



711: New Ideas in Compliance Strategies: Educating Nonlegal Managers About Their Legal Responsibilities

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Nestor Barrero

Nestor Barrero is vice president—employment counsel for Universal Studios, a division of Vivendi Universal Entertainment, the U.S.-based film, television, and recreation entity of Vivendi Universal, a global media and communications company. He is actively involved in providing preventive legal advice and training for managers, overseeing employment litigation, and developing internal policies and procedures affecting the Universal workforce in the corporate, studio operations, motion pictures, television, and theme park businesses, and also advises the Universal Music Group.

Prior to joining Universal, Mr. Barrero was senior counsel for Union Bank of California and was associated with the law firms of Sheppard, Mullin, Richter & Hampton and McCutchen, Black, Verleger & Shea in Los Angeles.

Mr. Barrero is a member of the California State Bar Labor and Employment Law Section and is a frequent speaker and lecturer. He has been an instructor on “Sexual Harassment in the Entertainment Industry” for UCLA Extension and on employment law topics for the Continuing Education of the Bar, the Institute for Corporate Counsel, and the California Bar Labor & Employment Law Section. He is on the executive committee of the Los Angeles County Bar Corporate Law Departments Section, the board of the Constitutional Rights Foundation, a member of ACCA, and was past president of the California Employment Law Council. He is bilingual in English and Spanish and is active in community organizations such as the Bilingual Foundation of the Arts, UCLA Academic Advancement Program, the Latino Lawyers Association, and the California Hispanic Corporate Council.

Mr. Barrero received his BA from UCLA and JD from University of California Hastings College of the Law in San Francisco.

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Domenick A. Gallo

Domenick A. Gallo is senior staff counsel for Gateway, Inc., in San Diego. His responsibilities include drafting/negotiating contracts for product procurement, software licensing and settlement agreements, advising internal clients on doing business in Mexico, and providing legal counsel on issues with suppliers, intellectual property, compliance, and other corporate matters.

Prior to joining Gateway, Mr. Gallo served one year as corporate counsel for Discovision Associates in Irvine, California. While at Discovision, Mr. Gallo drafted/negotiated patent licensing agreements. Prior to Discovision, Mr. Gallo worked for four years at the law firm of McKenna and Cuneo in San Diego. While at McKenna, Mr. Gallo advised clients such as Cisco Systems and SAIC on technology matters, corporate compliance, and drafting/negotiating technology contracts.

Mr. Gallo received a BA from the University of California at San Diego and is a graduate of the University of Southern California Law School.

Gloria Santona

Gloria Santona is senior vice president, general counsel, and secretary of McDonald's Corporation. She is also a member of the company's senior management team. In her capacity as general counsel, Ms. Santona provides oversight to McDonald's global legal function, which includes 62 lawyers in the United States and 49 lawyers in 19 countries around the world. She is responsible for all aspects of legal compliance and policy for the global enterprise. Ms. Santona also serves as secretary to the board of directors and, in that capacity, provides advice and counsel regarding matters of corporate governance.

Ms. Santona joined McDonald's as an attorney after her graduation from law school, and since then has held positions of increasing responsibility in the company's legal department, serving most recently as U.S. general counsel.

Ms. Santona is a member of the American and Chicago Bar Associations and a member of the boards of directors of ACCA and the Minority Corporate Counsel Association. She is a former member of the board of directors of the American Society of Corporate Secretaries and currently serves as a member of its audit committee. Ms. Santona was formerly chair of the corporate board of advisors of the National Hispana Leadership Institute.

Ms. Santona graduated from Michigan State University with a BS and is a *cum laude* graduate of the University of Michigan Law School.

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SESSION 711

NEW IDEAS IN COMPLIANCE STRATEGIES: EDUCATING NONLEGAL MANAGERS ABOUT THEIR LEGAL RESPONSIBILITIES

CO PRESENTER: Nestor Barrero, Vice President, Employment Counsel
Vivendi Universal Entertainment LLLP

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EEAC's OFCCP Compliance Checklist is designed for legal and non-legal managers employed by companies who are covered as government contractors under Executive Order 11246 and the regulations of the Office Of Federal Contracts Compliance Programs. It should be useful for those tasked with responsibility for handling an OFCCP compliance evaluation but also to other Human Resources personnel involved in an evaluation who might not be familiar with all of the "ins and outs" of the OFCCP compliance evaluation process. I encourage you to share the checklist with your HR managers.

Littler Mendelson's 2003-2004 publication "The National Employer" at Chapter 14 contains an up to date, comprehensive outline concerning the use of self-audits of labor relations and human resources policies and procedures. Please take particular note of the cautionary language in the introduction which references that self-audits can be discovered in litigation and the advisability of consulting with employment counsel on the application of any privileges. In general, no company should assume that any labor relations audit would be completely confidential.

OFCCP COMPLIANCE EVALUATION CHECKLIST

Location/Unit Selected:
 Local Contact Name:
 OFCCP Initial Contact Date:
 Scheduling Letter Received:

Corp. Contact / Project Mgr:
 HRIS Team Contact:
 OFCCP Contact Name:
 OFCCP Contact Telephone #:

Project Task	By Whom	Date	Comments/Status
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INITIAL CONTACT FROM OFCCP

Note name of OFCCP compliance officer, OFCCP district and area office, address, phone and fax numbers, and appropriate e-mail addresses.			
Note type of evaluation to be conducted (compliance review, compliance check, corporate management review, other).			
Note name of company official initially contacted by OFCCP.			
Note special issues discussed with compliance officer, such as special circumstances leading to establishment's selection, reasons why audit should not proceed at this time, etc.			
Note potential timeframe for audit and any follow-up action required.			

OFCCP COMPLIANCE EVALUATION CHECKLIST

Project Task	By Whom	Date	Comments/Status
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RECEIPT OF SCHEDULING LETTER

Note date of receipt of scheduling letter and recipient.			
Confirm type of evaluation. If compliance check, note possible date(s) for on-site visit. If compliance review, note date that desk audit submission is due (30 calendar days from receipt of <i>mailed</i> scheduling letter).			
Confirm contact information for OFCCP compliance officer (name, address, phone and fax numbers, e-mail addresses, etc.)			
As appropriate, notify local operations and human resources contact of evaluation and next steps.			
As appropriate, notify other involved company personnel such as law department, HRIS team, etc.			
Determine whether OFCCP has jurisdiction over the noticed establishment. If jurisdiction is in question, notify law department and contact OFCCP.			

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OFCCP COMPLIANCE EVALUATION CHECKLIST

Project Task	By Whom	Date	Comments/Status
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RECEIPT OF SCHEDULING LETTER (CONTINUED)

Determine whether noticed establishment is covered by a functional affirmative action program (FAAP) agreement. If so, notify OFCCP compliance officer and determine appropriate next steps (administrative closure may be appropriate if compliance officer was not aware of FAAP coverage).			
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COMPLIANCE CHECK PREPARATION AND FOLLOW-UP

Retrieve prior year's affirmative action program goals for women and minorities.			
Retrieve evidence of good-faith recruitment efforts, including copies of records indicating posting of open positions with State Employment Service (SES) / America's Job Bank (AJB).			
Retrieve policy for and records of any accommodations made for individuals with disabilities.			
Prepare compliance check folder containing the following: <ul style="list-style-type: none"> • Report on attainment of prior year's AAP goals, including summary of good faith efforts for any goals not achieved. • Copies of good-faith recruitment efforts including evidence of SES/AJB postings. • Summary of reasonable accommodations requested/made — excluding individually identifiable information — or, if none requested/made, copies of policy and communications. 			

OFCCP COMPLIANCE EVALUATION CHECKLIST

Project Task	By Whom	Date	Comments/Status
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COMPLIANCE CHECK PREPARATION AND FOLLOW-UP (CONTINUED)

Confirm date and time for on-site visit.			
Prepare meeting space.			
Conduct final review of materials in compliance check folder and brief local contact.			
Debrief local contact, note follow-up actions required, if any.			
Note completion date and date/type of closure letter received.			

SCHEDULING LETTER RESPONSE

Retrieve “central elements” of AAP for women and minorities: <ul style="list-style-type: none"> • Organizational Profile (workforce analysis or organizational display) • Job Group Analysis • Availability Analysis Reports • Placement Rate Goals (as required). 			
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OFCCP COMPLIANCE EVALUATION CHECKLIST

Project Task	By Whom	Date	Comments/Status
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SCHEDULING LETTER RESPONSE (CONTINUED)

<p>Retrieve and assemble “support data” requested in scheduling letter:</p> <p><u>Transactions Data for Prior AAP Year:</u></p> <p><i>Note:</i> If scheduling letter received six months or more into the current AAP year, transactions data also required for current AAP year.</p> <ul style="list-style-type: none"> • Applicants by job group, race/ethnicity, and gender. • Hires by job group, race/ethnicity, and gender. • Promotions by job group, race/ethnicity, and gender. • Terminations by job group, race/ethnicity, and gender (separate voluntary from involuntary terminations as appropriate). <p><u>Compensation Data:</u></p> <ul style="list-style-type: none"> • Total compensation (wages, salary, commissions, bonuses) by level (grade, band, job group, etc.). <p><u>Other Data:</u></p> <ul style="list-style-type: none"> • EEO-1 reports for three years. • Prior year’s AAP goals (for goal attainment report). • Prior year’s placements (hires and promotions) by job group, race/ethnicity, and gender (for goal attainment report). • Summary of last year’s good faith efforts to achieve last year’s AAP goals (if any). 			
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OFCCP COMPLIANCE EVALUATION CHECKLIST

Project Task	By Whom	Date	Comments/Status
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SCHEDULING LETTER RESPONSE (CONTINUED)

Review/prepare company definition of “promotion” for possible presentation to or discussion with compliance officer.			
Review/prepare company definition of “applicant” and process for soliciting applicant demographic data for possible presentation to or discussion with compliance officer.			
<p>Prepare the following documents/reports for submission to OFCCP:</p> <ul style="list-style-type: none"> • Summary of applicants by job group, race/ethnicity, and gender. • Summary of hires by job group, race/ethnicity, and gender. • Summary of promotions by job group, race/ethnicity, and gender. • Summary of terminations by job group, race/ethnicity, and gender. • Summary compensation report as instructed in paragraph 11 of scheduling letter’s itemized listing. • Goal attainment report for last year (and this year if six or more months into current AAP year) as instructed in paragraph 9 of scheduling letter’s itemized listing. 			

OFCCP COMPLIANCE EVALUATION CHECKLIST

Project Task	By Whom	Date	Comments/Status
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ANALYZE FOR ADVERSE IMPACT (SYSTEMIC DISCRIMINATION)

Contact law department as appropriate to determine whether analyses should be conducted at the direction of counsel.			
Perform adverse impact analysis for hires (hires or offers vs. applicants), ordinarily by AAP job group.			
Perform adverse impact analysis for promotions (promotions vs. those who applied for a promotion or vs. those "eligible" for promotion), ordinarily by AAP job group.			
Perform adverse impact analysis for terminations (terminations vs. incumbents), ordinarily by AAP job group. Consider performing analyses separately for involuntary vs. voluntary terminations. Consider performing analyses separately for special events such as reorganizations, reductions-in-force, etc.			
Investigate any instances of statistically significant adverse impact. If selection procedure or test results in adverse impact, ensure that procedure/test has been validated as being job-related, and reviewed by appropriate company experts.			

OFCCP COMPLIANCE EVALUATION CHECKLIST

Project Task	By Whom	Date	Comments/Status
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ANALYZE FOR ADVERSE IMPACT (SYSTEMIC DISCRIMINATION) (CONTINUED)

<p>Perform analyses of compensation data to detect evidence of race/ethnicity- or gender-based pay disparities. Analyze objective factors (e.g., time-in-job; time-in-grade) that may explain pay patterns.</p> <p>Analyze mean compensation and explanations from desk audit submission to identify potential areas where OFCCP may inquire/investigate further.</p> <p>Consult with compensation team to develop/execute strategy for more thorough analysis of compensation.</p>			
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ANALYZE WORKFORCE DISTRIBUTION

<p>Analyze data presented in Organizational Profile to determine whether potential disparities in workforce distribution are present.</p> <ul style="list-style-type: none"> • Analyze for potential “under-representations” or “concentrations” of women or minorities in particular departments. • Analyze for potential disparities in representation by job titles or levels. • Analyze for potential disparities in representation among minority subgroups. 			
<p>If and where any potential workforce distribution problems are identified, investigate possible causes and develop action plans as appropriate.</p>			

OFCCP COMPLIANCE EVALUATION CHECKLIST

Project Task	By Whom	Date	Comments/Status
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ANALYZE OTHER EMPLOYMENT PRACTICES

<p>Analyze and be prepared to explain other human resources procedures/practices that might impact the success of the AAP, such as:</p> <ul style="list-style-type: none"> • Training initiatives; • Recruitment strategies; • Special assignments; • High-potential employee programs; and • Succession planning programs. 			
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WOMEN AND MINORITIES AAP NARRATIVE

<p>Review and revise as necessary AAP narrative for women and minorities.</p> <p>Ensure that narrative contains all required confidentiality statements and that all printed reports are notated accordingly.</p> <p>Ensure that all AAP reports are described generally in narrative.</p> <p>Ensure that the following are referenced as appropriate:</p> <ul style="list-style-type: none"> • Designation of responsible official(s) for the AAP. • Statement that required “in-depth” analyses of employment process have been completed and, as appropriate, results and actions taken. • Statement that action programs to correct problem areas have been developed and executed including, as appropriate, specific programs for underutilized job groups. • Statement that required audit and monitoring efforts have been implemented to periodically measure the effectiveness of the AAP. 			
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OFCCP COMPLIANCE EVALUATION CHECKLIST

Project Task	By Whom	Date	Comments/Status
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VETERANS AND INDIVIDUALS WITH DISABILITIES AAP NARRATIVE

Review and revise as necessary AAP narrative for individuals with disabilities and covered veterans. Ensure that the following have been addressed: <ul style="list-style-type: none"> • Affirmative action policy reviewed and revised as necessary. • Outreach efforts and other good faith efforts explained. • Reasonable accommodation practice described. • Job qualification standards reviewed. • Training programs described. 			
Ensure that notice regarding availability of AAP for inspection is developed and posted.			
Review invitation to self-identify for compliance.			
Retrieve and assemble listings of openings with state employment service or America's Job Bank for possible later review.			
Retrieve copy of latest VETS-100 Report for possible later review.			

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OFCCP COMPLIANCE EVALUATION CHECKLIST

Project Task	By Whom	Date	Comments/Status
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PRE-SUBMISSION REVIEW

Review all AAP reports, narratives, and supporting data to ensure completeness, accuracy, and full compliance with technical requirements.			
Contact involved company personnel as appropriate for final sign-offs and approvals prior to submission.			
Draft submission cover letter and review with company personnel as appropriate. Ensure that cover letter identifies company's single point of contact for follow-up questions/requests from OFCCP.			

DESK AUDIT SUBMISSION

Copy all desk audit materials prior to submission.			
Arrange for dispatch of desk audit materials to arrive at OFCCP prior to or on date due (30 calendar days from earliest receipt of mailed copy of scheduling letter).			
Send desk audit materials via method allowing for confirmation of dispatch/receipt (<i>e.g.</i> , in person, overnight mail, certified mail, etc.).			

DESK AUDIT MANAGEMENT (RESPONDING TO DATA REQUESTS)

Document each instance of contact with OFCCP compliance personnel. When additional data/records are requested, consider asking OFCCP compliance officer to put request in writing.			
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OFCCP COMPLIANCE EVALUATION CHECKLIST

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DESK AUDIT MANAGEMENT (RESPONDING TO DATA REQUESTS) (CONTINUED)

Ensure that each request for additional data is reviewed by responsible company experts (example, compensation department for any requests for compensation data) prior to preparing information requested.			
Ensure that no submission is made without development of appropriate strategy in anticipation of OFCCP's analysis thereof.			
Ensure that all submissions are cleared by appropriate company management prior to being conveyed to OFCCP.			

DESK AUDIT MANAGEMENT (COMPENSATION)

If requested, review employee roster containing compensation and other related data for accuracy and consistency. Ensure that appropriate company personnel (compensation and law department staff, etc.) are notified of all requests and given the opportunity to review prior to preparing submission.			
Perform thorough analysis of compensation roster data for potential indicators of systemic pay discrimination.			
Ensure that no submission is made without development of appropriate strategy in anticipation of OFCCP's analysis thereof.			

OFCCP COMPLIANCE EVALUATION CHECKLIST

Project Task	By Whom	Date	Comments/Status
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DESK AUDIT MANAGEMENT (SELECTION PROCEDURES)

If requested, review supporting data regarding selection procedures (applicants, hires, promotions, terminations) to determine whether request is proper, relevant, and not unduly burdensome. Ensure that appropriate company personnel are notified of all requests and given the opportunity to review prior to preparing submission.			
Perform thorough analysis of data requested for potential indicators of systemic discrimination.			
Ensure that no submission is made without development of appropriate strategy in anticipation of OFCCP's analysis thereof.			

REQUEST FOR ON-SITE REVIEW

Document request by compliance officer to schedule an on-site visit and determine what problem areas warranting on-site were identified during desk audit.			
Notify appropriate company personnel of request and reasons for on-site. Determine whether on-site might be made unnecessary through provision of additional records/data to OFCCP.			
Negotiate on-site date acceptable for both the company and OFCCP.			

OFCCP COMPLIANCE EVALUATION CHECKLIST

Project Task	By Whom	Date	Comments/Status
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ON-SITE REVIEW (PREPARATION AND ENTRANCE CONFERENCE)

Assemble and brief team to assign and review roles and procedures.			
Prepare working area for compliance officer(s).			
Assemble and review any documents/data requested in advance by compliance officer. Develop strategy for handling questions likely to arise.			
Apprise managers and employees, as appropriate, of nature of compliance review and generally what to expect during on-site visit.			
Retrieve and review I-9 forms for completeness, accuracy, and compliance with all applicable requirements.			
Inspect facility to ensure: <ul style="list-style-type: none"> • Absence of any sexually, racially, or otherwise inappropriate items, photos, graffiti, etc. • Accessibility of public areas. • Accessibility of areas such as parking, restrooms, break rooms, working facilities, etc. to accommodate individuals with disabilities. • Required workplace posters are displayed. • Company policies and notices are posted. 			
Prepare for and hold entrance conference. Discuss with compliance officer expectations for time needed, requests for interviews, documents, etc. Prepare materials and/or staff accordingly.			

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OFCCP COMPLIANCE EVALUATION CHECKLIST

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ON-SITE REVIEW (INTERVIEWS)

<p>Prepare management representatives for interviews. Determine appropriate spokespersons on all potential compliance-related subjects, including recruitment and selection procedures, compensation policies, etc. Company representative may be present during interviews of management employees.</p>			
<p>As appropriate, apprise non-management employees of possible interview and inform that participation is voluntary. Without encouraging or discouraging a particular outcome, advise non-management employees of right to have company representative present.</p>			
<p>Ensure that interviews are scheduled so as to minimize disruption of operations.</p>			

ON-SITE REVIEW (DOCUMENT REQUESTS)

<p>Assemble requested documents for compliance officer's review. Evaluate any copy requests for relevance in determining compliance, burden, and other potential issues and discuss as appropriate to resolve any uncertainties or areas of dispute.</p>			
<p>Ensure that all copies are made on premises as necessary, always by company personnel. Record copies made for documentation in audit file.</p>			

OFCCP COMPLIANCE EVALUATION CHECKLIST

Project Task	By Whom	Date	Comments/Status
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ON-SITE CLOSURE

Agree upon date/time for and hold closing conference. Note issues requiring follow-up and develop plan for addressing those issues.			
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OFF-SITE PHASE AND CONCILIATION

Verify for compliance officer company's single point of contact.			
Follow-up with compliance officer at established intervals and document results of contacts.			
If notice of review completion ("letter of compliance") received, document receipt and notify appropriate company personnel.			
If notice of review completion with minor violations ("letter of commitment") received, document receipt, verify accuracy of violation(s) alleged, and that remedy asserted in letter is appropriate and acceptable. Notify appropriate company personnel.			
If notice of violations, notice to show cause, and/or proposed conciliation agreement received, document receipt and immediately advise appropriate company personnel. In the case of a notice of violations, send initial response to OFCCP advising that more complete response will be provided within a reasonable time period. In the case of a notice to show cause, immediately ensure that all involved company personnel are apprised of 30-day timeframe for responding.			

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OFCCP COMPLIANCE EVALUATION CHECKLIST

Project Task	By Whom	Date	Comments/Status
Involving company personnel as appropriate, assess alleged violation(s) and proposed remedy to determine company response (areas of agreement/disagreement).			

OFF-SITE PHASE AND CONCILIATION (CONTINUED)

Draft, clear, and send company's written response to alleged violation(s) and proposed remedy.			
Follow-up with OFCCP personnel to reach agreement in principle as appropriate. Document all contacts.			
Note receipt of proposed conciliation agreement and forward to company personnel as appropriate. Ensure that all proposed remedies and attendant reporting requirements are cleared through appropriate company channels prior to executing agreement.			
<p>Ensure that conciliation agreement is signed by appropriate company official.</p> <p>Note date of company signature. Send agreement to OFCCP and await receipt of fully executed agreement.</p> <p>Note date executed agreement is received.</p>			
Ensure that all systems necessary to ensure compliance and meet reporting requirements are developed and implemented in a timely fashion.			
<p>If reporting is required, establish monitoring system to ensure that all remedies agreed to are implemented.</p> <p>Develop notification or "tickler" system to ensure that all reporting deadlines are met.</p>			



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2003-2004 NATIONAL EMPLOYER*

CHAPTER 14

CONDUCTING A LABOR RELATIONS SELF-AUDIT:
AN OUTLINE FOR EXAMINING PERSONNEL
POLICIES & PROCEDURES

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LITTLER MENDELSON, P.C.

2003–2004 NATIONAL AND STATE EMPLOYERS

IMPORTANT NOTICE

This publication is not a do-it-yourself guide to resolving employment disputes or handling employment litigation. Nonetheless, employers involved in ongoing disputes and litigation will find the information extremely useful in understanding the issues raised and their legal context. This handbook is not a substitute for experienced legal counsel and does not provide legal advice or attempt to address the numerous factual issues which inevitably arise in any employment-related dispute. Although we have attempted to cover the major recent developments in employment and labor law, this handbook is not all-inclusive, and the current status of any decision or principle of law should be verified by counsel. In order to adhere to publication deadlines, developments and decisions subsequent to February 1, 2003 are generally not covered.

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CHAPTER 14

CONDUCTING A LABOR RELATIONS SELF-AUDIT: AN OUTLINE FOR EXAMINING PERSONNEL POLICIES & PROCEDURES

I. RECENT TRENDS & DEVELOPMENTS

§318

Increasingly, employers are recognizing the potential liabilities and obligations created by the enormous growth and expansion in employment litigation. Virtually every management or corporate decision in the employment area can potentially result in years of litigation, costly damage awards or settlements, and intensive investigation by federal and state agencies. Inaction by corporate management, including the failure to recognize and address potential employment-related inadequacies and problems, can produce similar negative results. The failure to appreciate and recognize potential causes of action for wrongful discharge, employment discrimination, and an assortment of related torts (such as defamation, false imprisonment, etc.) or the failure to comply with the increasing number of federal and state employment laws and regulations (such as family and medical leave laws) can produce disastrous results.

The growing trends in employment law mandate that companies take preventive measures to minimize the potential for litigation and employment-related claims. This self-audit is designed to aid employers in evaluating the strengths and weaknesses of their personnel policies and procedures. It is designed to raise important questions regarding labor and employment relations and to identify problem areas. Although some of these issues may already be apparent, this audit serves to focus attention on deficiencies and potential problems that employers may have overlooked but need to address and solve. Of course, there may be items that are not included in this self-audit which are important to your company. Therefore, it is recommended that you incorporate in the audit issues specific to your company.

THE NATIONAL EMPLOYER—2003/04 EDITION

§319 CHAPTER 14—CONDUCTING A LABOR RELATIONS SELF AUDIT

Concerns raised by this audit may require consultation with legal counsel to ensure that personnel policies and practices comply with applicable state and federal laws. In fact, many of the issues and questions in this chapter are also raised by former employees and their attorneys in lawsuits following termination of employment. Careful consideration of the issues and questions raised in this audit, prior to legal consultation, can greatly reduce the time and expense of having legal counsel thoroughly review a company's personnel policies and procedures.

When conducting an audit, employers should recognize that discussions and notes regarding the audit ordinarily will be subject to discovery during subsequent litigation. Plaintiffs' counsel could use these discussions and notes as a "road map" to potential areas of weakness in a case, or even to prove the employer's liability. There are several privileges that employers may be able to use to limit the use of audit information. However, the privileges apply only in limited circumstances, and it may be extremely burdensome, if not impossible, to satisfy all of the legal requirements for certain privileges. Employers are therefore advised to conduct audits and investigations, even those utilizing attorneys, as though the information generated will later be discoverable. This is particularly important when there is a possibility of criminal investigation by law enforcement agencies. Before undertaking an audit, it is advisable to consult with legal counsel to determine the applicability of any privileges and what steps can be take to preserve any privileges that are potentially applicable. In general, do not assume that any audit will be completely "confidential."

§319

II. OVERVIEW: THE LAW OF SELF AUDITS

There is no law which generally requires an employer to conduct a comprehensive self-audit. However, the increasing number of laws and regulations that regulate the employment relationship and the workplace make periodic audits important to avoid legal landmines.

The potential benefits of conducting a comprehensive self-audit are significant. For instance, accurate recordkeeping is essential to ensuring compliance with the Family and Medial Leave Act (FMLA).¹ As a further example, employee background checks are becoming more regular, and employers must be certain to comply with the required but complicated consent and notice provisions under the Fair Credit Reporting Act (FCRA).²

Evaluating and updating job descriptions to determine whether an individual or group of employees are accurately considered exempt or nonexempt under the Fair Labor Standards Act (FLSA)³ is crucial to avoid the current tidal wave of class-action lawsuits seeking back wages and corresponding statutory penalties for misclassified employees. By the same

¹ 29 U.S.C. § 260 *et seq.*; see also THE NATIONAL EMPLOYER® Chapter 26.

² 15 U.S.C. § 1681, *et seq.*; see also Chapters 11 and 18 of THE NATIONAL EMPLOYER® and Littler Mendelson's BACKGROUND CHECKS: FOUR STEPS TO BASIC COMPLIANCE WITH FEDERAL & STATE LAW®.

³ 29 U.S.C. § 201 *et seq.*; Chapter 21 of THE NATIONAL EMPLOYER®.

A. OUTLINE OF ISSUES & CONCERNS TO BE ADDRESSED IN A SELF-AUDIT §320

token, determining whether workers are properly designated as independent contractors can avoid significant potential liability under the FLSA as well as federal tax laws.

Ensuring personnel files are complete and include all essential components such as copies of offer letters, applications, drug testing/background check consent forms, personnel manual acknowledgements, at-will employment acknowledgements, and any other forms used by the employer is crucial to defending potential claims for wrongful termination, breach of contract, or other causes of action frequently asserted in an employment lawsuit under state law. Often times, poorly maintained personnel files create unnecessary hurdles exploited by plaintiffs' counsel in employment litigation.

Although numerous laws make a self-audit increasingly complicated, the potential benefits cannot be understated. On the other hand, failing to conduct periodic evaluations of an employer's policies, procedures, practices and other issues outlined below can result in a multitude of legal liabilities. Consequently, the self-audit remains an important tool for all employers.

III. PRACTICAL RECOMMENDATIONS §320**A. OUTLINE OF ISSUES & CONCERNS TO BE ADDRESSED IN A SELF-AUDIT §321**

A comprehensive outline of the issues, policies and practices that all employers should consider is set forth below. Although the frequency of periodic self-audits will vary with the size and complexity of each employer, annual self-audits are appropriate for most of the issues identified below. Whether more frequent self-audits are necessary should be discussed with legal counsel depending on the issue involved.

Although strict confidentiality may be difficult to maintain, the information gathered and considered during a self-audit should be carefully controlled. If appropriate, a team of company representatives should be designated to gather relevant information; a smaller employer may designate a single human resources representative to conduct the self-audit.

Gathering accurate information about the employer is the cornerstone to any self-audit. The outline of issues and concerns set forth below includes notations for key documents that should be gathered during the self-audit. If documentation does not exist for any of the issues and concerns identified in the self-audit, the employer should take proactive steps to implement appropriate reporting and recordkeeping procedures.

Once all the relevant information is gathered, it should be considered in a timely manner to ensure that recommendations arising from the analysis of the information can be implemented appropriately. Changes to an employer's policies, procedures, and practices arising from a self-audit should be supported by appropriate documentation that can be retrieved and referenced if the need arises for subsequent regulatory or litigation purposes. For instance, copies of outdated policies and procedures which are periodically updated should nevertheless be archived to document the employer's good faith efforts to meet its legal obligations. Ensuring that updated policies and procedures are distributed to each

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work site or to all employees, as appropriate, is also important to ensure the benefits of the self-audit are realized throughout the company.

As stated above, it is important to consult with legal counsel before undertaking a comprehensive self-audit to determine the possible applicability of certain legal privileges, as well as general issues of confidentiality and privacy.

The following outline identifies issues, concerns, policies and practices which should be addressed in a self-audit, and serves as a roadmap for the collection of audit information.

§322 *Company Organization*

- A. Total number of employees:
 - 1. Currently?
 - 2. One year ago?
 - 3. Two years ago?
- B. Does the company have an organization chart?
 - 1. If so, obtain copies of company-wide and departmental charts.
 - 2. If not, is there some other document showing the organization, such as a telephone directory, etc.?
 - 3. If not, prepare a “draft” working chart showing major functional areas and reporting relationships (*e.g.*, production, sales, engineering, finance, human resources, etc.).
 - a) Make sure that the “draft working chart” is labeled as such.
- C. Organizational structure:
 - 1. Is the structure appropriate for meeting goals?
 - 2. Are levels of supervision appropriate?
 - 3. Is there an appropriate span of control?
 - 4. Does authority overlap?
 - 5. Are there multiple superiors?
 - 6. Is authority commensurate with responsibility?

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A. OUTLINE OF ISSUES & CONCERNS TO BE ADDRESSED IN A SELF-AUDIT §322

- D. Organizational effectiveness:
1. Is employee competence appropriate for positions?
 2. Is the quantity of employees adequate to meet goals?
 3. Do employees know their responsibilities?
 4. Do employees understand reporting relationships?
 5. Are decisions being made at proper levels?
 6. Is work delegated to appropriate levels?
 7. Are responsibilities accepted?
 8. Is supervision of subordinates adequate?
- E. What are the job classifications or positions?
- F. How many employees are in each classification or position?
- G. How many employees are employed:
1. Full time?
 2. Part time?
 3. In temporary positions?
- H. Job descriptions:
1. Does the company have job descriptions for employees in the following categories? (If so, obtain copies.)
 - a) Managerial?
 - b) Supervisory, administrative, technical and professional?
 - c) Nonexempt salaried?
 - d) Hourly?
 2. Are job descriptions reviewed and updated regularly?
 - a) What are the procedures for update and review?
 - b) Are changes in existing jobs incorporated?
 - c) Are descriptions adopted for new jobs?

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3. Do the job descriptions clearly specify in detail:
 - a) Responsibilities?
 - b) Authority?
 - c) Essential job functions?
 - d) Reporting relationships?
 - e) Titles?
 - f) Qualifications?
 - g) Range of compensation?
4. Do the job descriptions include job specifications regarding:
 - a) Physical requirements?
 - b) Education and training?
 - c) Skills and experience?
 - d) Scheduling limitations?
 - e) Licensing?
 - f) Bonding?
5. Are the job descriptions used:
 - a) In evaluating jobs?
 - b) In recruiting and advertising open positions?
 - c) In organizational planning?
 - d) In counseling?
 - e) In evaluating whether an employee is eligible for a medical leave of absence, or to return to work from such a leave?
6. To whom are job descriptions available?
7. What organizational sector has responsibility for preparing and maintaining job descriptions?
8. Have the job descriptions been reviewed by an outside consultant such as an attorney specializing in employment and labor law?

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A. OUTLINE OF ISSUES & CONCERNS TO BE ADDRESSED IN A SELF-AUDIT §323

- I. Does the company utilize independent contractors? If so:
 - 1. Are they covered by a written contractor agreement? (If so, obtain copy.)
 - 2. Has their independent contractor status been verified by counsel?
- J. Does the company require employees to sign an agreement protecting the company's proprietary information, inventions, and/or trade secrets? (If so, obtain copies.)
- K. Do employees enter into agreements preventing solicitation and unfair competition? (If so, obtain copies.)
- L. What efforts are undertaken to protect the company's proprietary information, inventions, and/or trade secrets?
 - 1. Security provisions?
 - 2. Information provided on a need to know basis?

Administration of Human Resources & Industrial Relations**§323**

- A. Does the company have a Human Resources department? If so:
 - 1. How many employees are on its staff?
 - 2. What is the ratio of company employees to Human Resources staff?
 - 3. What is the size of its annual budget?
 - 4. Obtain a copy of the department's organizational chart or construct a functional chart if none is available.
 - 5. To whom does the manager report?
- B. Which of the following functions does the Human Resources department perform?
 - 1. Employment:
 - a) Recruiting?
 - b) Selection?
 - c) Placement?
 - d) Orientation?
 - 2. Human Resources services (e.g., recreation, employee facilities, counseling)?

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3. Human Resources record maintenance?
 4. Wage and salary administration?
 5. Employee and labor relations?
 6. Internal investigations?
 7. Review of disciplinary action?
 8. Training and supervisory/management development?
 9. Safety?
 10. Medical?
 11. Food service?
 12. Research?
 13. Benefits?
 14. Benefits or insurance plans provided by an outside organization?
 15. Communications?
 16. Administration of affirmative action/equal employment opportunity programs?
 17. Other?
- C. To what legal/professional organizations do the Human Resources staff members belong?
- D. Which professional journals do they receive?
- E. What training/continuing education do the Human Resources staff members undergo?
- F. Are they aware of all the current legislative requirements?
- G. How does the Human Resources department keep apprised of new legal developments?
- H. Does the Human Resources department have an ongoing liaison with outside labor/employment counsel?
- I. How is the Human Resources department's function viewed by supervisors and management?

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A. OUTLINE OF ISSUES & CONCERNS TO BE ADDRESSED IN A SELF-AUDIT §323

- J. Do Human Resources department representatives meet with supervisors and management to assist in solving day-to-day personnel issues?
- K. Do Human Resources department representatives solicit suggestions or information from supervisors and management before developing programs?
- L. Is the Human Resources department proactive or reactive?
- M. Does the Human Resources department view itself as representatives of management or advocates for employees?
- N. Does the company have a Human Resources Policy Manual? (If so, obtain copy.)
- O. Does the company have a Human Resources Procedures Manual? (If so, obtain copy.)
- P. Who is responsible for assuring that the company complies with all current state and federal posting requirements?
- Q. Summary evaluation of Human Resources department:
1. Is department organization appropriate?
 2. Is the staff adequate?
 - a) Quality?
 - b) Quantity?
 - c) Ongoing training?
 3. Its role in the company:
 - a) Is it properly utilized?
 - b) Is its authority adequate?
 - c) Is there sufficient communication?
 - d) Is its contribution respected?
 4. What is its cost per new hire?
- R. Does the company maintain a personnel record for each employee? If so:
1. What does it contain? (Obtain blank copy.)

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2. Does it impermissibly identify employees' race, color, religion, sex, national origin, ancestry, sexual orientation, physical or mental disability, including AIDS or positive HIV status, age, genetic characteristics, or marital or veteran status?
 3. Does the company have a policy permitting or prohibiting supervisor to maintain "shadow" personnel files?
 4. What are retention and storage requirements for "shadow" personnel file?
 5. Is there procedure for retention of the "shadow" personnel files when supervisors leave or are promoted out of the position?
- S. How does the company record changes in employee status, such as promotions, leaves of absence, rates of pay, etc.? (Obtain blank copies of any forms used.)
- T. Does the company provide employees with copies of documents that affect their status?
- U. Do employees have access to their own personnel records?
1. Can they make copies?
 2. What are the rules for access?
 3. Can employees add responsive documents or statements?
- V. Are there security procedures in effect to protect employee privacy?
- W. Are medical records or records containing medical information stored in a location separate from other personnel records?
- X. Are I-9 forms kept in a location separate from other personnel records?
- Y. Does the company use personnel records in connection with any of the following:
1. Hiring?
 2. Transfers?
 3. Promotions?
 4. Performance reviews?
 5. Disciplinary action?
 6. Staff planning?
 7. Development of employment statistics?

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A. OUTLINE OF ISSUES & CONCERNS TO BE ADDRESSED IN A SELF-AUDIT §324

8. Company reorganizations?
9. Reductions in force, layoffs or downsizing decisions?

Workforce Planning**§324****A. Staffing:**

1. Is the number of open positions acceptable?
2. Is the level of competence adequate?
3. Is the company understaffed?
4. Is the company overstaffed?
5. Is backup personnel adequate?
6. Is talent appropriately distributed?

B. Planning techniques:

1. Are there any formal workforce plans? (If so, obtain copies.)
2. Are these plans consistent with company objectives:
 - a) Short term?
 - b) Long term?
3. Are the planning criteria appropriate for determining company needs?
4. Are workforce forecasts:
 - a) Accurate?
 - b) Based on effective application of sufficient source data?
5. Do planners work closely with department heads?
6. Are tools and aids (charts, etc.) effectively used?
7. Are plans updated sufficiently and frequently?

C. Planning programs:

1. Is planning authority at the appropriate level?
2. Are control mechanisms centralized?

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3. Is planning feedback adequate?
4. Is coordination adequate with:
 - a) Internal placement?
 - b) External recruiting?
 - c) Management development?
5. Management inventory program:
 - a) Is it formally established?
 - b) Is it centrally controlled?
 - c) Is information easily retrievable?
 - d) Is information sufficient regarding the following:
 - (1) Vital statistics?
 - (2) Background?
 - (3) Special skills?
 - (4) Current performance?
 - (5) Potential for advancement?
 - e) Is the company sufficiently aware of its internal talent?
6. Is there a succession program?
7. Are there other planning programs? (If so, describe.)

§325 *Recruitment & Hiring*

- A. Requisition:
 1. Is the requisition procedure for staffing adequately standardized and formalized? Is it efficient?
 2. Are the means adequate for specifying the requirements of the position to be filled?
 3. Is the authority to hire or create positions at the proper level?

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A. OUTLINE OF ISSUES & CONCERNS TO BE ADDRESSED IN A SELF-AUDIT §325**B. Recruitment:**

1. Are current employees given appropriate consideration?
2. Are recruitment programs planned?
3. What recruitment sources are used and what is the annual cost?
 - a) Advertising?
 - b) Internal referrals? (Describe program, if any.)
 - c) Employment agencies?
 - d) Executive search?
 - e) Other? (Describe.)

C. Selection:

1. Which of the following selection methods are used?
 - a) Preliminary screening?
 - b) Interview by:
 - (1) Human Resources department?
 - (2) Supervisor?
 - (3) Staff psychologist?
 - c) Testing:
 - (1) If so, describe the tests.
 - (2) Are the tests validated?
 - d) Reference investigation. (If so, describe.)
 - e) Credit and criminal records investigation. (If so, describe.)
 - (1) If performed by a third party, is the investigation in compliance with the federal Fair Credit Reporting Act and any applicable state law?
 - (2) Does the company use authorization forms that comply with the federal Fair Credit Reporting Act and any applicable state law?
 - f) Education verification. (If so, describe.)

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- g) Legally permissible physical examination. (If so, describe.)
 - h) Legally permissible preemployment drug test. (If so, describe.)
 - i) Legally permissible honesty test. (If so, describe.)
2. Are the methods used appropriate and job-related?
 3. Are interviewers properly trained?
 4. Are applicants provided information about the company, the position, and career potential?
 5. Are applicants provided with a written job description?
 6. Are applicants given a realistic picture of the position to be filled?
 7. When vacancies are filled by outside hires, are the reasons explained to affected current employees?
 8. Are applicants required to complete and sign an employment application?
 9. If so:
 - a) Obtain copy.
 - b) Has the company filed a copy with the appropriate state agency such as the California Division of Labor Standards Enforcement?
 - c) Is the applicant provided a copy?
 - d) Does the application contain any questions or specifications as to race, color, religion, sex, national origin, ancestry, sexual orientation, marital or veteran status, genetic characteristics, physical or mental disability, including AIDS or positive HIV status, age, or other categories protected by state and local law?
 - e) Does the application inform the applicant that employment with the company is at-will?
 - f) Does the application require the employee to authorize the company to conduct a background investigation?
 - (1) If so, does the authorization language comply with the federal Fair Credit Reporting Act and any applicable state law?
 10. Is anyone under eighteen years of age employed?
 - a) If so, is the company in compliance with legal requirements regarding the employment of minors?

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A. OUTLINE OF ISSUES & CONCERNS TO BE ADDRESSED IN A SELF-AUDIT §325

11. Are any employees required to be bonded? If so, who pays for the bond?
 12. Are applicants required or requested to furnish photos? If so, who pays for them? If so, is there any state law prohibiting such a request?
 13. Are applicants required to submit the documentation required by the Immigration Reform and Control Act (IRCA) before commencing employment?
 14. Does the company complete and properly maintain I-9 forms as required by IRCA?
 15. Are candidates kept informed of their status?
 16. Are selection determinations appropriately communicated to candidates?
 17. Is appropriate relocation assistance provided?
- D. Are the following aspects of the company's candidate evaluation procedures adequate?
1. Initial screening?
 2. Technical skills?
- E. Job offers:
1. Are appropriate personnel involved in hiring decisions?
 2. Are offer procedures appropriate?
 3. Are offer procedures standardized? (If in writing, obtain copy.)
 4. Does the company have a standardized offer letter? (If so, obtain copy.)
 5. If an offer letter is provided:
 - a) Does it establish at-will employment status?
 - b) Does it establish the company's right to change terms and conditions of employment?
 - c) Does it provide for alternative dispute resolution or arbitration?
 6. Are outstanding offers monitored?
 7. Is follow-up on offers adequate?

§326 **CHAPTER 14—CONDUCTING A LABOR RELATIONS SELF AUDIT****F.** Recruiting staff:

1. Is the number of recruiters sufficient?
2. Are recruiters qualified?
3. Are the recruiters' goals consistent with the company's?

G. Statistics:

1. What is the number of new hires annually?
2. How many vacancies are filled by internal transfers or promotions?
3. How many offers are made?
4. What is the interview/offer/acceptance ratio?

H. Payroll expenses:

1. What is the company's total salary expense?
2. What is the salary expense as a percentage of all expenses?
3. What percentage of fringe benefits are paid by the company versus that paid by the employee?
4. Trends:
 - a) What is the current number of employees?
 - b) What is the company's total salary plus fringe benefit expense?
 - c) How does the salary expense compare to other expenses?
 - d) What is the average salary per employee?

§326 ***Orientation, Training & Development*****A.** Training function:

1. Is the training function adequately planned?
 - a) What employee/manager groups receive training?
 - b) Is the training budget adequate to provide training to the target groups?

A. OUTLINE OF ISSUES & CONCERNS TO BE ADDRESSED IN A SELF-AUDIT §326

- c) What is the size of the training staff?
 - (1) Is this size sufficient to effectively administer training?
- 2. What types of training are offered?
 - a) One-on-One training.
 - b) Group training.
 - (1) Classroom.
 - (2) Distance learning.
 - c) Computer-based training.
 - (1) Web-based.
 - (2) Server or Intranet.
 - (3) CD-rom.
- 3. Who performs the training?
 - a) In-house staff?
 - (1) Training Department?
 - (2) Human Resources?
 - (3) Corporate counsel?
 - b) Outside trainers?
 - (1) Organizations specializing in workplace training?
 - (2) Human resources consultants?
- 4. Do professional trainers (outside trainers) conduct the training?
 - a) Does the organization review the skills and experience of the trainers in providing the specific training involved?
 - b) Has the organization verified the trainer's credentials and resume?
 - c) Has the organization verified the trainer's references and recommendations?
 - d) Has the organization reviewed the specific training materials used?

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- e) Have the training materials been customized to meet the organization's specific training objectives and priorities and to incorporate the organization's policies and procedures?
- 5. Are the (in-house) individuals providing the training properly trained?
 - a) Is there adequate documentation of the skills of the individuals providing the training?
- 6. Is the training properly documented?
 - a) Are training materials retained?
 - b) Are sign-in sheets or other evidence of attendance used and retained?
- 7. Who develops the programs?
- 8. How is program content determined?
- 9. Are needs analyses and job analyses performed?
- 10. Are the programs objective-oriented?
- 11. How are the programs evaluated?
- 12. Does the program content match the goals of the training?
- 13. Is the Human Resources department appropriately involved?
- 14. Is in-house legal counsel appropriately involved?
- B. New employees:
 - 1. Does the organization have an orientation program? (If so, describe or obtain copy if in writing.)
 - 2. Are the individuals providing orientation properly trained?
 - 3. Does the organization have an instructional program? (If so, describe or obtain copy if in writing.)
 - 4. Does the organization have an employee handbook? (If so, obtain copy.)
 - 5. What materials are provided to new employees regarding the organization, benefits, and the job? (Obtain copies.)
 - 6. Is training provided to new employees in addition to "orientation?"
 - 7. Does the new employee training include training related to harassment and discrimination?

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A. OUTLINE OF ISSUES & CONCERNS TO BE ADDRESSED IN A SELF-AUDIT §326

8. Who provides the training?

C. Current employees:

1. Is continued training provided to current employees to broaden their present skills and enable them to acquire new skills? (If so, describe.)
2. Does the organization have any apprenticeship programs? (If so, describe.)
3. Is training provided to supervisors regarding any of the following? (If so, describe and obtain copies of any materials provided.)
 - a) Organization policies and procedures?
 - b) Organization structure and operations?
 - c) The role of supervisors?
 - d) Supervisorial/managerial skills?
 - e) Legal requirements of the job?
 - f) Managing within legal requirements (hiring, performance management, terminations).
 - g) Actions that could generate lawsuits, such as harassment (including harassment of all protected categories), discrimination, wrongful discharge, privacy, defamation, assault and battery, false imprisonment, etc.?
 - h) Safety and health training?
 - i) Violence and threatening conduct in the workplace?
 - j) Employee/human relations?
 - k) Substance abuse in the workplace?
 - l) Appropriate use of e-mail and the Internet?
 - m) Union avoidance?
 - n) Managing the unionized workforce?
 - o) Wage-hour law, compensation and employee benefits?
 - p) Leaves of absence (workers' compensation, FMLA)?

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4. Is training provided to nonsupervisors regarding any of the following? (If so, describe and obtain copies of any materials provided.)
 - a) Workplace harassment (including harassment of all protected categories)?
 - b) Discrimination?
 - c) Violence in the workplace?
 - d) Safety and health training?
 - e) Human relations (sensitivity training)?
5. Has the organization adequately identified its training needs and goals?
 - a) Has the organization identified applicable laws requiring training as set forth in federal, state, and local statutes, regulations, and ordinances, as well as case law?
 - b) What is the process for updating information regarding applicable laws requiring training?
 - c) Has the organization identified additional training requirements such as skills training, harassment training, workplace violence training, and occupational safety and health training?
 - d) Has the organization identified industry practices regarding additional training?
 - e) Has the organization reviewed its prior claims and litigation experience in determining training needs?
 - f) Has the organization surveyed its supervisors and employees to determine the areas in which they believe training is needed?
6. Describe any other in-house training programs.
 - a) Do employees verify in writing that they have attended such programs?
 - b) Are these training programs informational or skill-related?
7. Does the organization support, provide, or sponsor any outside training or educational programs for its employees? (If so, describe.)
8. Does the organization have tuition assistance or other program to assist employees in furthering their education? (If so, describe.)
9. Is the training offered on a nondiscriminatory basis and does the organization reasonably accommodate trainees with disabilities?

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A. OUTLINE OF ISSUES & CONCERNS TO BE ADDRESSED IN A SELF-AUDIT §327**D. Management development:**

1. How is management trained?
2. Is there a formal training program? (Obtain copies if in writing.)
3. What is the program content?
4. Who provides the program instruction?
5. Who determines management training needs and program content?
6. Does the organization use any outside programs?
7. How is use of those programs determined?
8. How does the organization evaluate the results of these training programs?
9. Does the organization utilize any of the following means of developing management skills?
 - a) Rotational job assignments?
 - b) Task forces?
 - c) Personal counseling or coaching?
 - d) Development plans for identified weaknesses?
 - e) Self-development?

Promotions & Transfers**§327**

- A. When are employees eligible for promotion?
- B. Does the company conduct any tests to determine employee eligibility for promotion? If so, are these tests validated?
- C. Who is responsible for determining individual employee eligibility for promotion?
- D. Are such tests open equally to all employees?
- E. What are the selection criteria for choosing among employees with equal qualifications?
- F. Are employees informed of open positions?
- G. Are all employees eligible for promotional opportunities considered equally?

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- H. Does the company attempt to fill job openings by internal promotion before considering outside applicants?
- I. Are internal candidates given official preference to external applicants?
- J. Who makes promotion decisions?
- K. How are promoted employees' pay rates determined?
- L. If employee fails to perform satisfactorily after promotion or transfer:
 - 1. Is employee eligible for transfer?
 - 2. Is employee offered return to prior position?
 - 3. What other action does company take?

§328 *Fair Employment Practices*

- A. Does the company have policies against discrimination based on race, color, religion, creed, sex, national origin, ancestry, sexual orientation, physical or mental disability, including AIDS or positive HIV status, age, genetic characteristics, marital status, veteran status, and all other categories protected by state and local law:
 - 1. Applications?
 - 2. Hiring?
 - 3. Promotions?
 - 4. Transfers?
 - 5. Salary increases?
 - 6. Work assignments?
 - 7. Terminations?
 - 8. Reductions in force?
 - 9. Reorganizations?
 - 10. Other?
- B. If so:
 - 1. Are such policies in writing? (Obtain copy.)

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A. OUTLINE OF ISSUES & CONCERNS TO BE ADDRESSED IN A SELF-AUDIT §328

2. How are they communicated to employees?
 3. Are policies reviewed and updated regularly?
 4. Do managers receive regular training on nondiscrimination policies and procedures?
- C. Has top management taken any action to demonstrate the company's opposition to discriminatory and harassing employment practices?
1. If so, describe such action.
 2. Obtain copies of any pertinent written instructions and policies.
- D. Has the company implemented a policy prohibiting harassment?
1. How has the policy been communicated to employees?
 2. Is the policy in writing? (Obtain copy.)
 3. Is the policy posted in the workplace?
 4. Does the policy comply with state and federal requirements regarding dissemination of harassment policies?
 - a) In addition to prohibiting sexual harassment, does the policy prohibit all forms of prohibited harassment?
 5. Is there a confidential complaint procedure included in the policy and procedure prohibiting harassment?
- E. Have the company's supervisors and Human Resources department been required to familiarize themselves with, and act in conformance with, state and federal equal employment opportunity laws, including the Americans with Disabilities Act (ADA)? (If so, obtain copies of any written instructions.)
- F. Do company job advertisements, employment applications, or personal interviews contain any specifications as to race, color, religion, creed, sex, national origin, ancestry, sexual orientation, physical or mental disability, including AIDS or positive HIV status, age, genetic characteristics, marital status, veteran status, or other categories protected by federal, state or local law?
If so:
1. Describe.
 2. Obtain representative copies.
- G. Have any government agencies been informed of the company's policies?

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- H. Does the company employ any persons who are members of minority groups or classifications protected by equal opportunity laws?
- I. Does the company maintain a record of employees' or applicants' race, color, religion, sex, national origin, ancestry, sexual orientation, physical or mental disability, including AIDS or positive HIV status, age, genetic characteristic, marital status, veteran status, or other categories protected by federal, state or local law for use in legal reporting? (If so, obtain copy.)
- J. If the company employs any persons who are members of minority groups or classifications protected by equal opportunity laws:
1. Total number?
 2. What are their job classifications?
 3. Total number of promotions?
 4. Total number of terminations?
 5. Number of supervisors and managers?
- K. Who in the company is responsible for administering fair employment practices?
- L. Is the company involved in government contracting? If so:
1. Does the company have affirmative action requirements?
 2. Does the company have affirmative action plans and goals? (Obtain copy.)
- M. What is the company's history regarding discrimination complaints, conciliations, outstanding or pending lawsuits, or other actions?
- N. If subject to the Americans with Disabilities Act, has the company taken any of the following steps to ensure compliance:
1. Identified an individual or group of individuals to be responsible for ensuring compliance?
 2. Reviewed existing job descriptions and/or prepared new job descriptions to clearly specify:
 - a) the requisite skills, experience, background, and other qualifications for the job position;
 - b) the essential job functions; and
 - c) the nonessential job functions?
 3. Reviewed job applications to ensure compliance?

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A. OUTLINE OF ISSUES & CONCERNS TO BE ADDRESSED IN A SELF-AUDIT §329

4. Reviewed preemployment testing to ensure that all testing is job-related and does not screen out qualified individuals with disabilities?
5. Ensured that medical examinations are required of all new hires in a particular job category and are required only after a job offer has been extended?
6. Trained supervisory personnel on the requirements of the ADA?
7. Reviewed personnel policies to ensure nondiscriminatory treatment of individuals with disabilities?
8. Prepared a written policy describing the company's adherence to the requirements of the ADA and setting forth the internal procedures for compliance and enforcement?
9. Established a team of individuals to review requested accommodations, discuss options for accommodation, and recommend methods for overcoming workplace and job-related barriers and impediments?
10. Prepared a form for documenting all efforts at reasonable accommodation?

Hours of Work**§329**

- A. What is the established number of workday and workweek hours?
- B. What is the established number of workweek days?
- C. When do the workday and workweek begin and end?
- D. How many shifts are operated?
- E. Do all employees work the same shift? If not, how are shift assignments made?
- F. What are the starting and quitting times?
- G. How are work hours recorded?
- H. Do any employees work more than six days in a week? If so, under what circumstances?
- I. Does the company provide rest periods? If so:
 1. What is their duration?
 2. At what time of day are they taken?

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3. Does local law permit voluntary waiver of rest period by employees?
 - a) Has company obtained written, signed waiver of rest period that complies with all legal requirements?

- J. Does the company provide meal periods? If so:
 1. What is their duration?
 2. At what time of day are they taken?
 3. Are any employees required to eat on the job?
 4. If so, does the company comply with legal requirements for on-the-job meal periods?
 5. Does local law permit voluntary waiver of meal period requirement by employees?
 - a) Has company obtained written, signed waiver of meal period requirement that complies with all legal requirements?

- K. Overtime work:
 1. Does the company have a policy for authorization of work beyond regular work hours?
 - a) Is overtime authorization policy regularly monitored and properly enforced?
 2. Are all overtime work hours properly documented?
 3. How is overtime work assigned?
 4. Does the company equalize hours?
 5. How and when does the company notify employees assigned overtime work?
 6. What policy does the company maintain regarding an employee's refusal to work overtime?
 7. If the company offers compensatory time off in lieu of overtime, does it comply with all the legal requirements?
 8. Does the company have an attendance control system?

§330 ***Compensation***

- A. What is the company's minimum rate of pay?

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- B. How frequently are employees paid? What are the company's regular paydays?
- C. Has the company posted a notice of day, time, and place of regular paydays? (If so, obtain copy.)
- D. Does the company pay by cash or check?
- E. What deductions does the company withhold?
- F. If deductions are taken for other than taxes, how are deductions authorized?
- G. Does the company furnish itemized statements of deductions with pay?
- H. Does the company pay nonexempt employees for overtime hours worked in accordance with state and federal law?
- I. How does the company calculate an employee's regular rate in determining the amount of overtime due?
- J. Does the company pay overtime-exempt employees for overtime hours worked? If so, describe the circumstances and rate of premium pay.
- K. What criteria are used to distinguish between exempt and nonexempt employees?
- L. Are exempt employees paid a salary or fee in accordance with applicable law?
- M. Are any impermissible deductions made from an exempt employee's salary for time not worked?
- N. Does the company pay a premium for work by nonexempt employees on the sixth consecutive day of work? If so, at what rate?
- O. Does the company pay a premium for work by nonexempt employees on the seventh consecutive day of work? If so, at what rate?
- P. Does the company pay a premium for work by nonexempt employees on Saturdays or Sundays? If so, at what rate?
- Q. Does the company pay a premium for work by nonexempt employees on holidays? If so, at what rate?
- R. What is the company's practice when an employee reports for work and there is no work to perform?
- S. Does the company ever request employees to return to work after they have gone home? If so, how are these employees compensated?
- T. How soon after voluntary and involuntary termination of employment is an employee paid his/her final wages?

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- U. Are employees paid for absences for personal reasons? If so, under what circumstances?
- V. Are employees paid for absences for:
1. Personal illness or injury?
 2. Illness or injury in the immediate family? (Define.)
 3. Death in the immediate family? (Define.)
 4. If so, under what circumstances in each instance?
- W. What attendance records does the company keep?
- X. How does the company treat absences without notice?
- Y. Does the company have a formal sick leave program? (If in writing, obtain copy.) If so:
1. How many days of sick leave are accrued per year?
 2. What is the length of service eligibility requirement?
 3. What type of absences are covered by sick leave?
 - a) Is doctor's certification required?
 4. Is sick leave monitored?
 5. Are abuses of sick leave properly addressed?
 6. Is accumulation of unused sick leave in excess of one year's allowance permitted?
 7. If the company permits accumulation, is there a cap on the total amount?
 8. Under what circumstances, if any, does the company pay employees for unused sick leave?
- Z. Does the company pay employees who attend summer military encampments (*i.e.*, reserve or national guard)? If so, what amount?
- AA. Does the company deduct from pay for tardiness of nonexempt employees? If so, describe the policy and practice. (If in writing, obtain copy.)
- BB. Does the company have a policy or practice of taking deductions from the salary of exempt employees or any form of paid time off for absences of less than one day?

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- CC. Does the company keep records of tardiness?
- DD. Does the company grant cost-of-living adjustments? If so, describe the practice and method used to calculate.
- EE. Does the company grant paid time off for voting? If so:
1. How much time?
 2. Is advance notice required?
- FF. Does the company grant time off for jury or witness duty? If so:
1. Are employees paid? How much?
 2. Is there a cap on paid time off?
- GG. Does the company accept wage assignments from employees? If so, what is the procedure?
- HH. What is the company's policy and practice regarding payment to employees who resign?
- II. What is the company's policy and practice regarding payment to discharged employees?
- JJ. Does the company provide severance pay on termination, layoff, resignation, or discharge?
1. If so, describe or obtain copy.
 2. Has this policy been verified for compliance with ERISA?
- KK. Does the company have a formal compensation program? (If so, obtain copy.)
- LL. Are compensation ranges established for each job classification? If so, how are the ranges determined?
- MM. Are all employees paid within the applicable range for their job?
1. Is documentation required for exceptions to applicable compensation range?
- NN. Is the compensation paid to the company's female employees comparable to that paid to male employees performing the same work?
- OO. Are jobs within the company rated in relation to each other?
- PP. How are jobs evaluated? How frequently are jobs reevaluated or updated?

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- QQ. Are wage surveys performed? If so:
1. Are they current?
 2. Do they cover all employees?
 3. Are they performed properly?
- RR. Are pay ranges revised as a result of these surveys?
- SS. Is the compensation program administered effectively?
- TT. Are compensation decisions made at the proper level?
- UU. Are compensation adjustments:
1. Timely?
 2. In line with the compensation program?
 3. Properly approved?
- VV. Are starting wages:
1. In line with compensation ranges?
 2. Properly determined and approved?
 3. Comparable to existing wages of other recent hires?
- WW. Does the system permit exceptions (red-circle rate)?
- XX. Do employees appear satisfied with their wages?
- YY. Incentive programs:
1. Does the company have a formal incentive program? (If so, obtain copy if in writing.)
 2. Does the company have any kind of profit-sharing plan? If so:
 - a) Obtain copy if in writing.
 - b) Who is eligible to participate?
 - c) How is the extent of participation determined?
 - d) In what form is payment made?
 3. Does the company have a year-end bonus plan? If so:

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- a) Obtain copy if in writing.
- b) Does the company have minimum service requirements for eligibility?
- c) How is the amount determined?
4. Are bonuses discretionary or triggered by productivity goal?
 - a) If non-discretionary, are bonus calculated into base rate for calculation of rate of overtime compensation?
5. Do the incentives improve productivity, etc.?
6. Are the amount of incentives paid used in calculating the amount of extra overtime compensation due nonexempt employees?
7. Employee attitudes:
 - a) Are they satisfied with the program?
 - b) Are they aware of the incentives?
 - c) Do they recognize the relationship between performance and compensation?

ZZ. Performance reviews:

1. Does the company conduct employee performance reviews? If so:
 - a) For which employees?
 - b) How frequently?
 - c) Who performs the review?
 - d) Is feedback provided to employees at appropriate intervals?
 - e) Are supervisors trained in reviewing performance?
 - f) Are reviews made in connection with prospective pay increases?
 - g) Is a checklist or guide provided for evaluation purposes? (If so, obtain copy.)
 - h) Do the reviews appropriately measure performance?
 - i) Do supervisors discuss performance reviews with each employee?
 - j) Is the accuracy and objectivity of evaluations monitored in order to avoid inappropriately positive or negative evaluations?

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- k) Is the performance review data used in management development/training and staffing requirements?
- l) Is the Human Resources department appropriately involved?
- m) Are employees required to sign an acknowledgment that they received the performance review?
 - (1) Is there a practice or procedure for employees that refuse to acknowledge receipt of performance review?

AAA. Merit increases:

- 1. Have performance criteria been established in advance and communicated to employees?
- 2. Is there a formal means of relating compensation to performance?
- 3. Is there an appropriate relationship between compensation and performance?
- 4. Are wage increases based solely on merit?
- 5. How frequently are wages reviewed?
- 6. How is the amount of increase determined?
- 7. Do employees in the same pay range receive the same merit increase?

§331 *Fringe Benefits*

- A. Which of the following fringe benefits does the company offer? (Obtain copies of all fringe-benefit plans if in writing.)
 - 1. Life insurance?
 - 2. Hospitalization, surgical, and medical insurance?
 - 3. Sickness and accident insurance?
 - 4. Major medical insurance?
 - 5. Disability insurance?
 - 6. Dental insurance?
 - 7. Optical or vision care insurance?
 - 8. Travel accident insurance?

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9. Pension or retirement plan?
10. Savings plan?
11. Stock purchase plan?
12. Credit union?
13. Paid holidays?
14. Paid vacations?
15. Educational reimbursement plan?
16. Length-of-service benefits?
17. Childcare?
18. Other?

B. Life insurance:

1. What are the eligibility requirements (service and salary level)?
2. What is the schedule of benefits (amounts)?
3. Who pays for the insurance?
 - a) Fully paid by the company?
 - b) Partially paid, partially contributory?
 - c) Entirely contributory?
4. What is the company's cost per month?
5. What is the employee's cost per month?

C. Hospitalization, surgical, and medical insurance:

1. What are the benefits?
2. Who is covered?
 - a) Employee only?
 - b) Employee and spouse?
 - c) Employee, spouse, and dependents?

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3. Who pays for the insurance?
 - a) Fully paid by the company?
 - b) Partially paid, partially contributory?
 - c) Entirely contributory?
 4. What is the company's cost per month?
 5. What is the employee's cost per month?
- D. Sickness and accident insurance:
1. What are the benefits?
 2. Who is covered?
 - a) Employee only?
 - b) Employee and spouse?
 - c) Employee, spouse, and dependents?
 3. Who pays for the insurance?
 - a) Fully paid by the company?
 - b) Partially paid, partially contributory?
 - c) Entirely contributory?
 4. What is the company's cost per month?
 5. What is the employee's cost per month?
- E. Describe any other insurance benefits provided.
- F. Consolidated Omnibus Budget Reconciliation Act (COBRA):
1. Did the company employ a sufficient number of employees last year to be covered by COBRA?
 2. Has the company adopted COBRA implementation policies?
 3. Did the company notify all covered employees and their spouses of their rights under COBRA on its effective date?
 4. Does the company notify new employees and their spouses of their rights under COBRA regarding any healthcare plans maintained by the company?

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A. OUTLINE OF ISSUES & CONCERNS TO BE ADDRESSED IN A SELF-AUDIT §331

5. Does the company offer continued healthcare coverage to terminated employees and members of their families?
 6. If company employees die, or become divorced, or become eligible for Medicare benefits, does the company offer continued healthcare coverage to their spouses and dependent children?
- G. Does the company have a pension or retirement plan? (If so, describe.)
- H. Does the company have a savings plan? (If so, describe.)
- I. Does the company have a stock purchase plan? (If so, describe.)
- J. Does the company have paid holidays? If so:
1. What are they?
 2. When does the company observe holidays that fall on a Saturday?
 3. When does the company observe holidays that fall on a Sunday?
 4. How does the company handle employees who extend a holiday by an unexcused absence?
 5. Do nonexempt employees who work on a holiday receive:
 - a) Compensatory time off?
 - b) Premium pay?
 6. Do employees who work overtime hours on a holiday receive overtime pay?
 7. Do employees receive holiday pay if their holiday falls outside of their regularly scheduled workweek?
 8. Do employees receive holiday pay for holidays that occur during:
 - a) Leaves of absence for personal reasons?
 - b) Leaves of absence for illness or injury?
 - c) Military leaves?
 - d) Vacation?
 - e) Leaves of absence for family care?
 - f) Leaves of absence for pregnancy, childbirth, and related medical conditions?

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K. Vacation:

1. Does the company have a vacation year for purposes of time and pay accrual?
If not:
 - a) How is the amount of paid vacation time employees accrue determined?
 - b) How is the rate of vacation pay determined?
2. What is the company's schedule for vacation accrual?
3. What are the service eligibility requirements?
4. How are vacations scheduled?
5. When do employees receive vacation pay?
6. In calculating service eligibility, are periods of personal leave deducted?
7. What is the effect of an employee's resignation and rehire on service eligibility?
8. Are employees permitted to substitute sick leave or other leaves of absence during their vacation period?
9. How is accrued, unused vacation treated for employees terminated due to:
 - a) Resignation?
 - b) Discharge?
 - c) Layoff?

L. Do the company's wage surveys compare benefit packages? If so:

1. Are the company's benefits competitive?
2. Are the company's benefits adequate?
3. Do employees appear to be satisfied with the benefit package?

M. Are the personnel assigned to administer these benefits adequate?

1. Skills?
2. Number?

N. How is benefit information provided to employees? Is it adequate?

A. OUTLINE OF ISSUES & CONCERNS TO BE ADDRESSED IN A SELF-AUDIT §332

- O. Are benefits processed in a timely and efficient manner (*e.g.*, payment of claims, responses to questions)?
- P. Are the reporting and disclosure requirements of ERISA being followed for all benefit programs?
- Q. Are there summary plan descriptions of each benefit program? (If so, obtain copies.)
- R. Is there a specific written statement for all benefit programs reserving the company's discretion to make all determinations concerning eligibility and interpretation of the plan?
- S. Do written plan documents reserve the company's right to amend, modify, or terminate each benefit program and do the documents articulate a procedure for such actions?
- T. Are benefits described in the company handbook? If so, are the descriptions contained in the handbook consistent with the benefit plan documents?
- U. Do all descriptions of benefits clearly and consistently set forth eligibility standards?

Safety & Health**§332**

- A. Does the company have a safety program? If so:
 - 1. Who directs it?
 - 2. How is it implemented?
 - 3. Are there written safety regulations?
 - 4. Obtain copies of all written program materials.
- B. Does the company provide employees with any safety equipment (*e.g.*, shoes, glasses, etc.)? If so, at whose cost?
- C. Does the company investigate all injuries that occur on its premises and in the use of its vehicles?
- D. Has the company established accident frequency and severity ratios? If so, obtain copies of the following:
 - 1. Most recent ratios.
 - 2. Ratios from last year.
 - 3. Ratios from two years ago.

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- E. Does the company have an alcohol and drug abuse policy? (If so, obtain copy if in writing.)
1. Does it inform employees that they may not report to work under the influence of alcohol or drugs?
 2. Does it inform employees that they may not possess or utilize alcohol or drugs while at work?
 3. Does it require employees to inform the company if they are taking prescribed medication that might affect their ability to perform their job safely?
 4. Does it advise employees that the company retains the right to search company property?
 5. Does the company require preemployment drug tests?
 6. Does the company conduct alcohol or drug tests for current employees? If so:
 - a) Under what circumstances?
 - b) How are they conducted?
 - c) What is the effect of an employee's refusal to be tested?
 - d) What happens to an employee who tests positive?
- F. What is the company's history responding to workers' compensation claims?
- G. Does the company provide first-aid facilities?
- H. Does the company provide rooms for resting?
- I. Does the company retain physicians' services?
- J. Does the company have an industrial nurse?
- K. Does the company's maintenance staff look for, document, and repair possible unsafe conditions before accidents occur?
- L. Has the company made arrangements with a medical clinic for handling emergencies?
- M. Are the company's supervisory and management personnel knowledgeable about OSHA and parallel state programs?

§333 *Communication*

- A. Are company personnel policies in writing? (If so, obtain copies.)

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A. OUTLINE OF ISSUES & CONCERNS TO BE ADDRESSED IN A SELF-AUDIT §333

- B. Are company personnel policies available to managers in the form of a manual or otherwise? (If so, obtain copy.)
- C. If not, how are personnel policies communicated to managers?
- D. Have written personnel procedures been adopted to implement personnel policies? (If so, obtain copies.)
- E. Does the company have a personnel procedures manual? (If so, obtain copy.)
- F. If personnel procedures are not in writing, how are they communicated?
- G. Have all company personnel policies and procedures been reviewed to avoid contradiction and inconsistency?
- H. Are all employees informed of their responsibilities and authority under the company's personnel policies and procedures?
- I. Does top management provide information internally as to company objectives, forward planning, and significant achievements? If so, by what means?
- J. Does top management support and encourage internal communication?
- K. Are supervisors informed of top management's interpretation of company personnel policies? If so, by what means?
- L. Are personnel policies applied consistently throughout the company? If not, identify problem area(s).
- M. Does the company have an employee handbook? If so:
 - 1. Does it accurately reflect company personnel policies and procedures?
 - 2. Do the personnel policies set forth in the employee handbook comply with state and federal law?
 - 3. Is the employee handbook reviewed and revised periodically? If so, are appropriate personnel assigned to perform this task?
 - 4. Are the policies and procedures set forth in the handbook followed?
 - 5. Is each employee provided with a copy of the employee handbook and requested to acknowledge receipt in writing?
 - a) Is each employee provided with the periodic updates and/or revisions to the employee handbook?
 - 6. Does the employee handbook set forth the company's policy concerning at-will employment?

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7. Does the employee handbook contain an alternative dispute resolution or arbitration provision?
 8. Has legal counsel reviewed the employee handbook?
- N. Have appropriate personnel documents been reviewed for the inclusion of employment-at-will language?
- O. Are employees provided a method to express their views and reactions to management?
- P. Is there a written procedure for hearing and resolving nonunion employee complaints? (If so, obtain copy.) Is this procedure effective?
- Q. Are the following barometers observed for signs of employee discontent?
1. Increased turnover?
 2. Increased absenteeism?
 3. Reduced productivity?
 4. Reduced cooperation?
 5. Reduced motivation?
 6. Increased complaints?
- R. If these signs indicate an employee attitude problem, what is done to diagnose and correct this problem?
- S. Has the company ever conducted an employee attitude survey and, if so, what changes, if any, were made in policies or procedures as a result?
- T. Does the company have a newsletter or other periodic publication? (If so, obtain copies.)
- U. Does top management use a management letter or other device to regularly communicate with employees? (If so, obtain copies.)
- V. Is management receptive to employee ideas?
- W. Is there a suggestion system? If so, to what extent do employees utilize it?
- X. How are employees notified of changes to company policy?

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A. OUTLINE OF ISSUES & CONCERNS TO BE ADDRESSED IN A SELF-AUDIT §334

Discipline, Termination & Leaves of Absence §334

A. Discipline:

1. Has the company published rules of conduct? If so:
 - a) How are employees informed of them? Obtain copy.
2. Does the company have a method to assure consistent interpretation and application of these rules? If so:
 - a) Who is responsible for assuring consistency?
 - b) Is it effective?
3. Does the company have regulations providing for consistent corrective action? If so:
 - a) Are they disseminated to employees?
 - b) Who is responsible for assuring consistency?
 - c) Is the program effective?
 - d) Obtain copy.
4. In the event of employee discipline, who takes the action?
5. If the company does not have published rules of conduct, how is employee discipline handled?

B. Terminations:

1. Does the company maintain a written policy regarding basis for termination of employment? (Obtain copy.)
2. Does the company maintain any procedures for initiating a termination?
3. Do terminations of employment occur for any of the following reasons?
 - a) Resignation with notice?
 - b) Resignation without notice?
 - c) Resignation by mutual agreement?
 - d) Discharge?
 - e) Layoff?

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- f) Retirement?
 - g) Improper extension of leave of absence?
 - h) Failure to return from leave of absence?
4. What documentation does the company utilize for terminations?
 5. Who completes the requisite documentation?
 6. Does the company maintain labor turnover records? If so, what is the company's turnover rate?
 - a) Currently?
 - b) One year ago?
 - c) Two years ago?
 7. Are exit interviews conducted for terminating employees? If so:
 - a) Who conducts the interview?
 - b) What is the nature of the interview?
 - c) How are the results utilized?
 8. How long does the company retain terminated employees' records?
 9. Does the company have procedures for terminating employees? If so:
 - a) Are they followed?
 - b) Obtain copy if in writing.
 10. Does the company consider the following before terminating employees?
 - a) Length of service?
 - b) Documentation in personnel file?
 - c) Wage increases?
 - d) Promotions?
 - e) Commendations?
 - f) Criticism of work or lack thereof?
 - g) Prior discipline or warnings?

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A. OUTLINE OF ISSUES & CONCERNS TO BE ADDRESSED IN A SELF-AUDIT §334

11. Who makes the decision to terminate an employee?
12. Are termination decisions reviewed by higher level management or the Human Resources department prior to implementation?
13. Are terminations handled as confidentially as possible?
14. Is legal counsel consulted prior to termination?
15. Does the company have procedures for adjudicating employee disputes regarding basis for termination decision?
16. Does the company ensure that terminations occur in accordance with its policies and procedures?
17. Does the company have guidelines for achieving consistent justification for terminations?

C. Layoffs:

1. If the company needs to reduce its workforce for an extended period due to lack of work:
 - a) How are employees selected for layoff?
 - b) Do laid-off employees receive any severance pay?
 - c) Does the company comply with all notice requirements concerning reductions in force required by the WARN Act?
2. If the company needed to increase its workforce after a cutback for an extended period, would laid-off employees be offered employment? If so:
 - a) How are employees selected for recall?
 - b) How is length of service/seniority affected for purposes of vacations, etc.?

D. Leaves of Absence:

1. What types of leaves does the company grant, if any?
 - a) Personal?
 - b) Medical?
 - c) Pregnancy?
 - d) Work-related disability?
 - e) Family care?

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- f) Bereavement?
 - g) Military?
 - h) Jury duty?
2. If the company is required by law to grant a certain type of leave, is the company in compliance with the requirements of any such law(s)?
 3. Do employees on any type of leave receive pay?
 4. How does the company treat employees who fail to return from leaves of absence?
 5. How does the company treat employees who overextend leaves of absence without permission?
 6. How does the company treat employees who work elsewhere during leaves of absence without authorization?
 7. What is the company's procedure for granting leaves?
 8. How do leaves affect employees' status, seniority, benefits, etc.?
 9. Are employees advised of these effects prior to taking leaves?
 10. Does the company monitor the status of employees out on workers' compensation leave?
 11. Are employees reinstated to their previous position upon return from leaves of absence? If not, why not?
 12. What happens to company-paid benefits during a leave of absence?

§335 *Union Relations*

- A. What is the number of company employees that are:
 1. Supervisory?
 2. Nonsupervisory?
 3. Hourly?
 4. Salaried?
- B. Is the company unionized? If so:
 1. Describe the bargaining unit or units.

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A. OUTLINE OF ISSUES & CONCERNS TO BE ADDRESSED IN A SELF-AUDIT §335

2. Which union represents each bargaining unit?
3. For how long?
4. What is (are) the expiration date(s) of any current contract(s)?
5. What is the extent of union membership?
6. Was recognition preceded by an election?
7. Obtain a copy of any union contract(s).
8. Are there any side agreements, oral or written?
9. Are there any significant past practices between the company and union(s)?
10. Who represents the company in negotiations?
11. Which management representatives are present in negotiations?
12. Are contract settlements generally preceded by a strike?
13. At what step in the process are most grievances settled?
14. What is the number of grievances annually for each unit?
15. What is the number of arbitrations annually for each unit?
16. Are either of the following provisions contained in the contract(s)?
 - a) Union shop clause?
 - b) Checkoff for dues and/or initiation fees?
17. Has the company experienced any unauthorized walkouts?

C. If company employees are not represented by a union:

1. Does the company have an informal dispute resolution procedure? (If so, obtain copy if in writing.)
2. Is it used?
3. Have any groups attempted to organize?
4. If so, which groups and how frequently?
5. Have elections been held?
6. If so, by what majority was unionization defeated?

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7. Has the company experienced any work stoppages?
8. Has the company been charged with any unfair labor practices?

§336 **B. CONCLUSION**

Even a brief glance at the preceding outline of issues and concerns makes it evident that conducting a self-audit is a significant task. The limitations of this chapter make it impossible to comprehensively raise every issue and, therefore, employers should include all other issues of specific importance to them in their self-audit. Nonetheless, the short-term effort of conducting such an audit yields important long-term gains by identifying problems the employer needs to address.

Such an audit is merely the first step in preventing and confronting potential employment problems. Once problems are identified, employers must act to correct those policies, procedures, and practices that are inconsistent with the employer's goals or legal requirements. Employment audits must not be regarded as one-time events, but rather as an ongoing process that must be engaged in with regularity as circumstances and legal requirements change.

ACCA Program 711 -- Educating Management regarding Legal Compliance Issues

Why do clients need to be educated?

- *Legal business practices are essential elements of business success*
- *In order to be effective, compliance programs must be integrated into day-to day business operations*
- *Reduces enterprise risk*
- *Ensures of compliance with laws and regulations*
- *Enhances public image as a good corporate citizen*
- *Decreases management distraction due to investigations and/or litigation*
- *Protects shareholder value*
- *Allows for continued ability to undertake government contracts*
- *Continuous evaluation of legislative, regulatory and business risks allows clients to respond quickly to a changing business environment*
- *Federal Sentencing Guidelines*

Who needs to be educated?

- *Board of Directors responsible for oversight (Caremark and SOX)*
- *Senior Management sets the tone from the top*
- *Operating Management*
- *Employees*

What's required to establish an effective compliance program?

- *Establishing compliance standards and procedures*
- *Creating a compliance infrastructure*
- *Communicating standards and procedures*
- *Enforcing compliance standards*
- *Detecting misconduct*
- *Responding to violations*
- *Taking steps to prevent future offenses*

How do you establish compliance standards and procedures?

- *Written commitment to compliance sponsored by top management, usually called a Code of Conduct*
 - Easy to comprehend (educational level of employee base must be considered)
 - Promotes an ethical culture
 - Provides appropriate references and contacts for guidance
 - Hard copy vs. on-line
 - Global or local?
 - Multilingual versions?
 - NYSE rules
- *Assessment of significant risks affecting business operations*
 - Laws and regulations
 - Proactive efforts of law firms to communicate compliance recommendations
 - Enforcement priorities of government agencies
 - Litigation risks
 - Due diligence

- Business practices – need for multi-disciplinary participation, client interviews and engagement
- *Regular evaluation of risks and effectiveness of existing compliance program*

What compliance areas should be considered in a risk assessment?

- *Accurate books and records*
- *Antitrust/anti-competitive*
- *Anti-bribery and FCPA*
- *Anti-kickback*
- *Confidentiality*
- *Conflicts of Interest/Corporate Opportunity*
- *Document retention*
- *Employment*
 - ADA
 - Child labor
 - EEOC/non-discrimination
 - FLSA
 - Immigration
 - Labor relations
 - OSHA
 - Sexual harassment
- *Environment*
- *Intellectual property*
- *Internet usage*
- *Misuse of company assets*
- *Money laundering*
- *Patriot Act*
- *Political contributions*
- *Privacy*
- *SEC/insider trading*

How do you create a compliance infrastructure?

- *Tone at the top – commitment of senior management*
 - Ethics or compliance?
 - “Walk the Talk”
 - Accountability (e.g., impacts compensation)
- *Compliance officer or ombudsman*
 - Regulated vs. non-regulated industry
 - Lawyer or not?
 - Full-time dedicated resources?
 - Reporting (where on the organization chart)
 - Access to CEO and Audit Committee
 - Budget
 - Centralized/decentralized activity
- *Relationship with Internal Audit Department*
 - Risk assessment
 - Objective measurement and feedback
 - Follow-up on corrective action
 - Forensic capabilities

- *Interaction with HR is critical*
 - Encourage positive behaviors/ethical culture
 - Recruitment (screening new hires)
 - Training
 - Performance measurement
 - Employee feedback (surveys, exit interviews)
- *Multi-national enterprises*
 - Different regulatory structure
 - Culture and business practices
 - Same or different compliance standards?
 - Control environment
 - Individualized risk assessments?
- *Audit Committee oversight*
 - Regular reporting on compliance matters
 - SOX Whistleblowing line for financial fraud

How do you communicate standards and procedures?

- *Regular communications*
 - Newsletters and other company publications
 - Intranet
 - Compliance library
- *Mandated compliance training for all employees*
 - Opportunity to outline expectations
 - In person or computer-based?
 - Internal training staff or outside vendor?
 - Generic or tailored? (costs)
 - U.S. only or all operations?
 - Languages?
 - General (e.g., HR practices) vs. Job-specific (e.g., antitrust) – relevance
 - Easily accessible policies and training materials
 - Specialized for particular risk areas
 - Litigation process training??
- *Hotline or other means for reporting misconduct*
 - Visibility of contact information
 - Phone, e-mail, P.O. box
 - One line or more
 - Internal or outside vendor?
 - Legal privilege issues
 - No retaliation (Sec. 806 SOX)
 - Anonymity
 - Reporting
 - Follow-up and investigations
 - Information gathered to further refine compliance challenges
- *Consequences of failure to comply clearly communicated*
 - Compliance matters considered in performance evaluations
 - Sanctions proportionate to violations
 - Established protocols for handling misconduct
 - Consistent enforcement
 - Commercial relationships with outside entities are terminated when unethical or unlawful conduct is detected

New Ideas in Compliance Strategies

Educating Non-Legal Managers About Their Legal Responsibilities

Gloria Santona
Executive Vice President and General Counsel
McDonald's Corporation

October 9, 2003

How do you convince management?

- Board is responsible for oversight
 - In re Caremark
 - Sarbanes-Oxley
- Senior management commitment is crucial to the success of a compliance program

What are the barriers?

- “This is just another legal program.”
- “The General Counsel is building an empire.”
- “It’s expensive.”
- “It distracts my managers from achieving their business goals.”
- “Why now?”

Why do you need a program?

- To protect:
 - Reputation
 - Directors and officers
 - Stakeholder confidence
 - Credit ratings
 - Shareholder value
- To minimize or avoid:
 - Civil penalties
 - Criminal penalties
 - Litigation
 - Government debarment
 - De-listing
 - Increased premiums

What are the benefits?

- There is value added from:
 - Cost savings
 - Business continuity
 - Harmonization of business practices
 - Awareness of risks allows quick reaction to a changing business environment
 - Enhanced reputation for CSR
 - Leveraging compliance data
- It's the law!

What are the costs?

- “Parade of Horribles”
 - Damage to reputation and investor confidence
 - Decline in stock price
 - Personal liability of directors and officers
 - Litigation
 - Civil and criminal penalties
 - Loss of insurance coverage

What are the trade-offs?

Declining stock price
Erosion of stakeholder
confidence
Escalating insurance
premiums
Costs of litigation
Penalties, fines and
imprisonment

Staffing Costs
Consultants
Employee
training
Technology

What are the risks?

- Adverse use in litigation
 - Documentation can be a roadmap
 - Admissions against interest
 - Privilege issues
- Unintended employment contract
- Disparate or discriminatory impact
- Retaliation against whistleblowers

How do you start?

- Enlist a compliance council
- Identify risks
- Review existing policies
- Determine gaps
- Formulate a business case
- Get management approval to proceed

What's a compliance council?

- A cross-functional team that oversees compliance policy
 - Legal
 - Internal Audit
 - Human Resources
 - Operations
 - Finance
 - Communications
 - Geographic distribution

How do you design your program?

- Assess risks
- Identify gaps
- Review and refresh your Code of Conduct and other compliance policies
- Create new policies
- Communicate policies
- Train employees
- Audit and monitor compliance
- Improve continuously

What are key risk areas?

- Accounting
- Antitrust
- Confidential Information
- Employment
- Export/Import
- Foreign Sales
- Government Contracts
- Health, Safety and Environment
- Improper Payments
- Intellectual Property
- Money Laundering
- Political Activities
- Privacy
- Records Retention
- Securities
- Taxes

What's in a Code?

- Accounting standards and practices
- Confidentiality
- Conflicts of interest
- Environment, health and safety
- Gifts and entertainment
- Insider trading
- Labor and employment laws
- Interacting with competitors
- Political contributions

What are other policies to include?

- Antitrust
- Economic espionage
- Foreign Corrupt Practices Act
- Intellectual property
- Internet usage
- Patriots' Act
- Privacy
- Records retention
- Regulated industry rules

What's in your business case for compliance?

- Rationale
- Integration with business objectives
- Scope of the program
 - Basic policies
 - Existing resources
 - Gaps
- Resource needs
- Timeline
- Budget

What's in the budget?

- What do you already have in place that you can use?
- What gaps do you need to fill?
- Do it yourself? Or hire a consultant?
 - Program design
 - Communications
- Hotline
- Training
- Technology

How do you engage the organization?

- Clear, comprehensible code of conduct, keyed to organization's culture
- Demonstrated management commitment
 - Consistent message
 - Incentives for compliance
 - Non-retaliation
- Relevant training
 - Job responsibilities and status
 - Educational levels

What's the best way to communicate standards?

- Mandated compliance training
 - Classroom or computer-based?
 - Internal staff or outside vendor?
 - Generic ethics training or tailored to your Code and/or the employee's job responsibilities?
- Hotline
 - Convenient, accessible 24/7
 - Safe and comfortable for employees
 - Feedback

How do you ensure engagement?

- Compliance matters considered in performance reviews
- Established protocols for handling misconduct
- Sanctions consistently applied and proportionate to violations
- Commercial relationships with vendors immediately terminated in misconduct is discovered