208 Keeping Up Corporate Defenses After 9/11

Donald D. Anderson
Partner
McGuireWoods LLP

Craig P. Culbertson
Partner
McGuireWoods LLP

John L. Howard
Senior Vice President and General Counsel
W.W. Grainger, Inc.

Bart M. Schwartz
President and CEO
Decision Strategies LLC

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Faculty Biographies

Donald D. Anderson

Donald D. Anderson is a partner with McGuireWoods LLP in Jacksonville, FL. He represents manufacturing, transportation, and other businesses in environmental, safety, and health matters throughout the eastern United States.

Before attending law school, Mr. Anderson spent three years teaching and four years as a caseworker in a juvenile and domestic relations court.

He is a member of the environmental sections of the ABA and the Florida Bar. He is active in the environmental, safety, and health issues of the First Coast Manufacturers Association, an organization of manufacturing companies and associates in northeast Florida.

Mr. Anderson received a BA from The College of William and Mary, an MEd from the University of Virginia, and is a graduate of the University of Virginia School of Law.

Craig R. Culbertson

Craig R. Culbertson is a partner at McGuireWoods, LLP in Chicago and regularly represents companies, banks, boards of directors, and special committees in a wide variety of corporate/financing transactions and matters, including corporate governance, finance matters, international matters and mergers and acquisitions.

Prior to joining McGuireWoods, Mr. Culbertson was a partner at Jenner & Block. Mr. Culbertson is currently general counsel of iTRACS Corporation and was formerly executive vice president and general counsel of Castle Energy Corporation.

Mr. Culbertson received his BA cum laude from Davidson College and his JD summa cum laude from Loyola University of Chicago.

John L. Howard

John L. Howard joined W.W. Grainger, Inc. and was elected senior vice president and general counsel. His current responsibilities include supporting all of the company's legal functions. Grainger is the leading North American industrial distributor of products used by businesses to maintain, repair, and operate their facilities.

Before joining Grainger, Mr. Howard served as vice president and general counsel for Tenneco Automotive, a $3.2 billion automotive business of Tenneco, Inc. Prior assignments included vice president, law, and assistant general counsel at Tenneco. From 1990 to 1993, Mr. Howard served as counsel to the Vice President of the United States. He also held a variety of legal positions within the federal government, including Associate Deputy Attorney General in the U.S. Department of Justice.

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Mr. Howard serves on the Wilson Council of the Woodrow Wilson Center for International Scholars and on the Council of Legal Advisors of the National Legal Center for the Public Interest, both in Washington DC. He also serves on the board of directors of the Gilda's Club of Chicago.

Mr. Howard earned his bachelor of science from Indiana University, with honors. He earned his JD from Indiana University and received his LLM from George Washington University, graduating with highest honors.

Bart M. Schwartz

Bart M. Schwartz founded Decision Strategies in 1991 and is currently the president and CEO. Mr. Schwartz is an attorney with extensive government and private sector experience as a trial attorney and manager of complex investigations and prosecutions.

Mr. Schwartz served as chief of the Criminal Division in the office of United States Attorney for the Southern District of New York, under U.S. Attorney Rudolph W. Giuliani. He had direct responsibility for overseeing all criminal cases from white-collar crime and organized crime to narcotics and environmental violations. For over 15 years, Mr. Schwartz has managed national and international investigations in the private sector. His areas of expertise include: serving as a monitor to report to regulators and prosecutors; directing internal and independent investigations for corporations and their audit committees; conduction of a due diligence investigation advising clients on the establishment and conduct of ethics and compliance programs; and developing investigative strategies in support of complex litigation. For example, Mr. Schwartz was retained for the independent investigation at Texaco Inc. relating to racial discrimination and document destruction. Mr. Schwartz has had numerous court and similar appointments to monitor the conduct of corporations.

In September 2000, Mr. Schwartz was appointed by New York City Mayor Rudolph W. Giuliani to chair a Task Force to conduct a top-to-bottom management review of the Department of Buildings and develop recommendations for the agency's future operations.

Mr. Schwartz is a graduate of the University of Pittsburgh and the New York University School of Law.

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CORPORATE COMPLIANCE AND ETHICS PROGRAM CHECKLIST

by Dwight Howes

Primary Program Guidelines

- Identify and list risks/vulnerabilities specific to your organization
- Identify and list risks/vulnerabilities common to most organizations
- Include both specific and common risks/vulnerabilities in written compliance and ethics programs
- Adopt and amend code of conduct and comprehensive corporate compliance and ethics programs as necessary by the Board of Directors
- Insure that high-level management are in charge of the corporate compliance program

Communications/Training Programs

- Plan and schedule one year in advance
- Identify specific days on which communications/training will occur
- Identify specific topics to be covered in communications/training
- Identify specific plans for communications releases, including bulletin board posters, spots on company videos, intranet messages, e-mails, company newsletter articles, wallet cards and the like
- Document and implement changes to communications/training plan
- Document communications/training conducted, including who received the training, what training was conducted and what training materials were distributed
- Document the types and distribution of communications
- Document the explanation for communications/training that did not occur as planned
- Include compliance and ethics program communication/training in employee orientation
- Include communication/training program about compliance and ethics program for contract employees, vendors and others as appropriate

Auditing and Monitoring Plans

- Plan and schedule audit (announced and unannounced) and monitoring plans at least one year in advance
- Identify specific days on which audits will occur

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- Document that audits occurred as planned or explain exceptions from plan
- Identify specific facilities or programs for audit
- Identify specific topics for audit (OSHA, human resources issues, compliance program, antitrust, etc.)
- Interview employee as part of audit (to test regarding knowledge about requirements, concerns about subject of audit, etc.)
- Survey employees using specific "yes or no" questions about specific and common areas of risk/vulnerability

Additional Program Guidelines

- Establish a 24/7 hotline, assuring ability to anonymously report wrongdoing or to raise questions about ethics and/or compliance, with mechanism for feedback
- Identify specific person(s) with responsibility for and authority to initiate, plan, conduct and appropriately document internal investigations to follow-up on credible reports of wrongdoing
- Implement a mechanism for routine, periodic reporting on compliance and ethics program activities to the Audit Committee of the Board of Directors or other committee of independent directors
- Make open and direct communications available, at the discretion of the person with overall responsibility for compliance and ethics program, with general counsel, CEO and chairman of Audit Committee for emergency/non-routine communications
- Implement a lessons learned mechanism for investigations that reveal wrongdoing
- Have a consistent and meaningful discipline program in place to address wrongdoing
- Include compliance/ethics goals and objectives in employee evaluations at all levels, including cooperation with audits/investigators, facilitating/ensuring participation by direct reports in communication/training programs and completing required training
- Have a procedure in place for incorporating lessons learned into compliance and ethics program or other specific policies as appropriate
- Include representatives of all functional areas in review and update of compliance and ethics program (auditing, human resources, legal, operations, financial, etc.)

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On July 30, 2002, the President signed into law the Sarbanes-Oxley Act - implementing sweeping legislative reforms to combat corporate and accounting fraud. The Act, among other things, establishes a new accounting oversight board and imposes new penalties and higher standards of corporate governance. This provides increased incentive to review and/or implement corporate compliance programs.

Prepared By:
Dwight Howes
Partner
McGuireWoods LLP
Dominion Tower
625 Liberty Avenue
Pittsburgh, Pennsylvania 15222
(417) 667-7902
dhowes@mcguirewoods.com

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"BEST PRACTICES" IN CRISIS RESPONSE

by Bart Schwartz

Understanding that even the best crisis management plan is a work-in-progress, regular review and adjustment is essential to reflect changes in personnel and circumstances.

Crisis Task List - Immediate Stage

- Notify emergency, government and regulatory authorities
- Activate the crisis management team
- Designate company spokesperson
- Organize emergency relief efforts
- Issue media statement
- Issue statement to employees
- Notify insurers and any other relevant constituencies
- Begin internal investigation
- Determine whether inside or outside counsel will lead the investigation

Crisis Task List - Intermediate Stage

- Assemble legal team
- Determine need for coordinating counsel and local counsel
- Preserve evidence
- Issue document hold orders to suspend routine records destruction
- Identify and interview witnesses
- Consider need for outside experts and independent testing of evidence
- Instruct employee witnesses on privileges, creation of new documents and email
- Determine use of internal investigation
- Respond to investigative agency requests or subpoenas
- Collect and manage relevant company documents including electronic records
- Formulate legal strategies for defending or settling lawsuits

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Crisis Task List - Final Stage

- Revise existing crisis response plan as needed
- Conduct crisis post mortem and make needed changes to company procedures
- Prepare "lessons learned" evaluation of the crisis
- Evaluate insurance needs
- Consider need for public relations consultant
- Consider additional employee training
- Consider additional preventative legal counselling

Crisis Prevention

- Hold workshops on crisis prevention
- Implement crisis response plan
- Conduct crisis response drills
- Review and update corporate compliance programs
- Prepare for product recalls
- Conduct audit of company's "high risk" products or businesses
- Review procedures for document retention

* Reference List of Known Terrorist Organizations

Prepared By:
Bart Schwartz
President and Chief Executive Officer
Decision Strategies, LLC
505 Park Avenue, 7th Floor
New York, NY 10022
(212) 935-4040
bschwartz@dsfx.com

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CRISIS COMMUNICATION PLANNING AND TACTICS

by William Allcott and Donald Anderson

Primary Goal

- Minimize damage to the organization's reputation

Other Goals

- Minimize compensatory damages
- Avoid punitive damages
- Minimize civil enforcement
- Avoid criminal prosecution

Before the Crisis

- Identify audiences that need to be informed in case of a crisis. Determine the mode of communication that is most accessible to each audience.
- Develop written materials that can be predetermined, (i.e. company facts, key phone numbers of government agencies and internal team members), and keep filed both on-site and off-site. Also have safety, labor and employment records readily available.
- Media training for team leaders, appointed spokespeople, and back-ups at each location

When the Crisis Occurs

- The first priority is to deal with the crisis itself. If forced with a choice between acting to diffuse the crisis and talking to the media, the media can wait. The only exception is when there is a danger to the public at large.
- Communicate directly and immediately to internal audiences such as directors and employees and crucial external audiences such as customers, so that they do not hear of the news through the media.
- Always remember the public is looking for two things: reassurance and responsibility. As soon as the danger has passed, let them know. Likewise, whenever possible, assume responsibility. Don't pass the buck!
- Provide timely, honest information, but use prepared talking points and media statements dispersed by the appointed spokesperson. Never lie!
- Be especially alert about photographers. You have no control of photos or video taken off company property, but every right to control photos or video taken within the facility.

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- Monitor news, evaluate coverage and adjust public relations tactics if reporters are not covering the positive actions the organization is taking to minimize the damage, help the victims, etc.
- Consider the value of building "goodwill equity," such as positive actions that can be taken after the crisis to rebuild community relations

Key Communication Tips During the Crisis

- Demonstrate you are acting on the identified problem.
- Accentuate the positive steps being taken
- Never lie
- Never comment on hypotheticals
- Have spokesperson be accessible to the media and communicate on a regular basis
- Get the name and phone numbers of all reporters in case the spokesperson has to call them back later
- Give brief, direct, factual answers that do not include your personal opinion
- Never say "no comment"
- Never get angry
- Do not act defensively or be confrontational
- Do not be evasive
- Do not bury facts
- Do NOT go off record
- Do not use colorful language
- Do not say anything you would not want to use in a headline
- Do not use technical jargon that people outside your industry/field would not understand
- Do not repeat questions or mistatements that a reporter says
- Be in control of where media interviews take place, keep media in designated areas, which should be close to phones
- Don't avoid talking to reporters
- Do respect deadlines
- Do not ask to see the reporter's story before it is published
- Obtain feedback from publics
- Document actions

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Common Mistakes in Crisis Communications

- Failure to prepare materials in advance
- Failure to communicate with all publics
- Failure to communicate directly with internal audiences, such as employees
- Failure to return phone calls from the media
- Saying "no comment"
- Speculating, going off record, burying facts, being evasive
- Making misleading or false statements
- Playing favorites by giving more information to one reporter than another

Prepared By:
William Allcott
Senior V.P. and Director, Public Relations
McGuireWoods Consulting, LLC
One James Center
901 East Cary Street
Richmond, VA 23219
804-775-1906
wallcott@mwcllc.com

Donald D. Anderson
Partner
McGuireWoods LLP
Bank of America Tower
50 North Laura Street
Jacksonville, FL 32202
(904) 798-3230
ddanderson@mcguirewoods.com

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FINANCIAL/BUSINESS TRANSACTIONS IN THE WAKE OF 9/11

by Mark Brzezinski

Increased Risk of Legal Liability Associated with Physical Security Threats

Courts and juries are likely to hold corporations to higher standards of care in terms of planning and preparedness for a potential terrorist attack on their facilities and/or personnel.

Corporations that are at highest risk of being subjected to these increased standards of care include the following:

- High-profile corporations
- Corporations located or with a presence in certain high risk areas, including New York and Washington, D.C.
- Corporations in the travel industry, particularly in air travel
- Corporations that produce, handle or work with high risk materials, such as nuclear waste, biologic/germ agents, or volatile chemicals
- Corporations that employ a large number of personnel and/or corporations with personnel concentrated in certain specific locations
- Corporations with significant high-level government ties
- Corporations that provide products or services which are vital to a local or the national government or to a given community or industry, particularly the defense and intelligence industries

Increased Risk of Legal Liability Associated with Financial/Business Transactions

In the wake of the recent passage of stricter federal anti-money laundering laws, banks, broker-dealers, and many other corporate entities will face an increased risk of legal liability with respect to certain types of financial or business-related transactions.

These new laws and regulations, promulgated under Title III of the U.S. PATRIOT Act (2001), will apply for the most part to "financial institutions" operating in the U.S., a term which is broadly defined under the Act to include:

- Banks and broker-dealers
- Insurance and investment companies
- Travel agencies, real estate brokers and attorneys, auto dealers, pawnbrokers, jewelers, and many other non-traditional "financial institution" entities

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Some of the proposed and final regulations that the Treasury Department has already issued under the Act mandate that financial institutions operating in the U.S.:

- Sever all correspondent banking relationships with foreign "shell banks"—foreign banks with no physical presence anywhere (effective December 25, 2001)
- For broker-dealers, report suspicious securities transactions involving at least $5000 (effective July 1, 2002), and for persons who conduct a non-financial trade or business, report currency transactions in excess of $10,000 to the Treasury Department (effective January 1, 2002)
- Be prepared to respond within 120 hours to a request from a regulatory agency for any and all records relating to anti-money laundering transactions or compliance and to pay substantial fines for failing to do so (effective December 25, 2001)
- Adopt specific anti-money laundering policies and procedures for internal use, including the designation of a compliance officer, the development of an employee-training program, and the performance of an internal audit to test the soundness of these procedures (effective April 24, 2002)
- Apply "appropriate, specific, and enhanced" due diligence for banking relationships with non-U.S. persons, particularly with foreign political leaders and with banks operating in jurisdictions considered to have insufficient anti-money laundering standards (effective July 23, 2002)
- Comply with final regulations to be issued before October 26, 2002, that set out "reasonable procedures" for verifying the identity of customers at the time they open an account and for re-identifying them periodically

In addition, at any time, the Secretary of the Treasury could issue regulations under the Act that would require a domestic financial institution to:

- Maintain records and/or file reports with respect to any banking transaction and/or transactions with any foreign financial institution and/or transactions in any jurisdiction considered to be of "primary money laundering concern"
- Take "reasonable and practicable" steps to identify the beneficial owners of certain accounts
- Identify any customers whose funds move through payable-through or correspondent accounts, and sever such accounts if required

Other regulations now in the works that may increase the exposure of certain corporations to new legal liabilities related to business/financial activities include:

- New import/export regulations likely this fall that may require carriers that ship to and from the U.S. to vouch for the security of their shipments at all times, to send ahead accurate crew and cargo manifests prior to entering U.S. ports, and to comply with increased security procedures upon arrival

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- New food safety regulations that may mandate enhanced security and testing at food production centers and to increase the number of USDA import inspectors
- New immigration regulations that may increase the penalties for transporting or employing, wittingly or no, illegal immigrants

Reputational Costs Associated with Transactions with Foreign Financial Institutions

In addition to an increased risk of legal liability associated with physical and financial security threats in the aftermath of September 11th, U.S. corporations now face a heightened risk of reputational costs as well for engaging in transactions with suspect foreign banking entities or other financial institutions.

Accidentally doing business with a financial institution controlled by terrorists or tainted by ties to terrorism or organized crime would be disastrous for any corporation's public image, regardless of whether any potential legal liabilities would be involved.

Corporations can seek to avoid the increased risk of reputational costs not only by adhering to the various anti-money laundering regulations mentioned above, but also by:

- Voluntarily enhancing due diligence procedures with respect to transactions with foreign financial institutions
- Keeping abreast of the list of terrorism-affiliated businesses identified by the U.S. government and declining to transact business, directly or indirectly, with any such entities

SOURCES:

1. Bart Schwartz, Outline of Presentation, Keeping Up Corporate Defenses After 9/11
2. Mark Brzezinski and Lee Wolosky, Keeping Your Business Safe, The Wall Street Journal Europe, December 19, 2001.
3. The Kiplinger Letter, Vol. 79, No. 27, July 3, 2002.

Prepared By:

Mark Brzezinski
Partner
McGuireWoods LLP
Washington Square
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 857-1717
mbrzezinski@mcguirewoods.com

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EMPLOYMENT LAW IN THE AFTERMATH OF 9/11

by John Michels

Heightened Awareness – Recognizing Discrimination

Since the September 11th terrorist attacks, incidents of bias against Arabs, Arab-Americans, South Asian-Americans, Muslims, Sikhs, Muslim-Americans and Sikh-Americans and others perceived to be of Middle Eastern origin, have been reported to the Civil Rights Division of the Department of Justice, the FBI, the U.S. Attorney and the EEOC at an alarming rate.

Unfortunately, these backlash incidents have invaded the workplace. During the two-month period after the attacks, 166 formal complaints of workplace discrimination specifically relating to the September 11 attacks were received by the EEOC. These complaints present claims of harassment, ethnic slurs, hostile work environment and discriminatory refusals to hire, demotions, re-assignments and terminations. Complaining parties also reported discrimination base on the way they look, dress and speak, as well as their presumed places of worship.

The obligation of maintaining a workplace free of illegal discrimination is required of all employers. In relevant part, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) et seq. ("Title VII") prohibits discrimination against employees "because of their race, color, religion, sex or national origin." 42 U.S.C. § 2000e-2(a)(1) (emphasis added). Furthermore the Immigration Reform and Control Act, ("IRCA") 8 U.S.C. § 1324a et seq. prohibits discrimination based upon citizenship or immigration statues and national origin. The following discussion addresses several issues whose saliency has increased since September 11th.

National Origin Discrimination

What Constitutes National Origin Discrimination?

Title VII does not define the term "national origin." However, this term generally is given a broad interpretation to mean the country of one's ancestry, or the country from which an employee or his/her forebears came. Place of origin need not be a sovereign nation in order to qualify as a "national origin." For example, an individual of Cajun ancestry could sue for national origin discrimination under Title VII. Thus, an employer may not deny an employee equal opportunity in the workplace because of her birthplace, ancestry, culture, language or accent. Furthermore, equal opportunity may not be denied to an employee because the employee has a name or accent associated with a particular nation or ethnic group, because an employee is married to or associates with people from a certain nation or ethnic group, or because an employee participates in certain customs associated with a particular nation or ethnic group.

Specific Examples of National Origin Discrimination

An employer may not discipline, refuse to hire, deny promotions or otherwise engage in any adverse employment conduct because of an employee's national origin. The following are specific examples of the bases for national original discrimination:

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- Marriage to, or association with, a member of a particular national origin group - It is unlawful to treat an employee differently because she attends a mosque or temple generally associated with particular national origin groups, she is married to a member of a protected class, she belongs to an organization designed to protect or promote the interest of a particular national origin group, or because she attends or attended a school normally associated with a particular national origin group.

- Association of name or spouse's last name with a particular national origin group - It is unlawful to discriminate against an employee because he or his spouse has a name commonly associated with a particular national origin group. Consequently, it is unwise to ask an employee about his or her spouse's name or pre-marriage name.

- Physical Characteristics - It is unlawful for an employer to impose unnecessary height or weight requirements that might discriminate against members of certain nationalities. A height or weight requirement must be a business necessity in order for it to pass statutory muster. Likewise, it is unlawful to treat an employee differently or deny her a desired assignment because her skin color gives her a Middle Eastern appearance, even if such a decision is based on customer or client preferences, personal preferences of the employee or supervisor, or past experience or problems in dealing with others of certain national origin.

- Dress Codes - While an employer may set standards of dress or appearance, such dress codes must take into account different cultural characteristics and may not set standards that deny an employment opportunity to members of a particular national origin. For example, it would violate Title VII to refuse to assign an employee to a requested position because she/he wears a hijab or a turban, both of which are traditional head coverings of certain cultures. This prohibition applies even where such a decision is based on client or customer preference.

- Accent or Manner of Speaking - It is illegal to discriminate against an employee based on the fact that the employee speaks with an accent. The only issues which may be considered are: (a) the qualification of the person; and (b) whether the individual's accent or manner of speaking has a detrimental effect on job performance. Customer preference is not a legitimate basis to prohibit an employee with an accent from performing a particular job.

- English-Only Rules - It is generally unlawful for an employer to establish a requirement that all employees be fluent in English. English-only rules violate Title VII unless the employer shows that the rule is necessary for legitimate business or safety reasons. Even where an employee institutes an English-only rule for proper business or safety reasons and provides proper notice to employees of the rule, the employer may not prohibit employees from speaking another language during break time or during work time when safety and efficiency will not be affected by the use of another language.

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- Citizenship/Work Status - The Immigration Reform and Control Act of 1986 8 U.S.C. § 1324a et seq. ("IRCA") prohibits employers, even those with fewer than 15 employees, from discriminating against employees on the basis of national origin or citizenship status. See discussion, infra, at, Section II, D.

- Harassment - Title VII prohibits harassment based upon an employee's national origin. Therefore, harassment based upon an employee's national origin that is "so severe or pervasive as to alter the conditions [of the employee's] employment" may create an abusive working environment and constitute a violation of Title VII. Conversely, when no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence. The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Religious Discrimination

Title VII prohibits discrimination in the workplace "because of race, color, religion, sex or national origin." 42 U.S.C. § 2000e et seq. (emphasis added). The religious discrimination provisions of Title VII prohibit discrimination and require employers to reasonably accommodate the religious practices of employees who notify their employer about a need for an accommodation.

Defining Religion under Title VII

The Equal Employment Opportunity Commission ("EEOC") has promulgated an extremely broad definition of religion. A "religious practice" is defined to include "moral or ethical beliefs as to what is right and wrong which is sincerely held regardless that no other religious group, or no other individual espouses such beliefs." 29 C.F.R. § 1605.1; Welsh v. United States, 398 U.S. 333 (1970). The courts have been hesitant to challenge the EEOC's religious discrimination guidelines and its definition of religion. Furthermore, the courts have been hesitant to attack the issue of whether a particular practice is mandated by a religious doctrine. The EEOC generally concluded that as long as the individual personally believes that they should engage in a practice for religious reasons, even though not mandated by the religion, the practice rises to the level of a protected activity.

Employer Obligations Under Title VII

Title VII prohibits discrimination by an employer against an employee because of the employee's religion. Unlike other protected classes, Title VII requires an employer to accommodate, if possible, without undue hardship, bona fide religious practices once the employee informs the employer of the conflict. In order to establish a prima facie case of religious discrimination based upon a failure to accommodate, the plaintiff bears the burden of demonstrating that: (1) he has a bona fide religious belief or practice that conflicts with an

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employment requirement; (2) he informed the employer of the belief or practice; and he received adverse employment treatment for failing to comply with the conflicting employment requirement.

Discrimination on the Basis of Citizenship Status and National Origin Under IRCA

The Immigration Reform and Control Act ("IRCA") prohibits discrimination on the basis of citizenship status and national origin. Under IRCA employers can be sanctioned for knowingly employing individuals who are not authorized to work in the United States. Fearing that the threat of sanctions could cause employers to discriminate against those who look or sound foreign, Congress included a provision in IRCA that prohibits discrimination on the basis of citizenship status and national origin.

- "Protected Individuals" - IRCA's anti-discrimination provision prohibits discrimination against "protected individuals." For the purpose of IRCA, "protected individuals" include: citizens or nationals of the United States, aliens who are lawfully admitted for permanent residence, aliens admitted for temporary residence, and refugees and aliens who have been granted asylum.

- Prohibited Conduct - IRCA's antidiscrimination provision prohibits employment discrimination on the basis of national origin or citizenship status in hiring, firing (including layoffs), recruitment or referral for a fee. It also prohibits requiring more or different documents than are legally acceptable for employment verification purposes or to refusing to honor tendered documents if they are legally acceptable and appear to be genuine. Finally, it prohibits intimidation, coercion, threats, or retaliation against individuals who file charges or otherwise cooperate with an investigation, proceeding, or IRCA hearing.

Immigration Status Discrimination

Discrimination because of one's citizenship or immigration status is different from national origin discrimination because the characteristic upon which the employer discriminates has to do with the individual's immigration status, rather than whether an individual or his/her ancestors came from another country. The following are examples of citizenship or immigration status discrimination:

- An employer with a citizens-only hiring policy
- An employer who denies a non-citizen employment because of his/her citizenship
- An employer who hires a citizen of foreign ancestry, but refuses to hire a permanent resident of the United States from another country
- An employer who refuses to hire a temporary resident with work authorization because he/she is not a permanent resident

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- An employer who refuses to consider hiring non-citizens until the pool of citizen applicants is exhausted
- An employer who singles out the documents presented by a particular nationality or ethnic group for a higher level of scrutiny

What Employers Can Do

Employers should make it clear to managers that they must caution employees against making stereotypic assumptions, disparaging comments, offensive jokes or other harassing statements. Employers should remind employees the company will stand by its anti-harassment policies and will not tolerate violations. Employers should also instruct workers to report violations promptly. Furthermore, it is important to examine and revise all anti-discrimination and EEO policies.

The Equal Employment Advisory Counsel (EEAC), an association of 350 of the nation's largest private-sector employers, has advised its members about ways to combat discriminatory backlash. The EEAC recommends that employers reiterate their policies against discrimination, harassment, and inappropriate workplace behavior, including inappropriate e-mail communications. Such reminders should include reminders not to harass, intimate, threaten or insult persons of Middle Eastern or any other national origin. Employers should provide targeted training to all employees regarding what it means to be Arab-American in today's environment. Employers should also conduct surveys of employees and issues they are facing. Pro-active initiative may prevent illegal discrimination in the workplace. Now, more than ever, it is important to educate and protect your workforce.

Prepared By:
John J. Michels, Jr.
Partner
McGuireWoods LLP
77 West Wacker Drive, Suite 4400
Chicago, IL 60601
(312) 849-5350
jmichels@mcguirewoods.com

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FEDERAL REGULATIONS – A GUIDE TO DISASTER PLANNING

by Donald Anderson

Workplace Safety and Environmental Requirements Related to Disaster Planning

Workplaces are likely to be covered by at least two general Occupational Safety and Health Administration standards, those relating to Means of Egress, 28 CFR § 1910.35 through 1910.40, and Fire Protection, 29 CFR § 1910.155 through 1910.165.

These regulations impose specific requirements for building systems including, for example, fire suppressive equipment, alarm systems, and fire exits.

Environmental, Safety and Health Regulations Triggered by Fire, Explosion or Other Disasters

The Clean Water Act

- Prohibits "discharges" of pollutants except in compliance with NPDES permits, as well as discharge of oil or hazardous substances "in such quantities as may be harmful" into navigable waters. The latter section was substantially revised in the wake of the Exxon Valdez disaster. Whether a substance is hazardous and has been discharged in harmful quantities is determined by reference to U.S. Environmental Protection Agency ("EPA") regulations. Indirect discharges to publicly owned treatment works ("POTW") must comply with pretreatment standards issued by EPA. Potential Liability may involve Civil and Administrative Penalties; Criminal Penalties and Cleanup costs and may be enforceable in a citizen suit.

The Clean Air Act Amendments of 1990

- Added provisions that must be considered when assessing statutory liability arising from an explosion and fire.

The Section 112(r)(1) General Duty Clause.

- The government must show that: the owner or operator of a stationary source producing, processing, handling, or storing any substance listed pursuant to § 112(4)(3), or any other "extremely hazardous substance," has a general duty akin to the general duty under the Occupational Safety and Health Act to identify hazards that may result from an accidental release of any such substances by using appropriate hazard assessment techniques, to design and maintain a safe facility "taking such steps as are necessary to prevent release" and "to minimize the consequences of accidental releases which do occur."

- Defenses. A notable defense to a general duty clause violation is "unpreventable employee misconduct." The elements of this defense are: established work rules

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designed to prevent the hazard; adequate communication of the rules to employees; due diligence to detect rule violations; and effective enforcement of the rule.

- Criminally Negligent Release of Hazardous Air Pollutants. 42 U.S.C. § 7413(c)(4) imposes criminal penalties for certain negligent releases of hazardous air pollutants. The statute does not define negligence. A simple negligence standard is the probable and most rational reading of the statute, since Congress chose not to use the phrase "gross negligence, but requires that the negligent actions have placed another person in "imminent danger of death or serious bodily injury."

The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) imposes liability for cleanup costs on an owner or operator of a facility at which there has been a release or threatened release of a hazardous substance.

Potential Liability Under the *Resource Conservation and Recovery Act (RCRA):* EPA has taken the position that the ash left after a fire in a warehouse storing acrylonitrile is a listed hazardous waste, subject to RCRA Subtitle C management requirements.

Primary Reporting Requirements

Before looking at statutes, always first check all permits, which may also contain enforceable reporting requirements, as requirements are not uniform. One must evaluate duty to report, determine who to contact, and what to say under each relevant statute.

Clean Water Act reporting requirements

- "Person in charge of" on-shore facility or vessel must notify National Response Center (NRC) "Immediately" of any discharge to certain listed waters of Oil or Hazardous Substances "in such quantities as may be harmful as determined" by EPA. Penalty for failure to provide notice B up to 5 years in prison.

- NPDES permits must report within 24 hours of learning of any non-compliance with the permit that may endanger health or the environment. All NPDES permits require reports on certain events.

- Must notify POTW of any substantial change in amount/character of pollutants in their discharge.

Release Reporting Under CERCLA

- A "person in charge" of a facility or vessel must report to the National Response Center (NRC) a "release" of a "hazardous substance" from a facility "into the environment" in an amount equal to or greater than a specified "Reportable Quantity" (RQ).

- As soon as the person in charge has knowledge (constructive or actual) of a CERCLA reportable release, he or she must immediately report the release to the National Response Center (800-424-8802).

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The Emergency Planning and Community Right-to-Know Act (EPCRA)

- Requires notification of releases of Reportable Quantities (RQ) of "Hazardous Chemicals," "Extremely Hazardous Substances," & "Toxic Chemicals" to Local Emergency Planning Committees & State Equivalent. Intended to enhance public protection by providing authorities with information needed to implement emergency response plans. Many EPCRA requirements mirror CERCLA reporting B but some substantive differences exist.

Occupational Safety and Health Act

- An employer must report a work-related incident causing the death of any employee or the hospitalization of three or more employees to OSHA within 8 hours. The OSHA regulations also require certain reports of chemical incidents.

OSHA Process Safety Management Standard (PSM),

- Applies to employers using a "process" involving "highly hazardous chemicals," flammable liquids or gases. The standard would not apply to a warehouse storing chlorpyrifos. An incident investigation is required after each incident that resulted in, or could reasonably have resulted in a catastrophic release of highly hazardous chemical in the workplace and should be initiated as promptly as possible, not later than 48 hours following the incident. A report must be prepared at conclusion of investigation, and it must be maintained for 5 years and made available to OSHA, but does not have to be sent to OSHA.

Summary: Thus, an industrial accident or spill may result in chemical releases. The releases may violate environmental law. The statutes and regulations generally require those responsible to report the spill to government officials. Oral and written reports are required, which may become plaintiff exhibits. The reports must include scientific information and health advisories. The government may investigate the accident and interview company personnel. All this creates fertile ground for damaging admissions.

Prepared By:
Donald D. Anderson
Partner
McGuireWoods LLP
Bank of America Tower
50 North Laura Street
Jacksonville, FL 32202
(904) 798-3230
ddanderson@mcguirewoods.com

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List of Known Terrorist Organizations

***Compiled from public U.S. State Department materials as of July 2002.**

COUNTRY	TERRORIST GROUP
AFGHANISTAN	al Qaeda
ALGERIA	Armed Islamic Group (GIA) The Salafist Group for Call and Combat (GSPC)
CAMBODIA	Khmer Rouge/The Party of Democratic Kampuchea
CHILE	Manuel Rodriguez Patriotic Front (FPMR)
COLOMBIA	National Liberation Army (ELN) United Self-Defense Forces/Group of Colombia (AUC-Autodefensas Unidas de Colombia) Revolutionary Armed Forces of Colombia (FARC)
EGYPT	Al-Jihad a.k.a. Egyptian Islamic Jihad, Jihad Group, Islamic Jihad Al-Gama'a al-Islamiyya (Islamic Group, IG)
GEORGIA	Zviadists
GREECE	Revolutionary Nuclei (RN) a.k.a. Revolutionary Cells Revolutionary Organization 17 November Revolutionary People's Struggle (ELA)
HONDURAS	Morzanist Patriotic Front (FPM)
INDIA	Al-Ummah
IRAQ	Abu Nidal organization (ANO) a.k.a. Fatah Revolutionary Council, Arab Revolutionary Brigades, Black September, and Revolutionary Organization of Socialist Muslims.
IRAQ	Mujahedin-e Khalq Organization (MEK or MKO) a.k.a. The National Liberation Army of Iran (NLA, the militant wing of the MEK), the People's Mujahidin of Iran (PMOI), National Council of Resistance (NCR), Muslim Iranian Student's Society Palestine Liberation Front (PLF)

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ISRAEL	Kach and Kahane Chai
JAPAN	Aum Supreme Truth (Aum) a.k.a. Aum Shinrikyo, Aleph Chukaku-Ha (Nucleus or Middle Core Faction) Japanese Red Army (JRA) a.k.a. Anti-Imperialist International Brigade
LEBANON	Asbat al-Ansar (The Partisans' League) Hezbollah (Party of God) a.k.a. Islamic Jihad, Revolutionary Justice Organization, Organization of the Oppressed on Earth, and Islamic Jihad for the Liberation of Palestine
NORTHERN IRELAND	Continuity Irish Republican Army (CIRA) a.k.a. Continuity Army Council Irish Republican Army (IRA) a.k.a. Provisional Irish Republican Army Loyalist Volunteer Force (LVF) Orange Volunteers (OV) Real IRA (RIRA) a.k.a. True IRA Red Hand Defenders (RHD)
OCCUPIED TERRITORIES	Al-Aqsa Martyrs Brigade Democratic Front for the Liberation of Palestine (DFLP) HAMAS (Islamic Resistance Movement) The Palestine Islamic Jihad (PIJ)
PAKISTAN	Harakat ul-Ansar (HUA Harakat ul-Mujahidin (HUM) Jaish-e-Mohammed (JEM) (Army of Mohammed) Lashkar-e-Tayyiba (LT) (Army of the Righteous)
PERU	Sendero Luminoso (Shining Path) Tupac Amaru Revolutionary Movement (MRTA)
PHILLIPPINES	Abu Sayyaf Group (ASG) Alex Boncayao Brigade (ABB) New People's Army (NPA)
RWANDA	Army for the Liberation of Rwanda (ALIR), a.k.a. Interahamwe,
SIERRA LEONE	Revolutionary United Front (RUF)
SOUTH AFRICA	Qibla and People Against Gangsterism and Drugs (PAGAD)
SPAIN	Basque Fatherland and Liberty (ETA), a.k.a. Euzkadi Ta Askatasuna

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SRI LANKA	Liberation Tigers of Tamil Eelam (LTTE) Other known front organizations: World Tamil Association (WTA), World Tamil Movement (WTM), the Federation of Associations of Canadian Tamils (FACT), the Ellalan Force, the Sangilian Force.
SYRIA	Popular Front for the Liberation of Palestine (PFLP) Popular Front for the Liberation of Palestine-General Command (PFLP-GC)
TURKEY	Kurdistan Workers' Party (PKK) Revolutionary People's Liberation Party/Front (DHKP/C) a.k.a. Devrimci Sol (Revolutionary Left), Dev Sol.
UNITED STATES	Jamaat ul-Fuqra
UZBEKISTAN	Islamic Movement of Uzbekistan (IMU)

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AMERICAN CORPORATE COUNSEL ASSOCIATION
IMPACT OF SEPTEMBER 11TH TERRORISM ON DIRECTORS' DUTIES OF DUE CARE
OCTOBER 21, 2002
CRAIG R. CULBERTSON, MCGUIREWOODS (CHICAGO)

1. Directors Duties – General Rules and Trends

In Delaware and other states, the statutes governing corporations generally charge Boards of Directors with the "management" of their respective companies and subject directors to certain fiduciary duties. Those fiduciary duties generally include the duty of "due care" in that management role. To that end, directors must reasonably inform themselves and take advantage of material information reasonably available to them. Each director must act with requisite care in the discharge of his or her duties.

- Directors are generally protected by the "Business Judgment Rule." For example, in Delaware there is a presumption that directors have acted on an "informed basis," in "good faith" and in the "honest belief that the subject actions were in the best interests of the company." Directors are then not normally liable for the consequences of those acts. However, the benefit of the BJR falls away if it can be shown that one or more of those elements was lacking. Accordingly if a director is shown to have acted without an "informed basis," the BJR may not apply.

- Likewise, an attack on the BJR generally requires proof of "gross negligence." However, at least one commentator, Folk on the Delaware General Corporation Law, has suggested that ***director inaction may not necessarily be protected by the "gross negligence" standard; that the standard for inaction may be only "mere negligence".*** Indeed, a director who is found to have "abdicated" his or her duties (for example, to management) of "supervision, direction and control" may not be entitled to a BJR defense at all. In such cases of "director neglect," the appropriate standard may be negligence.

- ALSO NOTE: In line with the prevailing public temperament following Enron and other recent corporate scandals, new case law suggests that we may see stricter accountability concerning the directors' duties to monitor corporate performance and compliance. In the Seventh Circuit case, In re Abbott Labs. Deriv. S'holders Litig., 2002 WL 1225183 (6/2/02), the court ruled, in the context of allegations that the Abbott Board had been culpable due to inaction, that plaintiffs who brought a derivative action on behalf of Abbott against its Board were excused from making pre-suit demand that the company bring the suit. The facts and background are as follows:

> During 1993-99, the FDA conducted numerous inspections of Abbott production facilities. During this period, the FDA sent warning letters to the company citing continued nonconformance with the Good Manufacturing Practice. Thereafter, and despite the initiation of a voluntary compliance program, the FDA filed a complaint for an injunction against continued

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production of certain products. Ultimately, Abbott was ordered to pay a $100 million fine.

The plaintiffs alleged that the company's directors knowingly, in an intentional breach and/or reckless disregard of their fiduciary duties, chose not to correct the FDA problems in a timely manner and to deny the existence of continued violations in public securities filings. The court determined that the facts, as alleged, were "sufficient to show that although corporate governance practices were in place, the directors were grossly negligent in failing to inform themselves of all reasonable available material information. (Emphasis added). (The case was decided solely on the basis of the plaintiffs' allegations.) The Court held that, assuming the truth of the plaintiff's allegations, Abbott's directors could be found to have failed over a multi-year period to take corrective action in the face of clear warnings, and that such inaction could amount to the type of "gross negligence" that falls outside the BJR.

Although the Abbott case obviously doesn't involve terrorism, it does exemplify that, in the post-9/11 world, a Board's inaction in the face of awareness of exposure and risk to the company may be grounds for liability to the individual directors, even where the corporation generally has acceptable governance practices.

2. Carrying Out Duties in the Post 9/11 World.

The high profile nature of terrorism in the wake of 9/11, and its widespread effects on American culture and society in general, have changed the way directors must think about many issues in discharging their duty of "due care" in the management of a company. "Negligence" is measured against the standard of the "reasonable man", and the now-omnipresent threat of terrorism requires a "reasonable" director to consider the potential impact of terrorist acts on his or her particular company. What is now reasonably "foreseeable" in the realm of terrorism or related acts is much, much broader than before. While the appropriate conduct, processes and decisions for a Board will depend on the particular facts and circumstances of a subject company, certain universal principles apply:

-- GET INFORMED AND STAY INFORMED

- A director cannot be an expert on all issues and areas relative to 9/11 types of exposure to his or her company – and such expertise is not required. But, on the other hand, directors should be reasonably informed and conversant as to the relevant issues, the potential courses of dealing with those issues and the solutions and actions decided upon. This requires

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continuous, periodic reports directly to the Board from management and outside experts.

-- BE PROACTIVE AND INVOLVED

- The Board is charged with the "managing" the company – so do it. Do not simply rely on management to assess 9/11 exposures and chart and implement appropriate responses. Management should investigate, report, recommend and execute. But the Board should proactively exercise "supervision, direction and control" respecting the policies and courses of action that the company will undertake, and then follow-up to make sure those policies and actions are implemented, maintained and, if appropriate, modified.

3. <u>Develop a Process</u>.

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The scope, breadth and complexity of the issues that need to be addressed in the 9/11 context, and which need to be monitored on a continuous basis, require that a company Board develop processes for its proactive involvement, including information gathering, risk assessment and decision making and implementing. The following are a few suggestions for developing those processes:

- Enlist, and review reports, analyses and recommendations from, outside experts, such as security and communications consultants.
- Mandate that one or more senior level executives be responsible to assert day-to-day supervision and control over the corporation's 9/11-related processes and responses, and have that executive(s) report regularly to the Board.
- Perhaps divide Board responsibilities for 9/11 issues by establishing committees. The committees should also engage outside expert advice and reports.
- Create and maintain ongoing detailed records which reflect the extensive Board "supervision, direction and control."

4. <u>Examples of Areas Which a Board Should Address</u>.

- *Emergency/Contingency Plans.*
  - Conduct threat assessment.
  - Develop communications processes, both internal and external.
    - Internal – how will communications be conducted within the company to facilitate crisis management?

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    - External – who will be tasked to communicate to the public, government agencies, insurance companies, etc. in order to present a unified response? Clearly identify methods and redundancies.
  - Develop processes for threat assessment.
  - Identify decision makers – no time for committee debate in a crisis. If a company has multiple locations, someone in each location should be tasked with handling crisis management and should know who to report to.
    - Possible response: More decentralized/flat management structure to foster effective decision making in crisis? Trade – off: need to present a unified response.

- *Insurance.* If not already done, revisit all insurance policies and communicate with contacts about new interpretations of clauses.
  - New all-risk property insurance policies now often exclude coverage for acts of terrorism, so coverage must be obtained with separate terrorism coverage
  - Lenders, under clauses requiring collateral property to be insured with coverage "reasonably acceptable to Lender", may require additional terrorism insurance, or may obtain coverage themselves and charge the company for the cost.
  - Although becoming more available, terrorism coverage is still very costly and typically limited in scope and amount.

- *Liquidity/Emergency Cash Reserves.* A Board should consider whether the subject company has liquidity (such as emergency cash reserves) sufficient to bridge the company through a crisis. For how long?

- *Asset management and identification.* Identify key assets and personnel, and their locations and security sensitivities. Develop an awareness and solutions for back-up and redundancy of key assets. Implement processes for asset identification and tracking. (Remember that a huge problem in post 9/11 New York was locating telephones and lap-tops.)

- *Investor relations and corporate giving.* Beware of charities with terrorist links. Make sure there is a process in place to evaluate requests for corporate giving from that perspective.

- *Cyber-terrorism.* Studies have shown a link between political conflicts and increased cyber-attack activity. Potential response: regressive technology. Return to faxes and paper memos in certain situations, abandoning potentially hackable electronic media in sensitive areas/tasks.

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5. Impact on Exculpation, Indemnification and D&O Coverage.

- The court in Abbott held that, if plaintiffs are able to sustain that the Board's inaction amounted to gross negligence, the company's exculpation and indemnity provisions, embedded in the Certificate of Incorporation, would not apply. This is the general rule in Delaware and other jurisdictions and it will certainly be applied to Boards facing exposure for inaction in the face of 9/11-type events.

- D&O Insurance must be evaluated in light of 9/11. Each director should know how subject D&O policies protect or do not protect them.

    - Is your carrier financially sound? 9/11 and other events have caused huge claims and adverse financial consequences.

    - What are the terms of your policy? Check deductibles, aggregate limits, exclusions (e.g., war and terrorism risk).

Directors should evaluate detailed reports from management and the carriers, and probably interview the carrier(s) directly.

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