

**RECOGNIZE AND AVOID PITFALLS IN HIRING AND FIRING – AN OVERVIEW OF
APPLICABLE LAWS AND ISSUES, WITH SUGGESTIONS AS TO 10 POLICIES
EMPLOYERS SHOULD HAVE IN WRITING**

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EMPLOYERS SHOULD HAVE IN WRITING**

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Increasingly, every step of the employment process contains potential pitfalls that, if not recognized and appropriately addressed, can result in significant employer liability. To effectively avoid these pitfalls, employers must have a basic awareness of the applicable laws, then organize and structure their operations in accordance with the requirements of these laws.

This paper will discuss methods for avoiding serious and costly mistakes in the employment relationship by reviewing applicable laws, discussing specific issues that should be anticipated by employers in the context of hiring and terminating of employees, as well as identifying policies that employers should have in writing.

I. OVERVIEW OF LAW AFFECTING NORTH CAROLINA EMPLOYERS

A. “Employment-At-Will” Doctrine

Historically, North Carolina has been an “employment-at-will” state, meaning that the general rule is that, absent a contract for a specific period, an employment relationship may be terminated by either the employer or the employee at any time, with or without prior notice, and for any reason whatsoever. However, various acts of legislation passed by the United States Congress and the North Carolina Legislature, as well as common law restrictions developed by North Carolina Appellate Courts, have now created substantial exceptions to the general “employment-at-will” doctrine.

As a result of such Congressional and judicial encroachment upon the employment-at-will

doctrine, a more modern enunciation of the rule has developed. Under current law, an employment relationship for an indefinite term may be terminated by either party for any reason, **but not** for a reason which contravenes state or federal law. Limitations have thus been placed upon the formerly all-encompassing doctrine. As the North Carolina Court of Appeals has stated:

An at-will prerogative without limits could be suffered only in an anarchy, and there not for long--it certainly cannot be suffered in a society such as ours without weakening the bond of counterbalancing rights and obligations that holds such societies together. Thus, while there may be a right to terminate a contract at will for no reason, or for an arbitrary or irrational reason, there can be no right to terminate such a contract for an unlawful reason or purpose that contravenes public policy.

Sides v. Duke Hospital, 328 S.E.2d 818, 826 (N.C.App. 1985). Thus, for today's employers, the question is not whether there are limitations upon the employment-at-will doctrine. Rather, the question is what are the parameters of those limitations.

B. Exceptions to "Employment-At-Will"

Under the modern employment-at-will doctrine, an employer's freedom to terminate an employee at will may be restrained when the circumstances surrounding the termination fall within an exception to the employment-at-will doctrine. Such exceptions may be broken down into three basic categories: (1) contract; (2) public policy; and (3) protected classifications.

1. Contract

In general, North Carolina courts apply a strict standard to the creation of employment contracts, and are reluctant to recognize an employee's claim for breach of employment contract in the absence of an express contract of employment for a definite term. Even if an employment contract makes specific reference to "a regular, permanent job," it is nevertheless terminable at the will of either party unless it contains a specific provision as to duration. See Still v. Lance, 279 N.C. 254, 182 S.E.2d 403, 406 (1971). Exceptions to this general rule do exist, however, and may create problems for the unwary employer. If an employer's representations concerning limitations upon discharge are specifically incorporated into the employment contract, such a situation may give rise to a contractual obligation on the part of the employer. Promises and procedures contained in an employee handbook may be enforceable if evidence exists that the employee handbook was made part of the employment contract. See, e.g., Harris v. Duke Power Company, 319 N.C. 627, 356 S.E.2d 357, 360-61 (1987). For example, an employee handbook that provides an employee may only be dismissed "for cause" may restrict the employer's power to discharge an employee if evidence exists that the handbook has been incorporated into the contract of employment.

The North Carolina Supreme Court has rejected an argument accepted earlier by the Court of

Appeals in Sides v. Duke Hospital, *supra*, that an employee, by moving his residence to North Carolina, can give “additional consideration” sufficient to create a contract under which the employee can be discharged only for cause. In Kurtzman v. Applied Analytical Industries, Inc., 347 N.C. 329, 493 S.E.2d 420 (1997), the employee was given several assurances of long-term employment, was told he would have a job as long as he did his job, and in reliance on these assurances, moved his residence from Massachusetts to North Carolina only to be terminated for what he alleged was no good reason. The North Carolina Supreme Court, in reversing the Court of Appeals, held that the employer’s assurances of continued employment and the employee’s relocation of his residence in reliance on these assurances did **not** remove the relationship from the “at-will presumption” such that the employee’s claim for wrongful discharge was dismissed.

2. Public Policy

Adopted in some form by a strong majority of the states, the public policy exception to the employment-at-will doctrine provides that an employer may not terminate an employee for a reason which is against public policy. Under North Carolina law, an employer who wrongfully discharges an employee in violation of public policy can be liable in tort for back wages, compensatory damages (additional financial loss, pain and suffering, mental distress), and possibly punitive damages as well. A claim with a tort remedy is especially attractive to claimants since, unlike certain statutory claims, wrongful discharge claims are not subject to “caps” (limits on the amount of a recovery set by statute).

The public policy exception to the employment-at-will doctrine was first accepted by a North Carolina court in Sides v. Duke Hospital, 74 N.C.App. 331, 328 S.E.2d 818 (1985). In Sides, a nurse alleged that she had been discharged as a result of her refusal to commit perjury in a medical malpractice lawsuit. The North Carolina Court of Appeals held that an employee’s discharge for refusing to commit perjury was contrary to State public policy, and thus wrongful.

Since the Sides decision, the Supreme Court of North Carolina has endorsed the public policy exception to the employment-at-will doctrine. In Coman v. Thomas Manufacturing Company, 325 N.C. 172, 381 S.E.2d 445 (1989), the Supreme Court held that the termination of an employee for refusal to violate Department of Transportation safety regulations governing maximum permissible driving time violated state public policy, and gave rise to a cause of action for wrongful discharge. Following the same analysis, the Supreme Court in Amos v. Oakdale Linen Company, 331 N.C. 348, 416 S.E.2d 166 (1992), held that terminating an employee for refusing to work for less than the statutory minimum wage violated public policy, and was therefore actionable.

In Garner v. Rentenbach Constructors, Inc., 515 S.E.2d 438 (N.C. 1999), the North Carolina Supreme Court provided some guidance on the parameters of the employment-at-will doctrine. Prior to Garner, the exception has been applied to situations where employees had been discharged for refusing to violate the law, or for exercising their legal rights or responsibilities. The North Carolina Supreme Court had stated that “at the very least, public policy is violated when an

employee is fired in contravention of express policy declarations contained in the North Carolina General Statutes." Amos, 416 S.E.2d at 169. As if this delineation of the public policy exception was not broad enough, however, the North Carolina Supreme Court had further defined public policy "as the principle of law which holds that no citizen can lawfully do that which has a tendency to be injurious to the public or against the public good." Id. at 168.

In Garner, the employer terminated an employee based on a report from an independent testing laboratory that the employee, a carpenter, had tested positive for use of marijuana in a drug screen. However, unknown to the employer at the time of termination, the laboratory which tested the urine sample was not properly accredited to perform forensic urine drug testing as required by North Carolina General Statute §95-230. This statute, the Controlled Substance Examination Regulation, was enacted by the legislature to protect individuals from unreliable and inadequate examinations and screening for controlled substances. After termination, the employee in Garner brought suit for wrongful discharge and offered evidence that the laboratory was not properly accredited and evidence which cast doubt on the reliability of the positive reading reported by the testing laboratory. At the trial level, the employer argued that more than a mere statutory violation is required to sustain a claim of wrongful discharge under the public policy exception, and that the employee would have to show termination for *an unlawful reason or purpose* that contravenes public policy. The trial court dismissed the claim and the employee appealed to the Court of Appeals. The Court of Appeals reversed the trial court, holding that even an unknowing or inadvertent violation of statute would give rise to a claim for wrongful discharge. However, the Supreme Court reversed the Court of Appeals, holding that the termination itself must be motivated by an unlawful reason or purpose that is against public policy.

At this point it appears that a claim for wrongful discharge arising out of the public policy exception to the employment-at-will doctrine must involve an element of employer retaliation against the employee for exercise of legally protected rights. For example, in Deerman v. Beverly California Corporation, 517 S.E.2d 686 (N.C. App. 1999), the North Carolina Court of Appeals recognized an exception to the employment-at-will doctrine where a nursing home nurse was fired by the nursing home for criticizing the patient's doctor to the patient's family and recommending that the family retain a new doctor. The court noted that the Nursing Practice Act provides that nurses have a responsibility to counsel and guide patients and their families.

3. Protected Classifications

In order to address historical discrimination against certain classes of persons based on their membership in such classes, federal and state lawmakers have enacted legislation to prohibit discrimination against such persons in all terms and conditions of employment, including termination. The following represents a nonexhaustive list of protected classifications.

a. Race

Racial discrimination in employment is prohibited by a number of federal and state laws. The most important of these laws is Title VII of the Civil Rights Act of 1964, which prohibits discrimination based on "race, color, religion, sex or national origin". Title VII makes it unlawful for an employer to discriminate against any applicant or employee as to hiring, firing, compensation, or any other terms, conditions or privileges of employment. Title VII applies to private employers with fifteen or more employees who are engaged in interstate commerce, or in a business which affects interstate commerce. Under Title VII, race or color may never constitute a bona fide qualification of employment.

In North Carolina, charges of discrimination under Title VII must initially be filed with the United States Equal Employment Opportunity Commission ("EEOC"), the federal agency charged with the responsibility for investigating and processing these charges of discrimination. These charges must be filed within 180 days of the alleged discriminatory conduct. Investigations can take anywhere from a month or so to several years and will either result in a finding of "cause" (i.e., a finding that there is reasonable cause to believe that a violation of the statute has occurred) or a "no cause" determination. In the event of a "cause" determination, the EEOC will attempt a conciliation (i.e., attempt to arrange a settlement). If conciliation fails, the EEOC will either pursue the claim in court if there appears to be sufficient policy implication or issue a "Right to Sue" letter allowing the individual to file suit within 90 days. If the EEOC issues a "no cause" determination, the claimant will still be given a right to sue letter and can file suit within 90 days. The Civil Rights Act of 1991 expanded remedies available under Title VII to include trial by jury and compensatory and punitive damages (subject to caps, based on the number of employees employed - \$50,000 for 15 to 100; \$100,000 for 101 to 200; \$200,000 for 210 to 500; and \$300,000 for more than 500), plus reinstatement, front pay, back pay, and attorney fees.

The Civil Rights Act of 1866, usually referred to as Section 1981, guarantees all individuals the same right to make and enforce contracts enjoyed by "white citizens." Courts have construed Section 1981 to cover almost all private contractual arrangements, whether written or oral, including employment contracts and obligations. Under the provisions of the Civil Rights Act of 1991, Section 1981 is applicable to all terms and conditions of employment, including termination, and prohibits termination based upon racial discrimination. The Supreme Court has defined "race" under Section 1981 broadly to include members of any identifiable ethnic class, and Section 1981, unlike Title VII, is applicable to all employers regardless of size.

Employers who contract with the federal government are subject to the requirements of Executive Order 11246, which requires employers to provide provisions in their federal contracts prohibiting employment discrimination on the basis of race or color. Contracts and subcontracts that do not exceed \$10,000 are exempt from the Order, unless the aggregate value of an employer's government contracts exceeds \$10,000 for any one-year period. In addition, employers with fifty (50) or more employees and \$10,000 or more in contracts are also required to develop a written affirmative action program.

Finally, the North Carolina Equal Employment Practices Act provides that it is the public policy of the State of North Carolina "to protect and safeguard the right and opportunity of all persons to seek, obtain and hold employment without discrimination or abridgement on account of race . . . [or] color . . . by employers which regularly employ fifteen or more employees." N.C.G.S. § 143-422.2. Although the statute does not provide a private right of action to remedy such racial discrimination, this clear statement of state public policy may potentially be utilized by discharged employees to construct state law wrongful discharge actions alleging termination in violation of public policy.

b. National Origin

Title VII prohibits employment discrimination on the basis of national origin, including discrimination based upon an employee's place of origin, and his or her physical, cultural, or linguistic characteristics. In addition, Title VII also prohibits national origin harassment, including ethnic slurs or conduct denigrating an employee's ethnic origins or background that interferes with an employee's ability to perform his or her job, or creates a hostile working environment. Under Title VII, however, an employer may make an employment decision based upon an employee's national origin where such factor constitutes a bona fide occupational qualification reasonably necessary to the performance of a particular business. The classic example of such a bona fide occupational qualification for national origin involves a Chinese restaurant that prefers to hire Chinese wait staff.

A related law is the Immigration Reform and Control Act of 1986 (IRCA), which prohibits the knowing employment of aliens and immigrants not legally authorized to work in the United States. IRCA provides that an employer may not refuse to consider a person for employment because it suspects the applicant is an unauthorized alien, but requires an employer to verify an applicant's status after an offer of employment has been accepted. Such verification is accomplished by requiring every employee to complete the Immigration and Naturalization Service's form I-9, attesting to his or her legal status.

While the Department of Homeland Security (DHS) recently published a rule designed to finally provide employers guidance by clarifying precisely what steps to take upon receipt of a "no-match" letter from the Social Security Administration (a letter indicating that an employee's name and social security number as reported on his W-2 form does not match the SSA's records), so as to avoid potential liability for employing illegal aliens, that rule has, at least temporarily, been barred from being enforced.

In addition to the verification provisions, IRCA also prohibits discrimination against noncitizens authorized to work in this country. Such antidiscrimination provisions apply to all employers with four or more employees who are not covered by Title VII. Thus, IRCA is applicable to all employers with between four and fifteen employees.

In addition to Title VII and IRCA, Executive Order 11246 requires that employers who hold contracts with the federal government in excess of \$10,000 include provisions in such contracts prohibiting discrimination against employees on the basis of national origin. Finally, the North Carolina Equal Employment Practices Act provides that it is against the public policy of the state to allow national origin discrimination, and thus creates the potential for a state law wrongful discharge action based upon national origin discrimination.

c. Religion

Title VII prohibits employment discrimination on the basis of religion. In addition, Title VII also requires employers to reasonably accommodate the religious beliefs and practices of their employees. Such accommodation might include altering work schedules, relaxing dress codes, reassigning employees, and so on. If the accommodation creates an undue burden on the employer's business, however, then such accommodation is not reasonable, and therefore not required. The U.S. Supreme Court has held that, in accommodating religious practices, an employer is not required to incur more than minimal cost, and is not required to provide the accommodation of the employee's choosing if another accommodation would equally suffice. If an employee is terminated or constructively discharged because of an employer's refusal to provide reasonable religious accommodation, such discharge may constitute a violation of Title VII.

In addition to Title VII, Executive Order 11246 requires employers who hold contracts with the federal government in excess of \$10,000 to include provisions in such contracts prohibiting discrimination against employees on the basis of religion, and the North Carolina Equal Employment Practices Act provides that religious discrimination is against state public policy, thus providing employees discharged on the basis of religion with a potential basis for a wrongful discharge claim.

d. Disability

The Americans with Disabilities Act of 1990 (ADA) prohibits discrimination against qualified individuals with disabilities by employers employing 15 or more persons. A "qualified individual with a disability" is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." The ADA defines "disability" as

- (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
- (B) a record of such an impairment; or
- (C) being regarded as having such an impairment.

"Reasonable accommodation" does not require "undue hardship" of the employer or create a direct threat of health or safety concerns and is determined on a case by case basis. Such accommodation may include modification of the work environment, restructuring of the work schedule, and other similar

undertaking. The ADA is applicable to all private employers with fifteen or more employees.

The United States Supreme Court has held that the determination whether an employee or applicant is “disabled” within the protection of the ADA is to be made based on the employee’s present condition, taking into consideration any measures used by the employee or applicant to correct or mitigate the alleged disability. In Sutton v. United Airlines, Inc., 119 S.Ct. 2139 (1999), the plaintiffs, twin sisters, had applied for positions as global airline pilots. Although they did not satisfy United’s criteria that pilot’s *uncorrected* vision had to exceed 20/100, *through the use of eyeglasses*, their vision was corrected to 20/20.

Based on the plaintiffs’ inability to meet the *uncorrected* vision standard, however, the employer terminated their interview and refused to consider them for the pilot’s position. They then filed suit under the ADA claiming discrimination on the basis of their visual impairment as a “disability”. The Court concluded that the plaintiffs were not disabled because their visual acuity, in its corrected state, did not substantially limit their major life activity of working. The Court also concluded they were not “regarded as” disabled since they were able and qualified for many other pilot positions. Therefore, the plaintiffs did not qualify as “disabled” within the meaning of the ADA.

In Murphy v. United Parcel Service, Inc., 119 S.Ct. 2133 (1999), the plaintiff suffered from high blood pressure. To treat his underlying illness, Mr. Murphy took medication that controlled his blood pressure and allowed him to function normally. As a mechanic, Mr. Murphy’s job required him to drive commercial vehicles for which he needed a commercial driver’s license. To get that license, Mr. Murphy had to meet the health certification requirements of the Department of Transportation, requirements that disqualified persons diagnosed as suffering from high blood pressure.

After mistakenly hiring Mr. Murphy, UPS fired him on the belief that his hypertension exceeded the DOT’s requirements. Murphy sued UPS claiming that they had violated the ADA. In accordance with its opinion in Sutton, the Court concluded that Mr. Murphy’s condition must be viewed in its medicated state. Since Mr. Murphy, when medicated, could perform his job without substantial limitation, he was not “disabled” under the ADA and could not sustain his suit against UPS. The Court also concluded Mr. Murphy was not protected under the ADA as “regarded as” disabled, in that UPS’ decision to terminate him was based only on his ineligibility for a commercial driver’s license (an essential function of the job), rather than any fear that he would have a heart attack or medical claims. Both opinions, however, leave unanswered the question of whether an applicant or employee who suffers from a condition that is fully treatable could still be “disabled” under the ADA because of the side effects produced by the mitigating measures or by the nature of the mitigating measures themselves.

Charges of discrimination under the ADA, like charges of discrimination under Title VII, must be filed with the EEOC within 180 days of the alleged discriminatory act. The process for

investigating and handling the charge by the EEOC and the remedies available to claimants are much the same as for Title VII, discussed above in section I.B.3.a., except that employers have the defense of good faith efforts to a charge of alleged failure to reasonably accommodate, which can preclude awards of compensatory and punitive damages.

The Rehabilitation Act of 1973, the model for the ADA, prohibits discrimination against qualified handicapped employees by employers holding government contracts or receiving federal financial assistance. Similarly, the North Carolina Handicapped Persons Protection Act (NCHPPA) prohibits employment discrimination on the basis of a handicapping condition, and applies to all employers with fifteen or more full-time employees within North Carolina. Although the Rehabilitation Act and the NCHPPA provide for different coverage and remedies, the requirements of the acts are very similar to those under the ADA.

Finally, the North Carolina Communicable Disease Act prohibits employers from determining the suitability for continued employment of an employee on the basis of whether or not that employee is HIV positive or has AIDS. The Act, however, does not prohibit employers from taking appropriate action, including termination, against an employee who is HIV positive or who has AIDS when the employee is unable to perform his normally assigned job responsibilities, or when the employee poses a significant risk to the health of his co-workers or the public at large. However, in dealing with an employee who has AIDS, employers need to be aware that AIDS is considered to be a disability under the ADA.

e. Age

The Age Discrimination in Employment Act (ADEA) prohibits employment discrimination on the basis of age against all employees over age forty. The ADEA applies to all private employers with twenty or more full-time employees, and prohibits mandatory retirement. In certain cases, the ADEA recognizes defenses based on a bona fide occupational qualification (where an age limitation is reasonably necessary to the essential aspect of the business and a factual basis is shown for the presumption that all persons outside the age limitation cannot perform the job safely or efficiently or that it is not feasible for the employer to make a case-by-case determination of ability to perform - such a showing has been approved for airline pilots after 60). Another important exception to the general rule allows for the mandatory retirement of individuals who are bona fide executives or in high policy-making positions, are at least 65 years of age, have held their position for the two years immediately preceding retirement, and are entitled to retirement income of at least \$44,000.

Charges of discrimination under the ADEA must be filed with the EEOC within 180 days after the alleged unlawful practice occurred. Suit may not be brought until 60 days after a charge has been filed. However, there is authority that, as to ADEA claims, the foregoing requirements are not absolute and that suit may be brought within the two or three year (for willful violations) period that applies to claims under the Fair Labor Standards Act. The process for investigation of charges of age

discrimination by the EEOC is similar to the procedures followed by the EEOC in investigating other charges of discrimination.

f. Gender

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of gender. An employer may make an employment decision on the basis of gender, however, where such factor constitutes a bona fide occupational qualification reasonably necessary to the performance of the particular business. This is a narrow exception, not always uniformly recognized by the courts (examples which have been recognized include refusing to hire females as guards in an all male prison with a high percentage of sex offenders and refusal to allow janitors to clean wash rooms of opposite sex patrons during use).

In addition to prohibiting gender discrimination, Title VII also prohibits sexual harassment. Following the Supreme Court decision in Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986), federal courts recognized two distinct forms of sexual harassment: *quid pro quo* sexual harassment and *hostile work environment* sexual harassment. *Quid pro quo* sexual harassment, as the name implies, occurred when an employer or an employee with management authority demanded sexual favors from an employee in exchange for any employment-related benefit. Where an employee's refusal to accede to these demands caused damages to the employee, such as retaliation, the courts held employers strictly liable. In contrast, hostile work environment sexual harassment was based on the idea that an employee's work environment may be so infused with sexual comments or conduct that working in such an environment intrinsically involves harassment. To prevail under this theory, a plaintiff had to show that the harassment was sufficiently severe or pervasive to create an abusive work environment. To recover against the employer, the employee usually had to show that the employer either was aware, or should have been aware, of the conduct or had somehow ratified the harassing behavior.

In two cases decided in June of 1998, the Supreme Court addressed the issue of employer liability for supervisor misconduct where no adverse employment actions had been taken against the employees and the employees did not complain to higher management. In Burlington Industries, Inc. v. Ellerth, 118 S.Ct. 2257 (1998), Ms. Ellerth quit her job after 15 months as a sales-person for Burlington, allegedly because she had been subjected to constant sexual harassment by one of her supervisors, Ted Slowik (a mid level manager with authority to hire and promote others subject to higher approval but without policy making authority). Among other harassing conduct, Slowik invited Ms. Ellerth to a cocktail lounge during a business trip and made unwelcome comments concerning her appearance; he noted that he could make life at Burlington very easy or very hard for Ms. Ellerth; and he later made comments to the effect that her job would be easier if she wore shorter skirts.

Despite Ms. Ellerth's knowledge of Burlington's written policy against sexual harassment, and although Ms. Ellerth told Mr. Slowik that she considered his conduct inappropriate, Ms. Ellerth

did not complain about Slowik to her immediate supervisor or to any of Mr. Slowik's superiors. Ms. Ellerth eventually quit her employment, giving reasons unrelated to the alleged sexual harassment. Three weeks later, she sent a letter explaining she had quit because of Slowik's behavior.

In Faragher v. City of Boca Raton, 118 S.Ct. 2275 (1998), Ms. Faragher, while attending college, worked as a lifeguard for the City of Boca Raton during the six summers between 1985 and 1990. During her employment, her immediate lifeguard supervisors allegedly subjected her to uninvited and offensive touching, lewd comments, and offensive comments concerning women. Ms. Faragher resigned in 1990. Ms. Faragher did not complain to the City concerning the conduct of her supervisors prior to resigning. The City had adopted a sexual harassment policy in 1986 and revised the policy in 1990, but had not disseminated the policy to the lifeguards or their supervisors.

The Supreme Court in Ellerth rejected the former "quid pro quo/hostile environment" analysis and held in both Ellerth and Faragher that, under Title VII, an employer could be held liable for harassment of an employee even though no adverse personnel action was taken against the employee, the employer had no knowledge of the harassment, and the employer was not negligent or otherwise at fault for the supervisor's actions. However, the Court also held in both cases that employers have a defense to such claims if they can establish (a) that the employer exercised reasonable care to prevent and correct promptly any sexually 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. The Court noted:

While proof that an employer had promulgated an anti-harassment policy with a complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing any unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense.

The Court also noted that when the supervisor's harassment culminates in a tangible adverse employment consequence (such as discharge, demotion, or undesirable reassignment), **no** defense is available. Finding both (1) that the City of Boca Raton did not disseminate its policy to the lifeguards and their supervisors and (2) that the policy did not contain assurances that the harassing supervisors could be bypassed, the Court in Faragher held that the City was not entitled to further litigate the issue of its liability and could not employ the affirmative defense. In Ellerth, however, the Court remanded Ms. Ellerth's claim for a determination of the availability of the two part defense to Burlington.

In Burlington Northern and Santa Fe Railroad Co. v. White, 126 S.Ct. 2405 (2006), the United States Supreme Court held that Title VII of the Civil Rights Act of 1964 provides broader

protection for victims of retaliation than for victims of race, ethnic, religious, or gender based discrimination. The Court also held the anti-retaliation provisions of Title VII protect against employer actions that would have been materially adverse to a reasonable employee or applicant, i.e., employer actions that “might well have ‘dissuaded a reasonable worker from making or supporting a charge of discrimination.’”

In addition to Title VII, Executive Order 11246 requires that employers who hold federal contracts in excess of \$10,000 provide in such contracts that the employer will not discriminate against employees on the basis of gender. Also, the North Carolina Equal Employment Practices Act provides that it is against public policy to discriminate on the basis of gender, and may provide a discharged employee with a basis for a state law wrongful discharge action.

In discussing gender as a protected classification, a final federal statute deserves mention. The Equal Pay Act of 1963 (EPA) requires that men and women receive equal pay for equal work. The EPA makes it illegal for an employer to discriminate on the basis of gender by paying employees of one sex lower wages than wages paid to employees of the opposite sex for work requiring substantially equal skill, effort, and responsibility that is performed under similar working conditions. The Act provides exceptions for bona fide seniority or merit systems, and systems that measure earnings by quantity or quality of production. Although the EPA does not directly deal with issues of termination, claims under the Act are often combined with gender discrimination claims under Title VII, and an employer's history of providing unequal pay on the basis of gender may constitute some evidence of a pattern of gender discrimination.

The Equal Pay Act is part of the Fair Labor Standards Act, and does not require the filing of a charge or complaint with the EEOC. Remedies include attorneys' fees, back pay and liquidated damages for two years (three years in the event of willful violation), but not compensatory or punitive damages.

g. Pregnancy

The Pregnancy Discrimination Act (PDA) was adopted by Congress as an amendment to Title VII, and provides that the phrase "because of sex" in Title VII also means "because of or on the basis of pregnancy, childbirth or related medical conditions." The PDA thus prohibits employment discrimination on the basis of pregnancy. Women affected by pregnancy or related medical conditions must receive treatment equal to that afforded non-pregnant employees.

While an employer may not discriminate against pregnant workers, the PDA does not require that pregnant employees receive preferential or favorable treatment. For example, a pregnant employee terminated for chronic tardiness and early departures from work failed to establish that she had been subjected to unlawful pregnancy discrimination, even though her attendance problems were attributable to severe morning sickness. The discharged employee failed to prove that non-pregnant employees with similar attendance records were treated more favorably, and thus failed to prove that

her termination was the result of unequal treatment. See Troupe v. May Department Stores Company, 20 F.3d 734 (7th Cir. 1994).

h. Military Status

The Uniform Services Employment and Reemployment Rights Act of 1994 (USERA) prohibits employment discrimination on the basis of past, current or future military obligations. The Act applies to all employers, regardless of size, and protects all individuals who apply to be a member of any of the branches of the uniformed services. If an individual's connection with the service is a motivating factor in an employer's adverse employment action, then the USERA has been violated, unless the employer is able to prove that the same action would have been taken regardless of the individual's connection with the service. Upon return from more than 180 days service, employees are protected for a period of one year. Employees who are gone for 30 to 180 days are protected for six months.

The Family and Medical Leave Act of 1993, was amended effective January 28, 2008, to allow 12 work weeks leave for a "qualifying exigency" (to be defined by regulation) arising out of the fact that the spouse, son, daughter, or parent of the employee is on active duty (or has been notified of an impending call or order to active duty). Additionally, a provision was added allowing 26 work weeks leave for an eligible employee who is the spouse, son, daughter, parent, or next of kin to care for the servicemember.

i. Union Activities or Membership

For those employees who are union members and their employers, termination procedures and the employment relationship itself are governed by the collective bargaining agreement between the union and the employer. Issues surrounding such collective bargaining agreements are complex, and far beyond the scope of the present paper.

All employers need to recognize, however, that the National Labor Relations Act of 1935 (NLRA) and the Labor-Management Relations Act of 1947 (LMRA) provide certain protections to employees whether or not they are currently covered by a collective bargaining agreement. Specifically, these Acts protect an employee's right to organize and join labor unions, and to participate in concerted activities. Concerted activities include action taken by an employee concerning workplace issues on behalf of not only the employee, but also on behalf of other employees. Such action need not be related to any "union" issues.

Discrimination against or termination of an employee based upon the employee's exercise of his or her rights under the NLRA or the LMRA (including concerted action) may constitute an unfair labor practice by the employer. If a complaint is made to the National Labor Relations Board, and the Board determines that an unfair labor practice has occurred, the Board will issue a cease-and-desist order and most likely take affirmative action, which may include reinstatement of an

aggrieved employee, possibly with back pay. Thus, even if an employer's work force is not currently unionized, employers must nevertheless proceed with caution when terminating an employee engaged in concerted activities.

j. Anti-Retaliation

Most state and federal employment laws contain anti-retaliation provisions that prohibit employers from demoting, discharging, or otherwise retaliating against employees because of the employees' exercise of their legal rights. Of these many laws, however, two deserve particular attention: (1) the North Carolina Retaliatory Employment Discrimination Act; and (2) the Family and Medical Leave Act of 1993.

(1) North Carolina Retaliatory Employment Discrimination Act

In 1991 a fire at the Imperial Food Products Plant in Hamlet killed 25 workers and seriously injured over 75 others. The fire represented the worst industrial accident in North Carolina's history, and a committee was quickly appointed by the General Assembly to investigate. During the investigation, many of the Imperial Food employees testified about the unsafe working conditions at the plant, and their inability to complain about such conditions due to fear of retaliation. In reaction to such fear, the General Assembly quickly adopted the North Carolina Retaliatory Employment Discrimination Act, §§ 95-240 *et seq.* of the North Carolina General Statutes (REDA).

REDA protects employees who are discharged, demoted or otherwise discriminated against as a result of engaging in "protected activity" associated with their rights under any of the following statutes:

- a. The Workers Compensation Act of North Carolina
- b. The Wage and Hour Act of North Carolina
- c. The Occupational Safety and Health Act of North Carolina
- d. The Mine Safety and Health Act of North Carolina
- e. General Statutes section prohibiting discrimination against persons with sickle cell trait or hemoglobin C trait
- f. National Guard Reemployment Rights Act
- g. General Statutes section prohibiting discrimination against persons based on genetic testing or genetic information
- h. General Statutes article requiring compliance by parents with orders involving juveniles adjudicated delinquent or undisciplined

REDA repealed and replaced antidiscrimination and anti-retaliation laws scattered throughout these statutes with a single, uniform law, and specifically provides that employees have

the right to "file a claim or complaint, initiate any inquiry, investigation, inspection, proceeding or other action, or testify or provide information to any person" under any of the above-listed statutes. N.C.G.S. 95-241(a). REDA not only covers employees who actually exercise protected rights, but also individuals who merely complain to their supervisor about a safety or health hazard in the workplace. The protection provided by REDA is thus extremely broad.

REDA prohibits discrimination or retaliatory action against an employee because the employee in good faith does or threatens to file a claim or complaint, initiate any inquiry, investigation, inspection, proceeding or other action, or testify or provide information to any person with respect to, among other things, the North Carolina Workers' Compensation Act. REDA also provides protection for any employee who in good faith does or threatens to cause any of the above-mentioned conduct to be initiated on behalf of another employee. "Retaliatory action" is defined in REDA to include discharge, suspension, demotion, retaliatory relocation of an employee, or other adverse employment action taken against an employee in the terms, conditions, privileges and benefits of employment. The North Carolina Court of Appeals has held that this broad definition of retaliatory action includes non-renewal of an employment contract. Johnson v. Durham Technical Community College, 139 N.C. App. 676, 535 S.E.2d 357 (2000).

By way of defenses, the Act specifically provides it shall not be a violation of REDA for a person to discharge or take any other unfavorable action with respect to an employee who has engaged in otherwise protected activity *if the person defending against the claim proves by the greater weight of the evidence that it would have taken the same unfavorable action in the absence of the protected activity of the employee.*

This statute does not prohibit all discharges of employees who are involved in the enumerated protected activities; it only prohibits those discharges made *because* of activity protected by the statute. For example, in Johnson v. Trustees of Durham Technical Community College, *supra*, the North Carolina Court of Appeals affirmed dismissal of a REDA claim on summary judgment, holding that the evidence was insufficient as a matter of law to establish that the plaintiff's termination was because of a prior workers' compensation claim. In Johnson, the plaintiff, an instructor, brought both a REDA and an ADA claim against her community college employer, alleging that her contract was not renewed either because she had filed a workers' compensation claim or because of a disability which confined her to a wheelchair. The instructor had been teaching literacy courses at a prison facility. After teaching for several successive renewals, she was injured when she fell from her crutches while trying to open a security door at the prison. She filed for and received workers' compensation benefits.

During the year after she had filed her initial claim, the plaintiff entered into and performed three successive contracts with the community college for literacy courses. When the plaintiff subsequently injured herself again in a non-work-related accident, the community college expressed concern that she would again injure herself. Additionally, the community college expressed concern over certain of the instructor's absences as a result of her injuries and her requirements for

accommodations such as having guards at the jail to assist her open and close doors.

In reaching its decision dismissing the plaintiff's REDA claim, the Court found that there was no close temporal connection between the filing of the plaintiff's claim and the alleged retaliatory act. The fact that the community college had continued to reemploy the instructor for three successive classes after her compensation claim insulated the community college from liability. However, the Court of Appeals reversed that portion of the summary judgment which had dismissed the ADA claim, finding a genuine issue of material fact as to whether the community college took adverse personnel action against the instructor based on her disability.¹

Unlike the predecessor statute, under the current version of REDA, pain, suffering and emotional distress is not recoverable.

Remedies include any or all of the following:

- (1) An injunction to stop continued violation of REDA;
- (2) Reinstatement of the employee to the same position held before the retaliatory action or discrimination or to an equivalent position;
- (3) Reinstatement of full fringe benefits and seniority rights; and
- (4) Compensation for lost wages, lost benefits, and other economic losses proximately caused by the retaliatory action or discrimination. If a court ultimately determines that the employee was injured by a willful violation, the court "shall" treble the amount awarded under this subsection.

Additionally, the court may award reasonable costs and expenses, including attorney's fees against the defendant. If the court determines that the plaintiff's action is frivolous, the court may award the defendant reasonable costs and expenses, including attorney's fees in defending the action. REDA does provide for the right to jury trial.

Complaints of violations of REDA must be filed within 180 days of the alleged violation. Complaints are filed with the Employment Discrimination Bureau (previously WORD [Workplace Discrimination] section of the North Carolina Department of Labor). After the filing, the North Carolina Department of Labor assigns the file to a discrimination investigator, who sends a copy of

¹The case returned to the Court of Appeals (Johnson II), 577 S.E.2d 670 (N.C. App. 2003). The Court held that a claim under North Carolina's Persons with Disabilities Protection Act would not be dismissed based on after acquired evidence of the plaintiff's misconduct, but that such evidence could be considered with respect to the remedy available to the plaintiff.

the Complaint to the employer. The investigator contacts both the employer and the employee and perhaps third parties for evidence. If the employer does not respond, the Department of Labor will make a determination based on information obtained from the employee. If the employee does not provide information and cooperate with the investigation, the complaint will be dismissed.

If the Department of Labor determines that a violation of REDA exists (a “merit” finding), the Department of Labor will attempt to negotiate a settlement between the employer and employee. If unable to do so, the Department of Labor will either file suit against the employer or, more likely, issue a “merit” right to sue letter entitling the employee to file suit within 90 days from date of the letter. Although a “merit” determination practically guarantees that a private attorney will pursue the claim in a private suit, the “merit” determination does not preclude the defendant from defending on liability.

If the Department of Labor does not determine that a violation of REDA exists and issues a “no merit” finding, the Department of Labor will so advise both the employee and employer and will provide the employee with a right to sue letter allowing the employee to commence suit within 90 days of the date of the letter. Just as a “merit” right to sue does not dictate a successful result at trial for a claimant, so also does a “no merit” determination not dictate a successful result at trial for the employer. Regardless of whether a “merit” or “no merit” finding is issued, failure to commence suit within 90 days of issuance of the letter will time-bar any subsequent efforts to file a REDA suit.

However, even if an employee fails to timely file a REDA charge, the employee may still bring a claim for wrongful discharge in violation of public policy if discharged because a workers’ compensation claim. In Brackett v. SGL Carbon Corporation, 580 S.E.2d 757 (N.C. App. 2003), the North Carolina Court of Appeals held that North Carolina recognizes a tort claim for wrongful discharge in violation of public policy based on allegations that adverse personnel action resulted from assertion of rights under the Workers’ Compensation Act. Unlike a REDA claim, this wrongful discharge claim can be brought at any time within three years from the date of the adverse action, does not require that a REDA claim be processed, and does not require that the REDA time deadlines be met. Although attorney’s fees are not available for wrongful discharge claims, plaintiffs can recover a full range of compensatory damages, including pain, suffering, emotional distress, and punitive damages where appropriate. As a practical matter, plaintiff’s attorneys will simply file REDA claims with the Department of Labor to obtain an investigation, and will pursue what otherwise would have been simply REDA claims as claims for both violation of REDA and for wrongful discharge.

(2) The Family and Medical Leave Act

The Family and Medical Leave Act of 1993 (FMLA) entitles eligible employees of employers with 50 or more employees to take up to twelve weeks of unpaid, job-protected leave during a 12 month period for specified family and medical reasons. Such reasons include: (1) the birth of an employee’s child, (2) placement of a child with the employee for adoption

or foster care; (3) an employee's need to care for the employee's child, spouse or parent with a serious health condition; (4) an employee's own serious health condition; and (5) a "qualifying exigency" (to be defined by regulation) arising out of the fact that the spouse, son, daughter, or parent of the employee is on active duty (or has been notified of an impending call or order to active duty). Additionally, a provision was added allowing 26 work weeks leave for an eligible employee who is the spouse, son, daughter, parent, or next of kin to care for the servicemember.

The FMLA prohibits employers from interfering with, restraining or denying the exercise of any right provided under the FMLA. Further, the FMLA also provides that it is unlawful for an employer to discharge or discriminate against an employee because such employee has filed a charge or instituted a proceeding related to the FMLA, or because such employee has given information in connection with any inquiry or proceeding under the FMLA.

Complaints of violation of the FMLA may be filed with and investigated by the U.S. Department of Labor or filed as civil lawsuits, within two or three (if the violation was willful) years from the action complained of. Damages include lost wages, benefits, and other compensation, attorneys' fees, and potential liquidated damages absent proof by the employer of good faith.

k. Exposure under Other Regulatory Statutes

Although detailed discussion of the requirements of these acts are beyond the scope of this paper, employers should be aware that many other state and federal statutes affect the employment relationship.

(1) Fair Labor Standards Act

The Fair Labor Standards Act of 1938, as amended, 29 U.S.C. §§ 201 *et. seq.* (hereinafter "FLSA") requires that employers covered by the FLSA pay to their employees at least the minimum hourly wage prescribed by the FLSA (\$5.85 per hour effective 7/24/07)¹ for each hour worked and that such employers pay eligible employees at least one and one half times the employee's regular rate for all hours worked by the employee in excess of 40 hours in a given work week. FLSA §§ 6, 7. The FLSA applies to employers with employees engaged in commerce, and the production of goods for commerce, or in the handling, selling or otherwise working on goods that have been moved in or produced for commerce, with annual gross volume of sales made or business done of \$500,000.00 or more (exclusive of excise taxes at the retail level that are separately stated). Even if the employer does not meet the \$500,000.00 test, the FLSA still applies to individual employees who are engaged in interstate or foreign commerce or producing goods for transportation in interstate or foreign commerce. The FLSA does not apply to independent contractors.

¹ North Carolina's Wage & Hour Act, N.C. G. S. §95-25.1 *et seq.* requires payment of \$6.15 per hour effective 7/24/07, \$6.55 per hour effective 7/24/08, and \$7.25 per hour effective 7/24/09

The FLSA is enforced by the United States Department of Labor, Wage and Hour Division. Additionally, individual employees are entitled to bring actions to enforce the FLSA in either federal or state court. Remedies available to individual employees include unpaid minimum wages, unpaid overtime, an additional amount up to the amount owed as liquidated damages, and attorneys' fees. The FLSA provides for the potential of a \$10,000.00 fine for willful violations and imprisonment for 6 months for a repeat conviction. The FLSA also provides for a civil penalty not to exceed \$10,000.00 for a child labor violation and a civil penalty not to exceed \$1,000.00 for each violation of the Section 6 (minimum wage) and Section 7 (overtime) provisions of the Act.

Most FLSA audits result from individual employee complaints. In the audit process, the United States Department of Labor generally both 1) requires employers to correct non-complying policies and 2) also collects unpaid back wages and overtime on behalf of **all** affected employees for the period of two years preceding the audit. This two-year period reflects the statute of limitations for nonwillful violations. However, in the case of willful violations, the statute of limitations is three years and the Wage and Hour Division can assess back wage liabilities for this three-year period.

(2) North Carolina Wage and Hour Act

The North Carolina Wage and Hour Act (hereinafter "NC Act"), §§95-25.2 *et. seq.* of the North Carolina General Statutes, that employers pay the minimum wage established by North Carolina (see footnote 1 on the preceding page), requires overtime at a rate of not less than 1½ of the employee's regular rate of pay for hours worked in excess of 40 per week, has provisions relating to youth employment, and contains a number of specific requirements relative to the timing, conditions and methods of payment to employees. The minimum wage and overtime requirements of the NC Act generally apply to businesses not covered by the FLSA, such as business enterprises grossing less than \$500,000.00 per year or businesses not engaged in interstate commerce. However, the *wage payment* requirements of the NC Act apply to all employers in North Carolina.

The provisions of the NC Act are enforced by the North Carolina Department of Labor, Wage and Hour Division. The NC Act also allows employees to retain their own attorneys and bring suit in North Carolina state court. In addition to unpaid amounts due, the NC Act gives the court discretion to award liquidated damages in an amount equal to the amount found to be due, plus interest from date payment should have been made, plus costs and attorneys' fees. In determining whether or not to award liquidated damages, the court can consider whether the employer had reasonable grounds for believing that the employer's act or omission was not in violation of the NC Act. §95-25.21(a)(1). Claims under the NC Act are subject to a two-year statute of limitations.

(3) Occupational Safety and Health Act

In 1973, the North Carolina General Assembly enacted the Occupational Safety and Health Act of North Carolina, N.C. Gen. Stat. §§ 95-126 through -155. Under this Act, the Commissioner of the North Carolina Department of Labor is charged with

implementing and enforcing the standards promulgated by the United States Secretary of Labor pursuant to the federal Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 652 *et seq.* The North Carolina Act, like the federal Act, applies to employers (a person, firm or corporation engaged in business) with employees.

Both the North Carolina and its federal counterpart include the following “general duty clause:”

Each employer shall furnish to his employees conditions of employment and a place of employment free from recognized hazards that are causing or are likely to cause death or serious injury or serious physical harm to his employees.

Additionally, both Acts provide that employers are required to comply with Occupational and Safety Health Standards promulgated under the federal Act.

One defense available to employers receiving citations for serious violations of occupational safety and health standards is commonly referred to as the “isolated employee misconduct” defense. This defense arises under the definition of “serious violation,” a definition that excludes situations where the employer did not know, and could not, with exercise of reasonable diligence, know of the presence of the violation. In determining whether given conduct was in fact isolated employee misconduct, the Safety and Health Review Board considers evidence such as whether the employer has a written policy concerning violation of OSHA rules and whether the employer has actually disciplined employees who violate those rules. Failure to have such policies and a failure to enforce such policies through discipline is considered to be evidence of employer ratification of the violations and can defeat an “isolated employee misconduct” defense.

(4) North Carolina Employment Security Law

North Carolina Employment Security Law provides that employees who are unemployed through no fault of their own and cannot find work may receive up to 26 weeks of benefits for which the employer will be taxed or charged. As a general rule, separated employees are entitled to these benefits, unless (1) they voluntarily terminate their employment, without good cause attributable to the employer; (2) they are discharged for “substantial fault”; or (3) they are discharged for “misconduct.”

Under the first exception, employees who quit voluntarily with good cause attributable to the employer are not disqualified from benefits. An example of “good cause attributable to the employer” for an employee resignation would be sexual harassment by the employer or any other employer action making the conditions of employment intolerable.

“Substantial fault” is defined to include those acts or omissions over which employees exercise reasonable control and which violate reasonable requirements of the job. “Substantial fault”

does not include (1) minor infractions of rules unless such infractions are repeated after a warning was received by the employee; or (2) inadvertent mistakes made by the employee; or (3) failures to perform work because of insufficient skill, ability or equipment. Therefore, in order to establish “substantial fault”, the employer must usually be able to show not only a breach of company rules, but also warnings to the employee concerning the consequences of such breach. Typically, the Employment Security Commission looks for written documentation in the form of written rules and written warnings to establish these elements. A finding of “substantial fault” usually results in a nine-week disqualification from receiving benefits, with a minimum of four weeks disqualification and a maximum of thirteen weeks disqualification.

“Misconduct” is defined as conduct evincing: (1) such willful or wanton disregard of an employer’s interest as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect from the employee; (2) carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design; or (3) an intentional and substantial disregard of the employer’s interests or of the employee’s duties and obligations to the employer. The type of conduct usually classified as “misconduct” includes violation of company drug policy, fighting, direct insubordination, sabotage, etc. The Employment Security Commission typically looks for written documentation establishing the employer’s policy and eyewitness evidence concerning the violation.

The Employment Security Law is administered by the North Carolina Employment Security Commission. When an employee applies for Employment Security Benefits, the Commission forwards a form for the employer to complete with the reason for termination and any severance benefits paid to the employee. Employment Security Benefits only begin upon expiration of the severance benefits. The public policy of North Carolina precludes an employee from releasing his or her right, if any, to Employment Security Benefits.

An employer wishing to contest an employee’s right to Employment Security Benefits should, in the initial response, set forth the basis for the employer’s contention that the employee either voluntarily quit, or was terminated for substantial fault or misconduct. In the event the employee was terminated for substantial fault or misconduct, the employer should reference the specific company policy violated by the employee.

After receiving the employer’s response, the Employment Security Commission will issue an initial adjudication. Either the employer or the employee may appeal this adjudication to a hearing. Hearings are held before appeals referees, who are attorneys employed by the Employment Security Commission. This hearing is the only opportunity for the parties to introduce evidence. Any evidence either side wishes to produce must be offered at this hearing. On request, the Employment Security Commission will issue subpoenas for witnesses. Each side should be prepared to produce evidence in the form of eyewitness testimony. Hearsay and written statements are typically ignored in favor of eyewitness testimony.

Although the rules provide for successive appeals of the Referee's decision to the Employment Security Commission in Raleigh, Superior Court, the Court of Appeals, and the Supreme Court of North Carolina, these appeals are all based on the record established before the appeals referee and are limited to the issue of whether the record before the referee contained evidence sufficient to support the referee's decision.

II. PROPER HIRING PROCEDURES

A. Recruitment Practices

As noted above, anti-discrimination legislation requires that employers provide equal job opportunities, regardless of an applicant's race, gender, disability, age, or other protected classification. Such requirements are applicable throughout the recruitment process. Whether an employer recruits prospective employees through the use of advertisements, word-of-mouth, employment agencies, or other form of recruitment, the employer is under a duty to insure that his or her recruitment practices do not violate applicable law.

1. Job Advertisements

Job advertisements must comply with anti-discrimination law. Under Title VII, an employer may never indicate a preference for job applicants based upon race or color in a job advertisement. Generally, an employer may not specify a gender preference in a job advertisement. As a result, the placement of classified want ads in newspaper columns headed "male" or "female" has been held to constitute illegal gender discrimination. The following job advertisements have also been found to constitute illegal gender discrimination:

"Wanted--men who desire to be truck drivers."

"Career-minded men will be interviewed."

"Excellent opportunity for an attractive lady."

Gender preference may be specified in a job advertisement when gender constitutes a bona fide occupational qualification of the employment at issue. For example, a private secondary school might limit applications for the position of live-in proctor of a girls' residence hall to women. To justify the legality of a gender preference in a job advertisement, however, the employer must be able to prove that the requirement is reasonably necessary to the normal operation of the enterprise. The circumstances in which gender is a bona fide occupational qualification are extremely limited, and employers should therefore proceed with extreme caution whenever considering use of a gender preference in a job advertisement.

In addition to gender preference, religion and national origin preference may also be specified in a job advertisement to the extent that such characteristics constitute bona fide occupational qualifications for employment. As with gender, however, the circumstances in which

national origin and religion are reasonably necessary to the normal operation of a business are extremely limited, and such preferences should only be indicated after consultation with legal counsel.

Job advertisements that indicate a preference for workers older than forty discriminate only against those persons who are outside the protected classification delineated within the Age Discrimination in Employment Act. As a result, such specifications are not prohibited under the ADEA. In addition, job advertisements may specify minimum age requirements, as long as such minimum age requirements are reasonably necessary for the operation of the business. For example, a job advertisement for a bartender might specify "must be 21 years or older," and a job advertisement for a heavy machinery position, in compliance with federal child labor laws, might specify "hazardous job, must be at least 18 years old."

Job advertisements do violate the ADEA, however, when they imply that youth is a requirement, or otherwise seek applicants less than forty years of age. For example, all of the following advertisements connote a preference for youth and have been found to violate age discrimination law:

"Recent high school grads"
"Accountant; new grad"
"Recent graduates"

In addition, the use of terms such as "girl" or "young girl" has been found to violate the ADEA, as such terms operate to discourage job seekers in the protected age bracket. A job advertisement that requests that applicants state their age is not per se a violation of the ADEA. As such requests may deter older applicants, however, the requests will be closely scrutinized to insure that the request has been made for a permissible, non-discriminatory purpose.

2. Other Forms of Recruitment

One of the most commonly used methods of recruitment is simply word-of-mouth, or the practice of relying upon referrals from current employees. Unfortunately, however, employees often have a tendency to only advise people of their own race or sex of employment opportunities in the work place. As a result, although word-of-mouth recruiting is not per se discrimination under Title VII, the practice can result in a perpetuation of the racial or gender composition of an employer's work force. To the extent that members of a protected classification are proportionately unrepresented in an employer's work force, word-of-mouth recruiting may constitute discrimination. For example, word-of-mouth recruiting was found to have fostered illegal discrimination against African-Americans where the employer had a substantially all-white work force; and to result in religious discrimination, where 93% of an employer's work force was either Amish or Mennonite. Word-of-mouth recruiting did not constitute unlawful discrimination against

African-Americans, however, where an employer's work force was already predominantly African-American.

It is important to recognize, however, that word-of-mouth recruiting practices that perpetuate past discrimination only violate Title VII where such practices are the primary means for recruiting applicants. If word-of-mouth recruiting is not a primary element of an employer's recruiting process, when compared to other recruiting practices such as newspaper advertisements and the use of employment agencies, then word-of-mouth recruiting will, in all probability, not result in a successful Title VII challenge. As a result, employers are well advised never to exclusively rely upon word-of-mouth recruiting, particularly when the employer's work force does not reflect the protected classification composition of the relevant labor market.

Another recruitment practice, which most employers fail to even recognize as a recruitment practice, is nepotism. Nepotism is generally defined as the practice of showing favoritism in employment to family members and relatives. Nepotism, like word-of-mouth recruiting, does not constitute per se discrimination. To the extent that nepotism perpetuates past discrimination, however, such practice may result in a violation of Title VII. For example, an employer's nepotism practices constituted illegal discrimination where preference was given to white relatives of employees while black females were under-represented in the employer's work force. Given such risks, as well as the fact that widespread nepotism often leads to charges of favoritism and morale problems in the work force, employers should be extremely wary of allowing the use of nepotism on anything more than an extremely limited scale.

A final common recruiting method is the use of third-party recruiters and employment agencies. Employers must recognize, however, that they may be held liable for the discriminatory practices of any employment agency or other recruiting entity whose services it utilizes. In addition, if the selection procedures administered by an employment agency result in a racially or sexually unbalanced flow of applicants, and the employer does not object, the employer may be held liable for any adverse impact that results from the selection procedures, even if the unbalanced flow was unintentional.

Given the foregoing, employers utilizing employment agencies or other recruiting organizations need to carefully prescreen such agencies prior to retaining their services to insure that the agency's practices and procedures are in compliance with federal anti-discrimination laws. In addition, upon retaining an agency, an employer should provide the agency with copies of its policies regarding equal employment opportunity and specify in writing that the agency's failure to comply with the requirements of federal anti-discrimination law will not be tolerated. Finally, the employer is well advised to monitor the agency's recruiting practices on an ongoing basis, to insure that federal law is being followed. To the extent that the flow of applicants provided by the agency is racially, sexually or otherwise unbalanced, an employer should investigate the imbalance and attempt to correct the problem.

B. Application and Inquiry Procedures

Once a pool of applicants has been recruited, an employer must select which of the applicants will actually be hired. From a legal perspective, three procedures during this process are of particular concern: employment applications, pre-employment inquiries, and background investigations.

1. Employment Applications

Requiring job applicants to complete written application forms is a legitimate and fair business practice and does not violate Title VII so long as the requirement is applied equally to all applicants regardless of their membership in any protected classification. Failure to uniformly apply a written application requirement, however, can lead to charges of discrimination under Title VII. For example, an employer who required every female applicant to complete a written application for employment within a certain period, but then hired one male applicant who had not been required to submit either a job application or a writing sample, and another who submitted his application after the stated deadline, was found guilty of gender discrimination.

Use of written employment applications can be used to the advantage of the employer. It is recommended that an applicant, in completing an employment application, be required to specify the exact job that they are applying for. Applicants who are allowed to generally apply for "all jobs available" on an application may later argue that they should have been considered for other jobs that they never specifically applied for when they are not hired for a particular job. By forcing the applicant to specify what job he or she is applying for, the employer is able to limit an applicant's potential subsequent claims. In the same vein, an employer should also provide an expiration date on the application, indicating that an application will remain on active status for only a limited time. Through this procedure, an employee will not be able to argue that they were unlawfully discriminated against because the employer failed to consider a previous application six months or even a year down the road.

One of the best pieces of information that can be obtained through a written employment application is the applicant's complete employment history. Any gap in employment history may be a red flag. The employer should then contact the applicant's previous employers to verify dates of employment. It is truly amazing how many applicants will not provide a truthful employment history, claiming to have worked at companies where they never in fact did, or exaggerating the length of time that they were with a specific company. Once again, an applicant's untruthfulness as to his employment history should be a red flag to the prospective employer, and can constitute grounds for termination or a defense as to certain claims for future damages in the event of a wrongful discharge.

In contacting previous employers, an employer should always ask for comments on the quality of the employee's work and if the employee is eligible for rehire. Given concerns about

potential defamation liability, however, many employers decline to provide information other than the position a former employee held, the dates of employment, and if authorized by the employee the rate of compensation.

Written application forms may also be used to obtain specific agreements from a prospective employee. Key among these is an acknowledgment by the applicant that the employment being sought constitutes employment-at-will, as well as an acknowledgment that, if accepted for employment, the applicant agrees to comply with all company policies and procedures. Another agreement which can be obtained on an application form is an authorization by the applicant for the employer to verify any information provided by the applicant, seek the disclosure of information from third parties, and conduct background investigations.

The written application form should also contain a clear statement that any false or misleading representations made by the applicant during the hiring process or on the application itself, whether written or oral, are grounds for either terminating the application process or, if discovered after employment, terminating employment. Such a provision may be used to cut off certain future liability in the event of a subsequent wrongful discharge lawsuit if it can be established that falsified information on an employment application would have resulted in the immediate termination of the applicant or employee.

Of course, all of the foregoing merely begs the obvious question: other than information concerning employment history, what else can an employer legally ask an applicant on an employment application?

2. Pre-Employment Inquiries

Pre-employment inquiries may be made by an employer either in writing, such as on an employment application or questionnaire, or orally, in the context of an employment interview. If an interview is conducted, the interviewer should have prepared a list of written questions, or at least a written outline, so that all interviews conducted in regard to a specific position will be fairly uniform, and some written documentation will exist as to the questions asked. In addition, personnel responsible for interviewing applicants should not be given complete discretion to make all hiring decisions, as the appearance of discrimination may result when complete reliance is placed upon one individual's subjective appraisals of applicants' qualifications. For example, racial discrimination has been found when numerous African-American applicants, who were more qualified than many white applicants who were later hired in regard to objective standards such as education, were denied employment on the basis of completely subjective appraisals of an interviewer. The subjective opinion of an interviewer is important but should be tempered by the objective standards and data available.

Whether made orally or in writing, all pre-employment inquiries must comply with the requirements of federal law. The following represents a non-exhaustive list of the types of questions

that can always be asked, and the types of questions that should never be asked in the pre-employment context.

(a) Permissible Inquiries

Employers may require applicants to provide certain neutral personal information, such as name, social security number, present and permanent address, and telephone number. An employer may also require an applicant to provide information concerning job experience and employment history, as well as information concerning membership in relevant professional or trade organizations. An applicant may be questioned about educational background and achievements, as well as extracurricular activities during education. An applicant may also be questioned about technical and continuing education.

In addition, employers may ask questions about subjective qualities which do not relate to an applicant's membership in a protected classification. Permissible subjects of pre-employment inquiries include motivation, ambition, willingness to accept directions, maturity, personality, persuasiveness, neatness, and so on. To the extent that a pre-employment inquiry is valid and made of one applicant, however, such inquiry should also be made with respect to all applicants. Failure to consistently and uniformly ask the same pre-employment inquiries of all applicants may result in charges of bias and discrimination.

Finally, an employer may ask applicants about their aptitude for an ability to perform the job for which the applicant is applying. Special care needs to be taken, however that such inquiries do not solicit information concerning an applicant's disability in such a manner as to violate the Americans With Disabilities Act. Such impermissible inquiries in regard to disability are discussed below. Permissible inquiries would include the following:

- *Inquiries about an applicant's ability to perform job-related functions*
- *Describe or demonstrate a job function and ask all applicants whether they can perform the functions with or without reasonable accommodation*
- *Ask whether the applicant knows of any reason that he or she cannot perform the essential functions of the job (since the applicant may not be able to perform the essential job functions for reasons unrelated to disability, and such inquiry is therefore not likely to elicit information regarding the existence, nature or severity of a disability)*
- *State attendance requirements and ask whether the applicant is able to comply with such requirements*
- *Request information about previous work attendance (as long as the inquiry does not specifically refer to an applicant's illness or disability)*

Always remember, pre-employment inquiries should be directed at determining an applicant's qualifications to perform the job for which he or she is applying. Questions not aimed at

this goal will, at best, only produce irrelevant information and, at worst, result in a basis for a charge of discrimination. As a result, questions unrelated to the evaluation of an applicant's training, education, experience, and ability to effectively perform the job should simply not be asked.

(b) Impermissible Inquiries

(1) Inquiries About Age

An inquiry as to an applicant's age or date of birth does not constitute discrimination per se, but such inquiry may not be made nor utilized for a discriminatory purpose. Since such a request may have the effect of deterring older applicants, and may constitute partial evidence of discriminatory intent, any inquiry regarding age will be subject to close scrutiny by the Equal Employment Opportunity Commission to insure that the request was made for a permissible purpose.

(2) Inquires About Disability and Workers Compensation History

The ADA prohibits all pre-employment inquiries of job applicants concerning the existence, nature, or severity of a disability. The purpose behind this requirement is to insure that an applicant's hidden disability will not be considered by the employer prior to assessment of the applicant's non-medical qualifications.

The EEOC guidelines make it clear that a lawful pre-employment question is one that focuses on an applicant's ability to perform the job functions. An employer may not ask a question or a series of questions that is likely to elicit information about an ADA-protected disability. If an employer could reasonably expect that a job applicant's response to a question, whether positive or negative, would indicate either the existence or nature of a disability, then the question violates the provisions of the ADA.

The line that the EEOC draws between permissible and impermissible pre-employment inquiries is not a bright one. For example, an employer may ask an applicant whether or not the applicant works well under stress, as many people who do not work well under stress do not have a covered disability. The employer is prohibited from asking most logical follow-up questions, however, such as "why do you not work well under stress?" or "does stress make you sick?" Each of these follow-up questions is likely to elicit information about the existence or nature of a disability and is, therefore, impermissible.

Other examples of questions that may not lawfully be asked under the ADA include:

- *Please list any conditions or diseases for which you have been treated in the last five years.*
- *Have you ever been hospitalized and, if so, for what reason?*

- *Have you ever been treated for a mental condition, or seen a psychiatrist or psychologist?*
- *How many times were you absent from work last year due to sickness or illness?*
- *Do you have any physical or mental condition that might render you unable to perform the job for which you are applying?*

Given the obvious difficulty in delineating what questions are likely to elicit information about the existence of disabilities, the safest approach for employers is to preserve such questions until after a job offer has been made. The ADA allows employers to ask disability-related questions following the extension of a bona fide offer of employment, even if such offer is conditioned upon the answer to the disability-related inquiry. Employers must be careful, however, to make certain that all job applicants who have been given a conditional job offer in the same category are subjected to the same disability-related inquiry. In addition, any information obtained from such inquiries must be kept strictly confidential.

Finally, an employer may not, prior to making a conditional offer of employment, inquire of an applicant about job-related injuries or past workers' compensation claims. Such questions relate directly to the severity of an applicant's impairments and are therefore likely to elicit information about the existence, nature, or severity of a disability.

(3) Inquiries Regarding Gender and Family Issues

A study by the National Consumers League of Washington, D.C., discovered that two of the most often asked, impermissible pre-employment inquiries were in regard to an applicant's marital status and an applicant's plans regarding having children. Generally, questions concerning marital status, maiden name, current pregnancy, future childbearing plans, child-care issues, or the number and ages of children may constitute violations of Title VII if the information thereby obtained results in the denial or limitation of employment opportunities. Employers are therefore well advised to simply avoid asking these questions altogether. If the information is in fact required for tax, insurance, or social security purposes, then it should be obtained after the applicant has already been hired.

In addition, an employer's assumption that the domestic responsibilities of a wife or mother negatively impacts upon her availability for work can constitute gender discrimination under Title VII unless the exact same assumption is applied to men as well in their roles as husbands or fathers. For example, an employer who hires men, but not women, with preschool-aged children is almost certainly violating Title VII. In addition, an employer who turns away recently married female applicants, on the assumption that family obligations and pregnancy will cause them to leave work, while not applying the same assumption to recently married male applicants, has also committed gender discrimination.

(4) Inquiries Regarding Race or Color

Unless made for the purposes of compliance with an affirmative action plan, employers should never make pre-employment inquiries about membership in a protected racial classification. In addition, employers should not require applicants to submit photographs with an application, as such photographs will reveal protected classification characteristics. Such photograph, if required for a legitimate purpose, such as use on a company ID, should only be requested after the applicant has already been hired.

(5) Inquiries Regarding National Origin

To avoid inquiries that violate the Immigration Reform and Control Act, employers should strictly follow the requirements of IRCA and otherwise avoid asking applicants about national origin or place of birth. Under IRCA, it is an unfair immigration employment practice to require applicants to produce more or different documents than those needed to comply with IRCA, or to refuse to honor any document that reasonably appears on its face to be genuine. In addition, impermissible inquiries beyond the requirements of IRCA and failure to strictly comply with IRCA may result in a charge of discrimination under Title VII.

(6) Inquiries Regarding Religion

Pre-employment inquiries regarding an applicant's religious affiliation are impermissible, except to the extent that an employer is able to demonstrate that the inquiry relates to a bona fide occupational qualification. The common employer response to such rule is that religious affiliation may impact upon work availability, which constitutes a bona fide occupational qualification.

Employers need to recognize, however, that pre-employment inquiries to ascertain an applicant's availability to work during certain time periods and religious holidays may result in an inference of unlawful religious discrimination. To avoid such inference and possible charges of discrimination, employers are well advised not to ask applicants what religious holidays they observe or whether their religion prevents them from working on weekends or certain holidays but to merely ask about an applicant's ability to comply with the attendance requirements of a specific job.

(7) Inquiries Regarding Military Status and Honorable Discharge

The Uniform Services Employment and Redeployment Rights Act prohibits employment discrimination on the basis of past, current, or future military service or obligations. The safest course of action for an employer, therefore, is to avoid pre-employment inquiries regarding military status.

(8) Inquiries Regarding Union Activities or Membership

Whether or not an employer's work force is currently unionized, discrimination in the hiring process based upon an employee's union activities or membership can constitute an unfair labor practice. Employers should therefore avoid asking questions concerning union membership or involvement of applicants.

3. Background Investigation

Employment applications and pre-employment inquiries involve obtaining information about an applicant directly from the applicant. Background investigations involve obtaining information about an applicant from third parties. The most common form of background investigation is checking employment references. Two other types of background investigations involve criminal and credit records.

The Fair Credit Reporting Act ("FCRA"), 15 U.S.C. §§ 1681 *et seq.* contains specific requirements for employers in connection with obtaining "consumer reports" from "credit reporting agencies." "Consumer report" is defined to include any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for, among other things, employment purposes. A "consumer reporting agency" ("CRA") is any person or entity which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties. "Employment purposes" when used in connection with a consumer report means a report used for the purpose of evaluating a consumer for employment, promotion, reassignment or retention as an employee.

(a) Reference Checks

The FCRA does not apply to reference checks performed by the prospective employer. Although not required by the FCRA, many employers include in their employment applications a provision for written consent by the applicant for the employer to contact and check references. However, if the reference is verified by an employment or reference checking agency for the employer, the FCRA does apply and requires specific consent and disclosures as set forth in FCRA § 603(o).

(b) Criminal Records Checks/Credit Reports

The FCRA draws a distinction between consumer reports (which include driving records, criminal histories, and credit reports) obtained by a review of records and investigative consumer reports, which contain information obtained through personal interviews. The disclosure requirements for investigative consumer reports are more stringent than those for consumer reports.

Prior to obtaining any type of consumer report, the user must have a permissible purpose. As noted above, employment purposes, including hiring, promotion and retention decisions, are a permissible purpose. In order to obtain a consumer report, the user/employer must notify the employee/applicant in writing, that a consumer report may be used in connection with employment decisions and the employer/user must obtain the employee/applicant's written authorization before requesting such report. The notice/permission may be drafted in such a way as to apply continuously throughout employment.

When an adverse action is taken after receiving information that in some way plays a part in the adverse action, the employer/user must notify the employee/applicant of the following:

- The name, address, and telephone number of the credit reporting agency that provided the report;
- A statement that the CRA did not make the adverse decision and is not able to explain why the decision was made;
- A statement setting forth the employee/applicant's right to obtain a free disclosure of their file from the CRA if they make a request within 60 days;
- A statement setting forth the employee/applicant's right to dispute directly with the CRA the accuracy or completeness of any information provided by the CRA.

Where an investigative consumer report is obtained, the employer/user must disclose to the employee/applicant that such a report may be obtained. This must be done in a written disclosure that is mailed or otherwise delivered at some time before or not later than three (3) days after the date on which the report was first requested. The disclosure must include a statement informing the employee/applicant of their right to request additional disclosures of the nature and scope of the investigation and a summary of the consumer's rights as required by § 609 of the FCRA. Upon written request of the employee/applicant made within a reasonable period of time after the disclosures, the employer/user must make a complete disclosure of the nature and scope of the investigation in a written statement mailed or otherwise delivered to the employee/applicant no later than five (5) days after the date on which the request was received.

(c) Title VII Considerations

Separate and apart from the requirements of FCRA, use of criminal records checks or credit histories without regard to the date and nature of the problems reflected in the histories and without regard to job relatedness could expose an employer to a disparate impact claim under Title VII of the Civil Rights Act of 1964.

Statistics reveal that certain minorities, particularly African-Americans and Hispanics, are arrested at rates disproportionate to their representation in the work force. As a result, an employer's blanket refusal to hire applicants on the basis of past arrests can have a disparate impact upon members of various protected classifications. Given that arrests do not actually establish guilt and, therefore, have almost no probative value in the employee selection process, an employer's use of arrest records can result in violation of Title VII and should therefore be avoided.

Since a criminal conviction represents the result of an actual adjudication, conviction records have a much higher probative value. Statistics, however, reveal that certain minorities are convicted at a rate disproportionate to their representation in the work force. The courts have therefore refused to recognize conviction records as an absolute bar to employment, reasoning that such an across-the-board rule would have a disparate impact upon members of certain protected classifications. As a result, refusal to hire an applicant based upon a conviction record must be justified by business necessity. In determining business necessity, an employer should consider the nature and gravity of the offenses, including the number of convictions and the circumstances surrounding each conviction; the length of time that has elapsed since the conviction or sentence; and how the conviction bears upon the specific job duties.

By way of example, an employer's decision not to hire an African-American crane operator because of a six-year-old murder conviction was not justified by business necessity and, therefore, constituted a violation of Title VII. An employer's refusal to hire an African-American applicant for a cashier position because of a conviction for armed robbery four months earlier, however, was found to be justified by business necessity and, therefore, did not constitute a violation of Title VII.

Job-relatedness is the most important factor in determining whether or not the disqualification of an employment applicant based upon a past criminal conviction is justified by business necessity. Employers therefore need to proceed on a case-by-case basis and determine in each case whether or not an applicant's conviction is job-related and justifies the employer's failure to hire such applicant.

The decision whether or not to investigate the criminal records of an applicant is further complicated by developments in the law of negligent hiring, a topic beyond the scope of this paper. As a result, an employer who feels a need to investigate the conviction records of its applicants, either generally or in regard to filling a specific position, is well advised to consult with legal counsel prior to undertaking such course of action.

C. Pre-Employment Testing

1. Polygraphs and Lie Detector Tests

For a short period of time, polygraphs and lie detector tests were used by many employers in the employee selection process. Such practice was essentially brought to an end, however, with the passage of the Employee Polygraph Protection Act (EPPA). The EPPA is extremely restrictive and

prohibits employers, with only a few exceptions, from asking or requiring applicants or employees to take a polygraph test, from inquiring about or using the results of a polygraph test, and from taking any employment action based upon the results of a polygraph test.

The Act is not applicable to federal, state or local government employers, and also does not prohibit testing of experts, consultants, or employees of federal contractors engaged in national security intelligence or counterintelligence. The Act also permits the testing of some prospective employees of private armored car, security alarm, and security guard firms, as well as permitting the testing of some current and prospective employees in firms authorized to manufacture, distribute, or dispense controlled substances. Such exceptions, however, are hardly applicable to most employers.

A final exception permits the use of polygraphs in testing employees who are reasonably suspected of involvement in a workplace incident that results in economic loss or injury to the employer's business. The EPPA creates very detailed procedural requirements for such a test, however, and this exception is also not applicable in the employee selection process. As a result, unless an employer's business falls within one of the above-listed exceptions, polygraphs and lie detectors may not be used in regard to hiring decisions.

2. Medical Testing

The Americans With Disabilities Act prohibits requiring job applicants to undergo medical examinations until after a conditional job offer has been made. The EEOC generally defines medical examinations to include those procedures or tests that seek information about an individual's physical or mental impairment or physical or psychological health.

In determining whether or not a given procedure or test constitutes an impermissible medical examination, the EEOC considers various factors, including the following:

- (a) Whether the test is administered or interpreted by a health care professional.
- (b) Whether the test is designed to reveal the existence of impairment or the state of an individual's physical or psychological health.
- (c) Whether the test is invasive, requiring the drawing of blood, urine, breath, or other bodily fluid or secretion.
- (d) Whether the test measures physiological or psychological response, as opposed to performance ability.

Obviously, determining which tests are impermissible medical examinations depends upon the specifics of a given situation. For example, most physical fitness tests are not medical examinations, as they generally merely measure an applicant's ability to perform a task and do not

seek information concerning the existence, nature, or severity of a disability. However, if an employer measures an applicant's physiological response to performance, such as blood pressure or heart rate, the procedure may be considered an impermissible medical examination, since such information could be used to determine the existence, nature, or severity of a disability.

As is the case with disability-related inquiries, an employer may conduct medical examinations after the extension of a bona fide offer of employment. Such offer may be conditioned upon "passing" the medical exam. An employer who conducts post-offer medical exams, however, must make certain that all applicants who have been given conditional job offers in the same category are subjected to the same medical examinations, and that any information obtained from such medical examinations is kept strictly confidential.

Despite the medical testing requirements of the ADA, the law nevertheless permits employers to use drug testing. As long as the drug testing policies are intended to detect current drug use, and designed to insure that former drug addicts are no longer engaged in illegal drug use, then such testing is permissible.

D. Post "Conditional Offer"/Prehire Testing

After making a job offer, an employer may ask disability-related questions and conduct medical examinations as long as the employer asks such questions and conducts such examinations for all employees in the same job category. The employer may condition the job offer on the results of the medical examination. However, if an individual is not hired because a medical examination reveals the existence of the disability, the employer must be able to show that the reasons the job offer was rescinded was job related and necessary for the conduct of the employer's business. The employer must also be able to show that there was no reasonable accommodation that would have made it possible for the individual to perform the essential job functions or that, under the circumstances, the employee's performance of the essential functions of the job would create a direct threat of harm to the employee or others.

Once an employee has been hired, the employer cannot require a medical examination or ask an employee questions concerning disability unless the employer can show that the requirements are job related and necessary for conduct of the employer's business. That is, after hire, the relevant inquiry for an employer is the employee's performance of the essential functions of the job.

III. PROPER-TERMINATION PROCEDURE

Proper termination procedure begins long before an employee actually sits down at a termination meeting. Such procedure involves both preparation and planning.

A. Employment at Will

As noted at the outset of this paper, in North Carolina, absent an employment contract with provisions to the contrary, we are all employees “at will” and can be terminated for good reason, bad reason or no reason. However, we cannot be terminated for an illegal reason. Under the modern employment-at-will doctrine, an employer's freedom to terminate an employee at will may be restrained when the circumstances surrounding the termination fall within an exception to the employment-at-will doctrine.

B. Reasons for Termination

The possible reasons for an individual employee's termination are as numerous as the number of different employees. Such reasons, however, can usually be broken down into three basic categories: (1) economics; (2) misconduct; and (3) performance. Whatever the reason for termination, however, it is crucial to remember that an employee bringing an action will inevitably allege that the given reason was merely pretextual, and that the true motivation for the termination was illegitimate and actionable. As a result, we recommend that employers not only have a sound business reason (or reasons) for the termination, but also that the employer be able to document the reason (or reasons), and that the employee be advised of such reason (or reasons).

1. Economic

Economic cutbacks have become a matter of corporate survival. Whether referred to as "reduction in force," "downsizing," or "rightsizing," the result is the same--costs must be cut, and employees must be let go.

In determining which employees will be terminated when downsizing becomes necessary, an employer's should be able to articulate a good faith business reason for each selection, such as elimination of unessential positions, an employee's performance or training relative to other employees, or seniority. All levels of management should be involved in the decision, with each department making recommendations to senior management. By involving all levels of management, consensus may be built, and termination decisions will be easier to justify.

One criteria that should never be used in downsizing is age. When mass terminations are undertaken, some companies are tempted to use the economic downturn as a justification for terminating many of their older employees as a way of further reducing costs, since older employees are normally paid at a higher wage or salary level due to their seniority, and often have more health problems, resulting in greater health insurance costs. From a purely financial standpoint, terminating older employees may make some sense. From a legal standpoint, however, such a decision would violate the Age Discrimination in Employment Act, and result in potentially massive legal exposure.

2. Misconduct

In general, misconduct involves the knowing and willful breaking of a company policy or procedure, or the knowing and willful breaking of a state or federal law while on the job. Examples of misconduct might include stealing company property, being under the influence of illegal drugs while on the job, sexually harassing another employee, and similar conduct. Misconduct should always result in discipline, and will often result in immediate termination.

When effecting a termination for misconduct, the most important issue is the employer's ability to prove that the employee was in fact guilty of the misconduct. If the employer is not able to prove this at the time of the termination, then he will not be able to prove it to a jury should litigation ensue. The employee may claim that the allegations of misconduct were pretextual, and that the employee was in fact wrongfully discharged. As a result of such concerns, a termination for misconduct should always be preceded by an effective internal investigation establishing the validity of the discharge.

3. Performance

Although terminations for misconduct and economic reasons often occur, by far the most common termination is one for inadequate performance. An employee may not be able to meet minimum performance or production goals. An employee's work style may be at odds with that of his supervisor, or an employee may seem unable to follow company policies and procedures. Whatever the reason, however, the employee is not living up to the employer's expectations, and discharge may be necessary.

In approaching a termination for poor performance, documentation of the employee's performance problems, communication to the employee of the respects in which the employee's performance is deficient, and the employee's subsequent failure to correct such problems within a reasonable time is crucial. The legal advantages of such documentation are discussed below. In addition to such legal reasons, however, there are also practical ones. The employee who has been made aware of his or her performance problems, and who has failed to correct such problems, is far more likely to view termination as resulting from his or her own individual failure. In contrast, the employee who is unaware of performance problems, and who feels blindsided by termination, is far more likely to believe that some insidious and unspoken reason for the discharge exists. Systems designed to document and correct performance problems are thus one of the best methods available to employers for avoiding litigation before it even begins.

C. Pre-Termination Documentation

An old adage goes that the three rules of defending employment litigation are "document, document, document." A comprehensive record supporting an employer's decision to terminate an employee is not legally required. Most juries, however, expect employers to be able to adequately support the reasons for their actions, and tend to look with disfavor upon employers who did not give an employee an opportunity to correct performance problems. In addition, documentation insures

the competency of trial evidence. Without adequate documentation, the memory of witnesses for the employer may fade, whereas the memory of the aggrieved employee, certain of the injustice done, will tend to become clearer and clearer. Adequate pre-termination documentation may thus make the difference between winning and losing a wrongful discharge lawsuit.

1. Employee Handbooks

Although not technically a form of performance documentation, employee handbooks nevertheless can constitute an important element of an employer's pre-termination procedure. By clearly delineating personnel policy on matters such as vacation, sick leave, absenteeism and leaves of absence, an employer is able to establish both consistency and uniform treatment of all employees. In addition, by specifically mandating compliance with federal law in regard to such issues as overtime compensation and anti-discrimination practices, employers are better able to avoid complaints to such agencies as the Department of Labor and the Equal Employment Opportunity Commission.

In drafting an employee handbook, it is highly advisable to seek professional assistance. Improperly drafted employee handbooks may result in contractual liability for employers, as well as violation of various state and federal laws. In addition, professional assistance assures that the employee handbook will meet the individual needs of the employer's business. The only thing worse than not having written employment procedures is to have written procedures that are not followed. By working with a professional in the creation of an employee handbook, an employer can develop procedures that are not only legally advisable, but practical as well.

2. Job Descriptions

Most employees perform their duties without a specific job description. In essence, an understanding is reached between the employer and the employee with regard to the parameters of the employee's job responsibilities. More and more frequently, however, employers are formalizing this understanding and developing written job descriptions.

Written job descriptions accomplish several important goals. First, job descriptions can serve as a baseline for performance evaluations. Job descriptions are often prepared in conjunction with the employee currently holding the relevant position, and provide an opportunity for establishing not only job requirements, but also performance objectives and goals. Then, through continued performance evaluations, the job description may be altered as updates in policy, technology and operations necessitate alterations in job requirements.

In addition to providing a performance baseline, job descriptions also serve an important function in regard to the Americans With Disabilities Act. The Americans With Disabilities Act prohibits employment discrimination against qualified individuals with disabilities, and defines a qualified individual with a disability as a disabled person who satisfies the job-related requirements

of the employment position at issue, and who, with or without reasonable accommodation, can perform the "essential functions" of the position. Under the ADA regulations, employers may use written job descriptions as evidence in establishing the essential functions of the job.

For example, an employer might maintain that an essential function of a particular position is the ability to lift at least 50 pounds. If a disabled individual is unable to lift this amount, the employer may contend that such individual is not able to perform the essential function of the position and is therefore not entitled to ADA protection. If an employer's written job description specifically provides that an essential function of the position is the ability to lift at least 50 pounds, then, pursuant to the ADA regulations, such job description is competent evidence of the job's essential function. If no written job description exists, however, then the issue is subject to factual dispute, and may simply dissolve into a swearing contest between employer and employee.

In drafting job descriptions under the ADA, employers should first obtain input from current employees. An employer should then carefully consider and precisely describe in each job description all of the essential physical, mental and emotional requirements of the position, so that the job descriptions will be an effective tool in potential ADA litigation. In addition, employers may wish to consult legal counsel in drafting job descriptions to adequately address all ADA implications.

3. Performance Reviews

Perhaps more than any other form of pre-termination documentation, performance reviews are often critical evidence in wrongful discharge litigation. Almost without fail, a terminated employee in litigation will claim that their performance had been satisfactory, and that the "true" reason for their termination was improper and illegal. An employer able to counter such contention with documentation supporting its decision is in the best possible position to defend against such a claim, and performance reviews provide employers with a regular and periodic opportunity to obtain such documentation.

In addition to the legal advantages of performance reviews, practical advantages also result. Performance appraisals provide a periodic opportunity for communication between employers and employees to discuss expectations and goals. Such communication serves to improve both productivity and company loyalty.

Successful performance reviews begin with thorough preparation on the part of the manager. The review should be a structured and planned interpersonal meeting, not a casual conversation. Prior to the review, the manager should familiarize himself with relevant job descriptions and job requirements, review the employee's history, including job skills, training, experience, and past job performance, and examine any performance problems that need to be addressed.

As the actual review begins, managers are well advised to listen to an employee's self-appraisal before offering their own evaluation. Often, managers can learn more from listening

carefully to an employee than from listening to themselves. Such self-appraisals may in fact bring information to the manager's attention of which he was previously unaware.

After the employee's self-appraisal, the manager should discuss the employee's strengths and weaknesses, and be able to provide specific, unbiased examples of weak performance if such exist. Managers should not be authoritarian in the evaluation, but should also not avoid confronting performance problems head on. Too often, performance reviews are inflated by supervisors who routinely rate employees favorably rather than confronting difficult issues. Such an approach to performance evaluations, however, not only defeats the purpose of improving productivity, but may also have serious legal repercussions in subsequent wrongful termination litigation. Members of management, therefore, must be trained to be candid in preparing evaluations, and in conveying such evaluations to employees.

Once a manager has raised performance problems, a discussion between the manager and the employee should ensue regarding potential solutions. Performance standards and goals should be discussed and mutually agreed upon, and a specific time frame should be set for achieving such goals. Such a system not only creates incentives for employees to meet these goals, but also creates a concrete method of measuring future performance improvement.

All performance reviews should be reduced to writing, including all job expectations, goals and objectives. Both the manager and employee should then sign and date the review, so that the employee will not later be able to claim that they were not aware of performance problems. Such a practice places the employee on the defensive in any subsequent wrongful discharge litigation by establishing that the employee was "on notice" of performance problems, and that the employee failed to correct such problems.

Finally, it is worth mentioning that performance reviews must be done on a consistent and equal basis for all employees. Often, terminated employees contend that their personnel file was excessively documented to "set them up" for termination, and that such documentation was pretextual. For evidence to support such contention, the personnel file of the employee may be compared with that of all other employees. To avoid any claim that pre-termination documentation is little more than a pretext for discrimination, employers must be sure that all employees are treated the same for purposes of performance reviews.

4. Disciplinary Meetings

Performance reviews are conducted on a regular basis, often annually or semi-annually. Many times, however, performance or disciplinary problems arise between scheduled performance reviews, and must be addressed immediately. In such circumstances, an employer is well advised to hold a disciplinary meeting.

Disciplinary meetings serve a number of purposes. Such meetings help to define problems and possible solutions, and also increase communication between managers and employees. In addition, disciplinary meetings provide an opportunity to document ongoing performance or disciplinary problems, and thus serve to protect employers from wrongful discharge litigation.

Procedures for disciplinary meetings should mirror those of performance reviews. Managers should thoroughly prepare, and should set the meeting for a specific time, free from interruptions. Such meetings should normally be held late in the day. If the meeting is held early, the employee may stew over the problem the entire day, resulting in poor productivity and exacerbation of the situation.

In the disciplinary meeting, an employee should be given the opportunity to discuss the problem and propose solutions. Most importantly, a clear timeframe in which to solve the problem should be established and documented. A written summary of the meeting should then be prepared, and signed and dated by both the manager and the employee.

As with performance reviews, disciplinary meetings should be utilized for all employees on an equal and consistent basis. If a disciplinary meeting is held for an employee experiencing a particular performance or disciplinary problem, meetings must also be held for all other employees experiencing the same or similar problems. Failure to utilize such procedures on an equal basis may result in a claim of employment discrimination.

5. Progressive Discipline Systems

In an effort to further formalize disciplinary practices, some employers utilize systems of progressive discipline. Such systems involve a succession of oral and written warnings, and perhaps disciplinary suspension, prior to discharge. Under such a system, use of oral and written warnings may alleviate performance or disciplinary problems, rendering termination unnecessary. In addition, if termination does become necessary, then the decision will be supported by a clear paper trail, making it far more defensible.

Progressive discipline systems require a great deal of time and effort to develop, however. Lists of specific offenses, steps and penalties must be established, and each disciplinary situation must be evaluated in regard to the progressive discipline system to ensure consistency and fairness in treatment. Progressive discipline systems are normally utilized by larger organizations, whose human resources departments have the time and resources to develop and monitor such systems. Because of the investment of time and resources necessary to develop a progressive discipline system from the ground up, employers are well advised to seek the advice of a human resource consultant or legal counsel.

6. Investigation of Misconduct

In the case of a potential termination for misconduct, employers are well advised to conduct a thorough investigation prior to deciding to discharge an employee. Such investigation allows an employer to establish whether misconduct has in fact occurred, and if termination is the appropriate remedy. In addition, such investigation insures that if litigation develops, the employer will be able to both prove and justify the correctness of its decision.

Internal investigations of misconduct should be conducted by a member of management not involved in the alleged incident. The chosen investigator should not be an advocate, but should remain neutral and objective in investigating the facts involved. Remember, an investigator may eventually be called to testify before a jury. As a result, the individual chosen as an investigator should have qualities that will make him or her a credible and effective witness.

In cases of serious or gross misconduct, such as alleged embezzlement or sexual harassment, an employer may want to consider retaining an independent or outside investigator. Exercising such option will help allay suspicion that the employer's investigation was biased, or favored one employee over another. In addition, an employer may also wish to consider conducting the investigation of serious matters under the protection of the attorney-client privilege. By having an attorney involved, and by insuring that the investigation is covered by privilege, eventual disclosure of embarrassing information or poorly written investigative reports may be avoided. If the employer later chooses to release the information, the attorney-client privilege may then be waived as necessary.

While the investigation is pending, an employer may wish to suspend the employee in question with or without pay. Such a procedure tends to minimize disruption in the work place, and may help to diffuse a potentially volatile situation. If termination does not result, then the employee should be reinstated with full back pay.

All investigations of misconduct should begin with a thorough review of relevant documents, including performance evaluations and supervisor's notes on any employee misconduct. The investigator should then speak with all persons who have any knowledge of the relevant facts, and take detailed notes. In cases with any potential legal exposure to the employer, signed statements should be obtained from the witnesses to preserve their testimony.

After interviewing all witnesses, the investigator should then meet with the employee against whom the complaint was made and obtain his or her version of the events. The employee should be given a full opportunity to rebut adverse statements and to deny each allegation of misconduct. A signed statement should be obtained from the employee. This procedure enables the employer to tie down the employee's version of the facts prior to institution of legal proceedings, which prevents a discharged employee from later altering his or her story to suit a particular legal theory. Any new facts elicited in this interview should also be thoroughly investigated.

Once the investigation is complete, the investigator should assess the credibility of all participants and witnesses, and submit a report to management. If the investigator determines that misconduct did occur, then all forms of appropriate discipline should be considered, up to and including termination.

By use of misconduct investigations, employers eliminate the possibility of hasty action, and insure that a decision to terminate an employee for misconduct will be made on the basis of all relevant facts. In addition, such investigation provides an opportunity for an employer to obtain evidence and statements from witnesses and the employee against whom the complaint is made, which information may be more difficult to obtain following termination.

D. Handling the Termination

No one enjoys firing an employee. Handling a termination is often a difficult and emotional procedure. It is nevertheless a procedure that every manager must eventually confront. Terminations should be handled in as humane a manner as possible. Unfair treatment often causes morale problems among remaining employees, and may result in an angry or humiliated ex-employee intent upon seeking retribution against his or her former employer. By handling terminations in a fair and even-handed manner, employers are able to minimize and possibly avoid such problems.

1. Termination Procedure

In handling a termination, the employer should treat the terminated employee as if he or she were a valued customer of the company. Language that would be inappropriate in front of customers is also inappropriate in dealing with employees. Emotional responses to the situation should also be avoided. Just as one would never scream at or threaten a customer, managers should avoid becoming emotionally involved while implementing a termination decision. In any subsequent litigation, the conduct of the employer at or about the time of the termination of the employee will be closely scrutinized. Employers must therefore strive at all times during the handling of a termination to be professional and fair. In everything that is said or done, remember that the employer may eventually be forced to justify its conduct before a jury.

Prior to reaching the termination decision, the employee's personnel file should have been closely reviewed to insure that adequate documentation exists to support the termination decision. In addition, an assessment of potential legal liability should also have been completed. Internal review of all termination decisions by a human resources manager or member of senior management is highly advisable. Employers should not allow first-level supervisors to fire employees. Instead, the supervisor's recommendation to terminate an employee should be subject to higher review, with dismissals of long-term employees reviewed at the highest level of management. Such policies forestall hasty terminations, and insure fair and consistent treatment of all employees. Such practices

also allow an employer to "pick its witnesses." In other words, an employer is able to choose the decision maker, and thus choose its chief witness in any subsequent judicial proceeding.

In conducting a termination meeting or exit interview, at least two members of management should be present, which allows for corroboration should litigation ensue. Although opinions differ, the best policy is to give a truthful, albeit succinct, explanation of the reason or reasons for discharge, remembering that any statements made at the termination meeting will be closely scrutinized in any subsequent litigation. Presenting a truthful reason for termination allows an employer to place the employee in the position of having to present the employer's reason for termination when the employee is questioned by a governmental agency or prospective plaintiff's attorney as to the reason for the termination. By getting the reason for termination on the table, the employer may be able to head off a lawsuit. Giving a reason for termination also forces the employer to evaluate for him or herself the validity of the termination. Many employers, however, choose to give no reason for termination until required by legal process, thereby avoiding committing themselves to a single legal theory, and making damaging statements that may be later used against them. Unfortunately, this approach often leads the employee to believe that the employer has no valid reason for the termination. A final decision on whether or not to give a reason for termination will ultimately depend upon the individual facts of each case. The more complex the situation, the better advised an employer is to seek legal counsel to minimize legal liability prior to implementation of the termination decision.

2. Severance Agreement with Release

The question of whether to enter into a severance agreement with a release with a discharged employee depends on the individual circumstances of the termination. On the one hand, severance payments may allow an employee sufficient "breathing room" to obtain alternate employment. Also, if an employee has potentially viable legal claims, obtaining a release of liability will eliminate legal exposure and the potential cost of defending a lawsuit. On the other hand, tendering a legal release to a terminated employee may cause the employee to feel that the employer fears a claim and increase the chances that the employee will pursue such a claim.

Employers should recognize, however, that the days when employees were ignorant of their legal rights are, for the most part, over. With extensive media coverage of sexual harassment lawsuits and substantial jury verdicts for wrongful discharge, most employees are aware of the potential for legal action. In addition, it is common for the friends and co-workers of a discharged employee to advise seeking legal advice. It is thus the rare employee who would not consider consulting with an attorney concerning a termination but for being presented with a release.

Ultimately, the employer must decide whether or not to seek a release based upon the circumstances giving rise to the termination. Absent a contractual obligation or policy provision requiring severance, severance is not a right. If more than a token severance is offered, the employer should require a release in order to obtain the severance. Severance might involve the payment of

a lump sum, continuation of base compensation for a period of time, an offer to pay a terminated employee's health insurance premiums for a specified period, out-placement services, or some other consideration specifically tailored to the circumstances.

For an employee's release of a Title VII or Section 1981 claim to be valid, the employee must have signed the release "knowingly and voluntarily." Determination of what is "knowing and voluntary," however, is a difficult issue. Several courts have used a "totality of the circumstances" test to determine whether the settlement was entered into knowingly and voluntarily. At the very least, therefore, every release should include an acknowledgment that the release was signed knowingly, voluntarily, and as the employee's own free act. In addition, a release should provide that the employee has consulted with or, at a minimum, had the opportunity to consult with an attorney.

Release of claims under the Age Discrimination in Employment Act are governed by the Older Workers Benefit Protection Act (OWBPA). The OWBPA sets forth a number of specific requirements which must be satisfied before a release of an ADEA claim may be considered "knowing and voluntary," and therefore valid. Under the OWBPA, the waiver must:

- (1) Be written in a manner calculated to be understood;
- (2) Specifically refer to rights under the ADEA;
- (3) Waive only claims that arose prior to execution of the release;
- (4) Advise the individual to consult with an attorney prior to execution;
- (5) Provide for a twenty-one day "consideration" period; and
- (6) Provide for a seven-day revocation period following execution.

See 29 U.S.C. § 626(f). If the employee is terminated as part of a group reduction (i.e., if at least one other employee is terminated) and is offered a severance package with a release, the offer must remain open for 45 days and the employee must be furnished with information as to the ages and job descriptions of those employees eligible for the package, as well as the ages of employees in the same job description not eligible for the package. Any release of an employee's claims against his or her employer that does not meet the requirements of the OWBPA is invalid as to the waiver of any age discrimination claim.

A final consideration in obtaining releases is the issue of confidentiality. The release itself may contain confidentiality provisions prohibiting disclosure of the existence or terms of settlement. The release may also provide for recovery of damages resulting from breach of the confidentiality provision. Employers need to recognize that such provisions are extremely difficult to enforce. As a practical matter, however, they may succeed in deterring former employees from discussing the terms of settlement.

E. Post-Termination Conduct and Issues

Proper termination procedure does not end with implementation of the termination decision. A number of other issues may arise immediately following the termination, or at some time subsequent to termination. Employers must be prepared to recognize such issues, and to effectively address them so as to prevent post-termination difficulties.

1. Out-Placement Services

More and more employers are providing out-placement services to terminated employees. Such services, or their monetary equivalent, may be offered in exchange for execution of a release of liability. In addition, many employers have found that out-placement services tend to focus the attention of discharged employees upon future employment opportunities and options, and thus decrease the chance that such employee will obsess about the termination and pursue litigation.

2. COBRA Rights and Responsibilities

Under the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), employers are required to offer most terminated employees the opportunity to keep their membership in the company's group health plan at the employee's expense. In most circumstances, such continuation of coverage lasts for up to eighteen months following termination.

COBRA is applicable to virtually all private employers with twenty or more employees that have a group health plan. Employers covered by COBRA must notify qualified beneficiaries of their rights to continue health benefits. Qualified beneficiaries who wish to obtain continuation coverage must then elect to do so during a sixty (60) day election period. The only exception to this rule is if a covered employee is terminated for reasons of gross misconduct, in which case the employer is not required to offer continuation coverage.

Discussion of COBRA rights and benefits should be included in all exit interviews, whether a termination is voluntary or involuntary. At such interview, it is advisable to obtain from the terminated employee a written and signed acknowledgment that such employee has been advised of his or her COBRA rights. It may also be possible in the exit interview to present an employee with an election form.

Under COBRA, for the initial coverage, qualified beneficiaries electing continuation coverage may be charged a premium of up to 102% of the group health plan's cost of providing coverage for a similarly situated beneficiary not under continuation coverage. COBRA continuation coverage then extends as long as the employee continues to make timely payments of the required premiums, up to the last day of the maximum coverage period, which is normally eighteen months following termination. If an employer fails to notify an employee of his or her COBRA rights, then the continuation period can extend for eighteen months from the date of actual notification. Thus, an employee who has not received notification of COBRA rights may ultimately receive the benefit of continuation coverage for a period in excess of eighteen months.

3. Defamation

Over the past decade, the use of defamation actions by terminated employees has become increasingly common. It has been estimated that approximately one-third of all defamation actions filed today arise out of employment disputes. With such statistics in mind, employers must understand the basic components of the tort of defamation, and be able to recognize and avoid situations involving potential defamation liability.

Defamation may be based upon either oral or written communications. Slander involves oral defamatory statements; libel involves written defamation. In either case, the plaintiff must establish four elements to prove a defamation case:

- (1) That the alleged defamatory statement was one of fact, not opinion;
- (2) That the alleged defamatory statement was false;
- (3) That the alleged defamatory statement was published to a third person;
and
- (4) That damage resulted from publication of the alleged defamatory statement.

Thus, defamation involves a false factual statement communicated to a person other than the plaintiff that causes harm to the plaintiff.

Most commonly, defamation actions brought by employees stem from termination. For example, an employer might discuss an ex-employee's discharge for misconduct with friends, or might announce the reason for termination at a meeting of all employees. If the employer's statements are false, the ex-employee may have a cause of action for defamation.

Employers, however, are not without defenses. Truth is an absolute defense to defamation, as is an employee's consent to the publication or communication of an employer's allegedly defamatory statement. In addition, employers also have a qualified privilege to make certain necessary statements. Such qualified privileges arise whenever a communication is made:

- (1) To protect the speaker's legitimate interests;
- (2) To protect the recipient's or third party's legitimate interests;
- (3) Where the parties have a common interest in the subject matter; or
- (4) Where the communication is to a public official on a matter of public or general interest.

Most common of the above-listed qualified privileges in the employment context is the common interest doctrine, which provides that an employer is protected from defamation liability when both the employer and the recipient of the employer's communication have a common and legitimate

interest in such communication. For example, in conducting an investigation of alleged misconduct, an employer may be forced to ask questions of and make statements to other employees that could be considered defamatory. To the extent that such statements are made in the context of the investigation, and further to the extent such statements are in the interest of the company and its employees, then the qualified privilege would apply.

If an employer abuses a qualified privilege, however, then the privilege will cease to exist. Abuse of a qualified privilege normally involves excessive publication of a defamatory statement to an undue number of people or by using inappropriate means. In addition, if a plaintiff is able to show malice, the privilege may also be defeated.

In the context of termination, an employer's safest course for avoiding defamation liability is to follow a strict "need-to-know" policy. An employee should not be terminated in front of non-management employees or even in front of management employees with no interest in the termination, and discussion of the termination should only occur when absolutely necessary. In addition, whenever an employer makes a statement concerning the employee or the employee's termination, the employer should first consider potential liability for defamation, and how a jury might view the making of such a statement. When in doubt, the safest path is to simply make no comment.

4. References

In most instances, employers will have a qualified privilege to give references. Potential liability for defamation, however, nevertheless exists. Employers are therefore well advised to implement reference procedures designed to minimize potential legal exposure.

Employers should be cautious in providing references over the phone. Instead, employers should request that persons asking for references submit such request in writing. Such procedure allows an employer to maintain a written record of references made, and gives an employer an opportunity to carefully consider the potential for defamation. In addition, this practice guarantees that a request for a reference has been made by another employer for legitimate business reasons. Many times, discharged employees may have friends or relatives call the former employer in an attempt to set up the employer for a defamation lawsuit.

Opinions differ on the amount of information that should be given in a reference. The safest advice is that references should be limited to the employee's name, dates of employment, position held and rate of pay. Many employers encounter difficulty with such a limited procedure, however. Particularly in smaller communities, employers may feel compelled to provide colleagues with more detailed references about former employees in order to obtain reciprocal information in the future. If an employer feels that it is absolutely necessary to give out more than a basic reference, then the employer should limit such additional information to pure factual statements, preferably ones supported by documentation.

Employers should consider assigning responsibility for making references to a single manager. Such a practice insures consistency, and thus decreases the chance of discrimination claims. Such a practice also insures that references will not be given out without forethought and consideration. When a reference request is made, members of the company will simply refer the request to the designated manager, rather than releasing information that might result in legal exposure.

5. Blacklisting

Although most employers are aware of the potential for defamation liability, many are unaware of North Carolina's blacklisting statute. The statute makes it a misdemeanor for an employer, after terminating an employee, "to prevent, or attempt to prevent, by word or writing of any kind, such discharged employee from obtaining employment with any other person, company or corporation." N.C.G.S. § 14-355. Violation of this statute constitutes a misdemeanor, and is punishable by a fine not to exceed \$500. In addition, the statute provides that any entity violating the blacklisting law shall be liable "in penal damages to such discharged person, to be recovered by civil action." *Id.*

6. Replacement Employees

When a termination is implemented for economic reasons, employers will most likely not have to face the issue of hiring a replacement employee. In performance-based terminations or terminations for misconduct, however, special consideration must be given to hiring a replacement. This is especially true when the terminated employee was a member of a protected classification. For example, if a black employee is discharged for performance reasons and replaced by a white employee, the discharged employee may attempt to use such replacement as evidence of discrimination.

Obviously, an employer must choose a replacement employee based upon business needs. Nevertheless, it is important for employers to at least consider the legal repercussions of replacement employees. For example, if a 50-year-old employee is discharged and then replaced by a 55-year-old employee, the discharged employee will have a difficult time in asserting a claim for age discrimination.

IV. CONCLUSION

Today, employers simply must recognize and comply with the myriad requirements of laws relating to the employment relationship. The days when employers could forego prior planning and address employment situations on an ad hoc basis as they arise are over.

Although it is true that there is no “magic wand” which will insulate an employer from claims arising out of the employment relationship, it is also true that, by understanding the basic principals of employment law discussed above and developing a proactive approach to compliance with these laws, an employer can best position himself or herself to avoid financial liability.

APPENDIX – 10 PERSONNEL POLICIES/DOCUMENTATION EVERY EMPLOYER SHOULD HAVE IN WRITING

1. Applications. Employment applications should contain statements advising the applicant that employment with the company is at will and that any misrepresentation on the application may be grounds for termination. The application should also contain an authorization to obtain information from a prior employer, check records and references on employee, a statement specifying the job applied for and that the application will be used only in connection with the job applied for (or, if the application is to be held, for what period of time).

2. Employment At Will and Other Statements Needed in Employee Handbooks. An employee handbook should contain an initial statement to the effect that employees of the company are employees at will, and that nothing in the employment handbook creates a contractual employment relationship. This disclaimer language is designed to provide the employer with some protection against attempts by disappointed employees to convert employment at will to employment pursuant to the provisions of the handbook.

Provisions in the handbook should be drafted with the idea that someday a disgruntled employee may seek to contractually enforce that provision against the Company. Include a prominent (highlighted, underscored, capitalized) disclaimer that the provisions of the manual are subject to change by the employer without prior notice to the employees, and do not create a contract or any vested rights for the employees. The same type provision should be contained in connection with any benefits described in the handbook.

The manual should specifically state that employees of the company remain employees at will. Employers should avoid language indicating that the provisions of the handbook constitute an agreement on how the company will be operated, any references to permanent employment, termination only for cause, or job security as a benefit.

The manual should provide that, regardless of specified progressive discipline procedures, immediate termination always remains an option available to the employer, depending upon the circumstances. The manual should provide that any offenses specified as resulting in termination are examples, rather than exclusive bases for termination.

3. Equal Employment Opportunity/Non-Harassment Policies. Title VII of the Civil Rights Act of 1964 applies to employers with 15 or more employees. These equal employment policies communicate to employees and to government investigators the employer's commitment to comply with applicable equal employment laws. The provisions are also designed to afford some measure of protection to employers from liability to employees arising out of improper conduct by other employees. Although courts have held employers strictly liable for "quid pro quo" harassment (where an employer or employee with management authority requires or demands sexual favors of an employee in exchange for employment, promotion, or a continuation or increase of other

employment related benefits), courts recognize an effectively communicated and enforced non-harassment policy as a defense to “hostile work environment” claims.

Even if an employer chooses not to prepare a handbook, the employer should communicate to its employees and post written equal employment opportunity/non-harassment policies on the employer’s bulletin board. The policy should be drafted so that the employer is not assuming obligations in excess of those required by law. The policy should also specifically identify a responsible person (one who will follow through with an investigation and who will be able and available to testify if needed) as the initial contact person, with a provision that the employee should address any complaints to the President or Board of Directors if the matter is not effectively addressed by the initial contact person.

4. Conduct/Disciplinary Rules. Each employer should list conduct that is unacceptable in the workplace, and specify that such conduct will be grounds for disciplinary action, up to and including termination. The North Carolina Employment Security Commission recognizes defenses to unemployment benefits claims based on both “substantial fault” and “misconduct.” With respect to both defenses, the Commission hearing officers will determine whether the employee violated a policy that has been effectively communicated by the employer. Having the policy in writing, with a receipt signed by the employee, will suffice to both prove the existence of the policy and establish the employee’s knowledge of the policy.

Having and enforcing written disciplinary rules can also provide the employer with some protection in the event of an OSHA citation. One defense available to employers receiving citations for serious violations of occupational safety and health standards is commonly referred to as the ‘isolated employee misconduct’ defense. This defense arises under the definition of “serious violation,” which defines serious violation to exclude situations where the employer did not know, and could not, with exercise of reasonable diligence, know of the presence of the violation. In determining whether given conduct was in fact isolated employee misconduct, the Safety and Health Review Board considers evidence such as whether the employer has a written policy concerning violation of OSHA rules and whether employees violating those rules are disciplined. Failure to have such policies and failure to enforce such policies through discipline is considered to be evidence of employer ratification of violations and can defeat an “isolated employee misconduct” defense.

5. Family and Medical Leave Act. The Family and Medical Leave Act applies to employers with 50 or more employees and requires such employers to allow eligible employees to take a total of 12 work weeks unpaid leave during any 12 month period for one or more of the following:

- (a) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter;
- (b) Because of the placement of a child with the employee for adoption or foster care;

- (c) In order for the employee to care for the spouse, child or parent of the employee, if such spouse, child, or parent has a serious health condition;
- (d) Because of serious health condition that makes the employee unable to perform the functions of the position of the employee.

To be eligible, employees must have been employed for at least 12 months and must have worked at least 1,250 hours during the previous 12 months.

The Family Medical Leave Act contains a number of options favorable to employers. However, in order to avail themselves of these options, the employers must establish written policies electing these options. These options include:

- . the ability to avoid “stacking” of FMLA leaves by electing a “rolling” 12-month period measured backward from the date the employee uses any FMLA leave
- . avoid “stacking” of unpaid FMLA leaves on paid leaves by providing written notice and requiring that employees use accrued paid personal, vacation or sick time for the first part of an FMLA leave, to run concurrently with the leave. If leave for workers’ compensation qualifies for FMLA leave, the employer can provide notice that the leave also counts as FMLA leave
- . to require reasonable notice by employees of their intention to take FMLA leave
- . require medical certification for any serious health condition used as a basis for leave
- . require fitness-for-duty reports by the employees before returning to work
- . require employees on intermittent leave to temporarily transfer positions where such leave can be better accommodated
- . require employees to pay their regular portion of health insurance premiums. If the premium payment from the employee is more than 30 days late, the employer can provide written notice to the employee that the payment has not been received. Such notice must be mailed to the employee at least 15 days before coverage is to cease, advising that coverage will be dropped on a specified date at least 15 days after the date of the letter unless the payment has been received by the letter. If the employer has established policies regarding other forms of unpaid leave that provide for the employer to cease coverage retroactively to the date the unpaid premium was due, the employer may drop the employee from coverage retroactively in accordance with that policy. Additionally, the employer can recover its share of health plan premiums paid

during a period of unpaid FMLA leave if the employee fails to return to work after the leave has been exhausted or expired, unless the employee does not return due to reasons covered by the FMLA.

6. Sick Leave/Short Term Disability Leave. Pursuant to the Pregnancy Discrimination Act amendments to Title VII, an employer must provide the same benefits for pregnancy-related conditions as the employer provides for other conditions. Leave policies therefore apply to employees injured in non-work related accidents, work related accidents, employees unable to work due to illness, and employees unable to work due to pregnancy-related conditions. In fashioning a leave policy, the employer should consider whether such leaves are paid or unpaid and whether vacation and holiday pay continues to accrue during the leave. The employer should also consider setting a maximum length of time for such leaves, upon the expiration of which the employment relationship is automatically terminated. Such a policy can avoid the situation in which an employee, out of work due to disability or a worker's comp injury, is retained as an employee indefinitely. This policy can be drafted to apply to exempt as well as non-exempt employees.

7. Wage & Hour Policies. Employers should establish written wage and hour policies, in compliance with the Fair Labor Standards Act and the North Carolina Wage and Hour Act. Generally speaking, these policies will address pay periods, issuance of checks, define "exempt" and "non-exempt" employees and prohibit work "off the clock". In special situations, such as restaurants, the policy should address issues such as tip credit or tip pooling, child labor, etc. A policy against working "off the clock" and a record of enforcing the policy can be quite helpful in the event of wage and hour audit prompted by a disgruntled employee alleging unpaid overtime. North Carolina allows forfeiture of wages based on bonuses, commissions or other forms of calculation if the employer had a written policy providing for such forfeiture prior to the time the compensation was earned and the policy was communicated to the employee. Finally, North Carolina has very specific requirements for making deductions from compensation, which require written authorization and written notification.

8. Vacation. North Carolina Wage and Hour law requires that employers set forth the employer's policies and practices concerning vacation pay, including (1) the method of vacation calculation so that the employees know the number of days to which they are entitled; (2) whether or not vacation days may be carried forward from one year to another; (3) when vacation days must be taken; (4) when and if vacation pay may be paid in lieu of time off; (5) under what conditions and what amount vacation pay will be paid upon termination and (6) any circumstances which result in forfeiture of accrued vacation pay.

9. Confidentiality Policy. North Carolina courts recognize the right of an employer to restrain current and former employees from disclosure of confidential information and trade secrets, based on a tort theory arising out of the employer/employee relationship. Additionally, Section 66-153 of the North Carolina General Statutes provides the owner of a trade secret with a remedy by way of civil action for misappropriation of the trade secret. An employer wishing to obtain this

protection needs to characterize and treat the employer's confidential information as confidential. This characterization can be assisted by a confidentiality statement. However, the employer needs to be able to demonstrate the uniqueness of the information developed or used by the employer and efforts by the employer to maintain secrecy of information.

10. Open Door/Non-Solicitation Provisions. These provisions are designed to assist the employer in resisting union campaigns. If the employer has consistently enforced the policy as written, the employer should be successful in precluding distribution of union literature. One isolated exception, such as for a United Way campaign, should not render these provisions unenforceable. However, numerous exceptions can result in the policies being held unenforceable in the context of a union campaign.