[o]ccasional personal use is permitted," failed to appropriately define these terms. Thus, the court determined that a reasonable employee could believe the policy applied only to the company's work-based e-mails, not e-mails sent using a personal e-mail account. In addition, even if the company had a more clearly defined policy, the court was loathe to sanction a policy for the monitoring and use of the employer's computer systems that would override the protections afforded by the attorney-client privilege.

Accordingly, the court concluded that the employee's interest in maintaining the attorney-client privilege outweighed the company's interest in enforcing its electronic communications policy. It reasoned that a policy transforming all private communications into company property furthers no legitimate business reason. Moreover, it concluded, significant public policy considerations underlie the need to protect the attorney-client privilege. The appellate court reversed the trial court and required the company to turn over all e-mails exchanged between the plaintiff and her attorney. The court also sent the case back to the lower court to determine whether the company's attorneys should be disqualified from further representing the company because they had reviewed the privileged e-mail messages.

Although it is unlikely to change the ultimate outcome of the underlying litigation, this decision emphasizes the importance of having a clearly-defined electronic communications policy covering all forms of communication that pass through a company's systems and equipment. While many employers opt in favor of permitting employees "limited personal use" of the company's electronic communication systems, in part, because of the difficulties associated with consistently enforcing a "business use only" policy, this decision may cause employers to reevaluate their practice of permitting employees to use their electronic

communication systems for personal reasons. While both options present certain risks to employers, this decision certainly makes it more difficult for employers to access information residing on their systems and exposes them to liability if such information is later deemed to be "private" to the employee. It also sends a strong message to attorneys regarding the risks of reviewing potentially privileged documents. Finally, given the speed at which technology and this area of the law has been changing, companies need to continually review their policies to ensure that policies are consistent with their business needs as well as current law.

Can Workplace Policies Minimize Your Organization's Potential Risk from Employee Blogs?

February 8, 2006

With the increasing prevalence of blogging – posting a diary or journal on the Internet by an individual, group, or entity – employers increasingly are concerned about what employees may be saying electronically that could be harmful to business interests or that may put the organization at risk of liability for harassment and other unlawful conduct. Blogs are accessed like websites, are available to anyone through the Internet, and often invite posts, or readers comments. Through electronic devices – yours and theirs – employees may post blogs about any topic or issue. What they ate for lunch, their political views, or a confidential business deal may instantly become the next discussion thread, a prospect that has employers worried about what bloggers may be saying and what can be done about it.

That employers are concerned about their employees' posts is understandable, since they have the potential to reach a global audience at virtually no cost to the blogger. According to a recent Pew Internet & American Life Project Study, more than eight million blogs are published by Americans alone, with a readership of 32 million in 2004.[4] Because of this nearly unlimited communication potential, blogging raises significant challenges for employers concerned about the broadcast of trade secrets and confidential and insider information, disclosure of which may subject the company to liability under federal or state securities laws. Blogging also may expose employers to charges of defamation or to liability for other unlawful speech or content that is later attributed to the employer.

To address these and other concerns, many employers have adopted policies regulating blogging, email and Internet use. With regard to blogging, employers in the private sector should keep in mind that, although not a constitutionally protected right of free speech, blogging activity may fall within the purview of whistleblower laws, anti-discrimination laws, and the National Labor Relations Act, which gives employees (even those who are non-union) the right to engage in "concerted activity," to discuss their terms and conditions of employment (and even to criticize their employers) with co-workers and outsiders.

With these important restrictions in mind, employers should consider a workplace blogging policy that at a minimum should state:

[4] "Content Creation Online," www.pewinternet.org/pdf/PIP_blogging_data.pdf (January 2005).

- company equipment, including computers and electronic systems, is limited to business use only;
- employees must abide by non-disclosure agreements or confidentiality policies;
- employees must make clear that the views in their blogs are their own and not those of the employer;
- company policies governing the use of corporate logos and other branding and identity apply, and only individuals officially designated have the authority to speak on the company's behalf;
- employees are prohibited from making discriminatory, defamatory, libelous or slanderous comments when discussing the employer, the employee's superiors, co-workers and/or competitors;
- employees must comply with other company policies (such as rules against sexual harassment); and,
- the company reserves the right to take disciplinary action against an employee if his or her blog violates the company policies.

While a blogging policy may not eliminate the risks and challenges posed by unauthorized electronic communications by employees, a policy that is well-drafted and has been reviewed for legal sufficiency may provide employers with options for taking appropriate corrective action.

ACC Extras

Supplemental resources available on www.acc.com

Model Association Employee Severance Agreement.
Sample Form & Policy, February 2009
http://www.acc.com/legalresources/resource.cfm?show=139378

Tips & Insights: Employment and HR Issues with Gregory R. Watchman.
ACC Docket. March 2008
http://www.acc.com/legalresources/resource.cfm?show=14370

Paycheck Rule Revived for Pay Discrimination Claims with Signing of the Lilly Ledbetter Fair Pay Act.
Quick Reference, January 2009
http://www.acc.com/legalresources/resource.cfm?show=216924

Management and Defense of Employee Whistleblower Claims.
InfoPak. September 2009
http://www.acc.com/infopaks

Please note, these additional resources are provided by the Association of Corporate Counsel and not by the faculty of this session.