Basic Employment Law

Manual for

Managers and Supervisors

Eighth Edition

Wolters Kluwer Law & Business

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Introduction

Hear the wake-up call

Hardly a week goes by without the media reporting that a company is being sued for employment law violations. Indeed, employment law cases continue to increase—so much so, in fact, that employment lawsuits continue to be one of the fastest-growing types of litigation. In particular, the last few years have seen a veritable "explosion" in class action litigation over workplace issues, including employment discrimination and wage-hour issues. During fiscal year 2011, 99,947 workplace discrimination charges were filed with the US Equal Employment Opportunity Commission (EEOC), the agency that enforces the federal employment discrimination laws, and the agency obtained \$455.6 million in relief. This is the largest number of annual charges received in the Commission's history. In 2011, the EEOC received record numbers of charges alleging retaliation (37,334). Although the numbers of charges with race (35,395) and sex (28,534) discrimination allegations declined slightly from 2010, charges with the two other most frequentlycited allegations increased: disability discrimination charges, to 25,742, and age discrimination charges, to 23,465. Several legal experts have noted the increase in disability-related charges, likely due to the ADA Amendments Act, and also the fact that the majority of harassment charges now filed are *not* sexual harassment charges but race, religion, or national origin harassment. All those charges potentially can wind up in court.

The costs to an organization sued for employment law violations can be staggering. In the past few years, several employment discrimination verdicts have awarded over \$100 million in damages; million-dollar verdicts are not unusual. Organizations have also been required to make changes to their policies and procedures in order to prevent future discrimination, including revising training, strengthening internal complaint procedures, identifying and remedying disparities in policies and procedures, and revising their performance management processes.

Given this pervasive legal climate, it remains crucial for managers and supervisors to be aware of the legal issues surrounding their dealings with employees. This Eighth Edition of *Basic Employment Law Manual for Managers and Supervisors* provides a basic understanding of how the employment laws impact issues that managers and supervisors face every day in their jobs. The book is designed to be a handy reference to help you as a manager or supervisor in complying with these laws.

Take action to avoid liability

Managers and supervisors must take action to avoid lawsuits. This book provides managers and supervisors with guidance that will help to prevent lawsuits and to reduce the risk of liability if their company is sued.

Key actions that the book teaches managers and supervisors to take to stay out of legal trouble include the following:

- Learn what the employment laws are and what rights and protections employees have under them.
 - Use only job-related factors as the basis for employment decisions.
 - Apply work rules in the same way to all employees.
- Treat people as individuals and in a respectful manner that recognizes the valuable contribution each person makes to the organization.
- Use performance appraisals and discipline not as punishment, but as positive tools for improving employee job performance or conduct.
 - Give employees honest, accurate feedback.
- Never discipline or terminate someone without first checking out whether doing so is fair, legal, nonretaliatory, and consistent with organization policies.
 - Document employees' performance.
 - Watch what you say:
 - Don't make rude or discriminatory remarks.
 - Don't make employment promises.
 - Don't interpret benefit plans.
 - Don't make false or mean comments about employees.
 - Don't discuss disciplinary issues concerning an employee except with persons who have a legitimate right to know.
 - Don't broadcast private facts about an employee.
 - Don't respond to a reference check without first checking organization policy.
 - Don't threaten employees who engage in union activity or any other protected activity.

- Take seriously employees' complaints about harassment, misconduct, wages, hours, job conditions, injuries, and organization practices that may harm the public or violate the law.
- Don't retaliate against an applicant or employee because he or she has opposed an unlawful employment practice, formally or informally, or because the employee or applicant participated in some way in an investigation, proceeding, or hearing about the unlawful employment practice.

Be a good manager

The principles covered in this book are not just useful in avoiding lawsuits; they also serve as basic steps to good human resources management. People management in general, including disciplinary action, should be viewed as the process of building a work force of productive persons. Use the information in this book first, to be a good manager or supervisor and second, to keep your company out of legal trouble.

November 2012

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Overview of Employment Laws

FEDERAL LAWS

Key federal employment laws that managers and supervisors should know about include the following:

Title VII of the Civil Rights Act of 1964 (Title VII). Title VII prohibits discrimination on the basis of race, color, religion, sex, or national origin.

Age Discrimination in Employment Act of 1967 (ADEA). The ADEA bans discrimination on the basis of age against persons who are 40 or older.

Americans with Disabilities Act of 1990 (ADA) (as amended by the ADA Amendments Act of 2008). The ADA forbids discrimination against qualified individuals with disabilities; the law also requires that reasonable accommodations be made to the known physical or mental limitations of qualified applicants or employees. The ADA Amendments Act significantly broadened the scope of individuals covered under the ADA by expanding the understanding of who is a person with disability. The amendments shifted the focus away from whether an individual is covered under the ADA toward employer compliance with the law.

Equal Pay Act of 1963 (EPA). Paying workers of one sex at a rate different from that paid to the other sex violates the EPA when jobs involve equal skill, effort, and responsibility *and* are performed under similar working conditions in the same establishment.

Immigration Reform and Control Act of 1986 (IRCA). IRCA prohibits discrimination on the basis of citizenship against persons who have a legal right to work in this country. (To comply with IRCA, all US employers must verify the employment eligibility and identity of all employees hired to work in the US after November 6, 1986, by completing the Form I-9, *Employment Eligibility Verification* for all employees, including US citizens. Employers who hire or continue to employ individuals knowing that they are not authorized to be employed in the US may face civil and criminal penalties. Human Resources departments usually handle this task.)

Family and Medical Leave Act of 1993 (FMLA). The FMLA guarantees covered employees up to 12 weeks of job-protected, unpaid leave each year for any one or more of the following reasons:

- the birth, adoption or foster care of a child
- the serious health condition of a child, spouse, or parent
- the employee's own serious illness or pregnancy

The FMLA also extends the maximum leave to 26 weeks for the spouse, child, parent or "next of kin" of injured military personnel to care for service members injured in the line of duty while on duty. Eligible employees are also entitled to up to 12 weeks unpaid leave due to a "qualifying exigency" arising from the fact that a spouse, child or parent is on active duty or has been notified of an impending call or return to duty.

Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). USERRA bans discrimination on the basis of past, current, or future military service. It also provides for military leaves of absence and reemployment of employees after military leave.

National Labor Relations Act (NLRA). The NLRA gives employees the right to unionize, the right to bargain collectively, and the right to engage in other activities for their mutual aid and protection.

Sarbanes-Oxley Act of 2002 (SOX). SOX, as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, gives whistleblower protection to employees of publicly traded companies (and their subsidiaries) and nationally recognized statistical rating organizations who provide information to governmental authorities about conduct they believe to be mail, wire, securities or shareholder fraud. Employees do not have to prove that actual shareholder fraud occurred before suggesting the need for an investigation. Rather, they need only demonstrate a reasonable belief that the fraud had occurred.

Genetic Information Nondiscrimination Act of 2008 (GINA). GINA bars discrimination and retaliation on the basis of genetic information relating to an employee or an employee's family member. Employers may not use genetic information in making employment decisions under any circumstances. Employers are also prohibited from acquiring genetic information about employees and their family members, except in specific circumstances. All genetic information about employees and their family members must be kept confidential under GINA, including information that an employee voluntarily discloses.

Lilly Ledbetter Fair Pay Act of 2009. Under the Lilly Ledbetter Fair Pay Act, an employee subjected to compensation discrimination under Title VII, the ADEA or the ADA may file a charge when:

- a discriminatory compensation decision or other discriminatory practice affecting compensation is adopted;
- an individual becomes subject to the decision or practice; or
- an individual is affected by the application of a discriminatory compensation decision or practice, including *each time* wages, benefits, or other compensation is paid, resulting in whole or in part from the decision or other practice.

This means that the time period for filing a claim restarts each time an employee receives a paycheck based upon a discriminatory compensation decision. The Ledbetter Act applies to all compensation discrimination claims pending on or after that date.

STATE LAWS

Statutes. Most states have employment laws that provide the same or similar rights as those provided under the federal statutes discussed above. Some state employment laws grant specific additional rights. For instance, discrimination on the basis of sexual orientation or gender identity, political affiliation, marital status, nursing mother status, gun possession or ownership, height or weight, unemployment status, or off-duty conduct may be prohibited under state legislation.

Common law. State common law (court-created law) is yet another source of employee rights. Below are some state common law theories under which an employee may sue a company:

- *Infliction of emotional distress*—the employee suffered severe emotional distress as a result of abusive treatment in the workplace.
- *Defamation*—a false or malicious statement (either written or spoken) was made about the employee that resulted in damage to the employee's reputation.
- *Invasion of privacy*—a supervisor publicly disclosed private facts about the employee, such as the details of a performance appraisal.
- *Interference with employment*—a supervisor tried to get the employee fired—or to botch his or her chances of getting or keeping a new job—in order to gain personal revenge or advantage.
- Fraud or negligent misrepresentation—the employee suffered harm as a result of reliance on false statements made to the employee about job security, performance evaluations, health hazards, or some other employment matter.
- Negligent employment (hiring or retention)—the employee was injured by a coworker whom the company knew or should have known could harm others.
- False imprisonment—the employee was detained or restrained against the employee's will.
- Battery—the employee was subjected to harmful or offensive contact.
- Assault—the employee was threatened with harmful or offensive contact.
- *Constructive discharge*—the employee resigned in response to working conditions that the employee found intolerable.
- Discharge in violation of public policy—the employee was fired for exercising a legal right, such as filing a workers' compensation claim; for satisfying a legal obligation, such as serving on a jury or making a required court appearance; or for reporting or protesting the company's illegal conduct.
- *Breach of contract*—an explicit written or spoken employment-related promise (such as a formal agreement to employ the employee for a set number of years) was broken.
- *Breach of implied contract*—an implicit employment-related promise (such as a supervisor's comments implying job security for the employee, or a personnel handbook statement implying that specific disciplinary procedures will be followed before anyone is fired) was broken.

VIOLATIONS ARE COSTLY

Court-ordered penalties. Remedies that courts may order for violations of employment rights include:

- Rehiring of someone who was illegally fired.
- Hiring of an applicant who was illegally refused employment.
- Back pay (payment of wages to an illegally fired employee for the period he or she was out of work).
- Double back pay for willful violations of certain laws.
- Front pay (payment of future wages that would have been earned if an employee had not been illegally fired).
- Compensatory damages for losses suffered as a result of illegal conduct. Losses that a company may be ordered to pay for include:

Nonmonetary losses (emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life);

Future monetary losses (expected losses due to inability to work, future medical expenses); and Past monetary losses (doctor's bills, money spent in seeking another job).

- Punitive damages to punish severe violations.
- Payment of an employee's attorney and expert witness fees.

Other consequences. Violations of the employment laws can also result in:

- Lost productive time of persons involved in resolving claims of unlawful conduct.
- Low employee morale.
- High employee turnover.
- Harm to the company's reputation and business.
- Government involvement in the company's business practices.

CAN MANAGERS OR SUPERVISORS BE LIABLE?

Personal liability of managers and supervisors under the federal employment laws is a hotly debated issue that remains unresolved. A number of courts have said only employers can be held liable. But others have concluded that managers and supervisors can be required in some circumstances to pay for their own illegal conduct.

However, regardless of their liability under the federal laws, managers and supervisors can be held personally liable when their conduct violates state common law (such as assault, battery, intentional infliction of emotional distress, wrongful discharge in some instances). Employees can also be made to pay for their own common law violations.

Discrimination/Fairness

KNOW WHICH GROUPS ARE PROTECTED FROM DISCRIMINATION

Awareness and knowledge are the keys to avoiding employment discrimination. Each supervisor or line manager—the management representative who has the most direct contact with employees—must be familiar with the types of discrimination that are not permitted in the workplace.

Federal laws. Federal equal employment opportunity (EEO) laws prohibit employers from basing employment decisions on any of the following personal traits that may apply to an applicant or employee:

- · Race or color
- Religion
- Sex (includes sexual harassment, equal pay, and pregnancy)
- Age (applies generally to persons age 40 or over)
- Disability (physical or mental)
- National origin
- Citizenship status (applies to US citizens or aliens who are authorized to work in the US)
- Veteran or military status
- Caregiver status
- Genetic information

State laws. Some state EEO laws also prohibit discrimination on the basis of:

- Arrest records
- Marital status
- Sexual orientation or gender identity
- State of residency
- Political affiliation
- Lawful off-duty activities
- Lactation

- Credit history
- Ownership or possession of firearms
- Victim status (domestic or sexual violence)
- Unemployment status

HOW DISCRIMINATION OCCURS

Job discrimination exists when employees or applicants who are members of a protected group or associated with members of a protected group are treated less favorably than others.

Intentional discrimination ("disparate treatment"). Unlawful discrimination is usually the result of a deliberate intent to base an employment decision on a person's protected status or association with a member of a protected group.

To avoid charges of intentional discrimination, managers and supervisors must:

- 1. Use only job-related factors as the basis for employment decisions—whether decisions about hiring, transfers, promotions, discipline, layoffs, terminations, pay, or job environment.
- 2. Never base an employment decision on a person's membership in a protected group.
- 3. Treat employees consistently and fairly.

Unintentional discrimination ("disparate impact"). Unlawful discrimination can also occur in the absence of any discriminatory intent. Unintentional discrimination takes place when a job requirement (such as a test, diploma, or height requirement) that applies to all employees tends to exclude members of a protected group. Such a requirement is against the law if it is not job-related and is not necessary to the business. Unintended age discrimination may occur, for example, when an employment policy or practice that applies to everyone, regardless of age, has a negative impact on applicants or employees age 40 or older and is not based on a reasonable factor other than age. If you think a company requirement is unfairly screening out members of a protected group, you should notify your Human Resources department.

While courts, including the US Supreme Court, continue to publicly struggle to find the right balance for causation and burden of proof requirements in employment discrimination cases, it is best for managers and supervisors to simply avoid engaging in discrimination altogether.

DISCRIMINATORY SITUATIONS

1. Discharging older workers and hiring younger, lower-paid workers. Workers 40 years of age and older are protected from employment discrimination on the basis of age.

- **2.** Requiring workers to speak only English in the workplace. Unless the employer can prove sound business or safety reasons why it needs to bar the use of a language other than English, it cannot do so.
- **3.** Disciplining an employee for not working on a day of religious observance. Employers are obligated to accommodate the religious needs of employees up to the point of undue hardship, and employees are required to minimize the potential conflicts.
- **4.** Firing a minority employee for poor job performance where the poor performance can be traced to a racially motivated failure to provide the worker with the proper training to perform the job.
- **5.** Firing an employee for absenteeism without determining whether the absenteeism was due to racially or sexually offensive conduct on the part of the employee's coworkers.
- **6.** Early retirement plans—retirement must be truly voluntary and give a reasonable amount of time for employees to decide whether or not to retire early.
- 7. Terminating employees due to relocation of a facility while offering jobs at the new location to similarly situated members of another class ... or offering relocation or commuting assistance to members of one class but not to members of another class.
- **8.** Refusing to hire a qualified applicant because of the need to accommodate that person's disability. An employer must provide a reasonable accommodation to the known physical or mental limitations of qualified applicants with disabilities unless it can prove that the accommodation would impose an undue hardship on its business.
- **9.** Firing a woman because she is pregnant, or limiting a pregnant employee's job duties based on pregnancy-related stereotypes.
- **10.** Reassigning a female employee to less desirable projects based on the assumption that, as a new mother, she will be less committed to her job.
- 11. Denying a male caregiver leave to care for an infant under circumstances where such leave would be granted to a female caregiver.
- 12. Discharging minority employees, employees of one sex, or older employees in such large numbers that it can be shown that there is a pattern of discharging only workers who are protected by EEO laws.
- **13.** Discharging a military reservist for excessive absenteeism when the absenteeism is due to his or her military service obligation.
- **14.** Firing an employee who has lodged a discrimination complaint or participated in the internal or external investigation of discrimination charges.
- 15. Rejecting a mother of preschool age children for an executive training program despite her having more managerial experience and superior performance appraisals than some of the

selected candidates. Although selectees were of both genders, selectees with preschoolers were limited to men.

- 16. Refusing to hire an applicant because of his association with an individual with a disability. While the applicant was the best qualified candidate for a position, his status as divorced with sole custody of a child with a disability prompted the employer to give the job to the next best qualified candidate. The employer concluded the applicant's caregiver responsibilities might negatively impact his job performance and attendance, and advised the applicant to apply for future openings should his caregiving responsibilities change.
- **17.** Deciding not to promote an employee to a position with significant public exposure out of fear that he will develop Parkinson's disease because he has a family history of the disease.
- 18. Failing to act upon a Muslim employee's complaints that his coworkers were making ethnic slurs and jokes. Employers have a responsibility to maintain a bias-free working atmosphere and must take immediate and appropriate corrective action to stop ethnic or other prohibited harassment.

A word on sexual orientation and transgender discrimination. Even though Title VII does not protect applicants or employees based on their sexual orientation or transgender status, managers and supervisors should not be quick to dismiss their discrimination or harassment complaints because federal law (Title VII) plainly prohibits discrimination based on sex stereotypes. For example, a self-described "effeminate" homosexual male may have a claim under Title VII because he was harassed by coworkers for his failure to comply with "male" stereotypes. Managers and supervisors have an essential role in identifying and preventing conduct that is inappropriate, so comments and adverse employment actions related both to sex stereotypes and to sexual orientation and transgender status should be prohibited in the workplace.

APPLY RULES AND STANDARDS FAIRLY

Managers and supervisors are "the employer" to most workers. That is, people may shape their opinion of an entire organization based, in large part, on the day-to-day relationship they have with their manager or supervisor. If people are treated unfairly by their immediate managers or supervisors, they may come to believe that the organization is unfair and a bad place to work. Lawsuits are likely to result. It is important that managers apply workplace rules and performance standards fairly.

There are two important elements to workplace fairness:

- 1. Respond to similar situations in a consistent fashion.
- 2. Treat people as individuals and in a respectful manner that recognizes the valuable contribution each person makes to the company.

CONSISTENT APPLICATION OF RULES IS BASIC TO FAIRNESS

Managers and supervisors must apply work rules and work standards consistently. If it looks like one approach is being taken in one case but not in another, people may assign improper motives to the action, even if no such motive was present.

The following actual cases show how companies got in trouble when work rules were not applied in a consistent fashion:

- *I* A black employee was fired for insubordination when she refused to stay late for overtime. The employee was able to prove race discrimination because white employees who left at the regular quitting time on the same day were not disciplined.
- 2 An employer engaged in "reverse discrimination" when firing a white employee for theft of cargo while retaining a black worker who was involved in similar misconduct.
- 3 Firing a female machine operator was discriminatory, even though the operator violated unwritten safety regulations, because males usually operated the same machinery in a similar fashion.

"Don'ts" for supervisors. To avoid inconsistency:

- Don't play favorites by constantly giving favorable assignments to the same individuals.
- Don't issue a warning to one employee who has broken a company rule and ignore the same conduct of another employee.
- Don't only document to build a case against troublemakers or people you want to fire.

 Document good performance as well as poor performance.

AVOID RETALIATION

Applicants, employees and even former employees are generally protected under employment laws from a wide range of retaliatory acts by employers. Retaliation is unlawful when it is directed against an individual who has engaged in protected activity, like asserting a statutorily protected right, opposing a prohibited employment practice, or participating in a statutorily authorized investigation or proceeding. Even an employee's verbal complaints may be considered protected activity. Since *anyone* can oppose unlawful discrimination and participate in proceedings intended to stop discrimination, the retaliation ban can protect individuals who were not themselves victims of the original claimed discrimination. Retaliation protections even extend to employees who speak out about discrimination and harassment not on their own initiative, but in answering questions during an employer-ordered internal investigation.

What types of employer conduct can be considered illegal retaliation? To be unlawful, retaliatory action must be something that an objectively reasonable employee would find significant enough that it is "likely to dissuade employees from complaining or assisting in complaints about discrimination." Prohibited retaliation can even include actions not directly related to the job or that cause harm outside of the workplace. Often retaliation charges come up when an employer wants to

discipline an employee. Consequently, managers and supervisors must review all of the circumstances surrounding the proposed discipline, keeping in mind a checklist of activities against which employers cannot retaliate.

To reduce the likelihood that employees who claim discrimination or otherwise assert protected rights will file retaliation charges, managers and supervisors should:

- Avoid unequal treatment. Treat employees who have claimed discrimination or participated in investigations or other proceedings on behalf of employees the same way as individuals who participated in proceedings on behalf of the employer.
- Establish an independent basis for discipline. If discipline is warranted, it can never be based on an employee's participation in protected proceedings. Since unlawful motive is the key, be careful not to create an appearance of unlawful motive.
- Don't try to limit participation rights. Promises not to file a charge or participate in proceedings should not be included in contracts requiring the use of alternative dispute resolution procedures, waiver agreements, employee handbooks, employee benefit plans, and noncompete agreements. First, these promises are generally not enforceable, and second, they may also amount to independent violations of the anti-retaliation provisions of employment laws.

TREAT PEOPLE KINDLY AND RESPECTFULLY

Kind, respectful treatment of employees will improve their performance and actually reduce the chance of discipline problems. How can a manager or supervisor focus on treating employees kindly and respectfully? Follow these tips:

- Ask yourself how you would like to be treated by your boss. Then treat people working with you accordingly.
- Let people clearly know what is expected of them as employees.
- Don't make unreasonable demands.
- Make work assignments in a courteous manner.
- Take the time to explain why the work people do is important.
- Stop to ask people for their help in solving problems.
- Make people feel valuable. Take time to thank them for their contributions.

Supervisor Statements as Evidence

SUPERVISORS' STATEMENTS BECOME EVIDENCE IN COURT

Statements made by supervisors or managers often become key parts of a court case alleging that an employee was unlawfully fired. The statements are used by employees to show that a company had unlawful motive for a firing or that a situation existed that unfairly forced the employee to resign. Here are some examples of statements made by supervisors that wound up being used as evidence to show that a termination was improper:

- Calling female employees "girls" while referring to male employees as "men" was evidence of both race and sex discrimination. The term "girl" could refer to a repulsive historical image in the minds of black employees and could also imply historical attitudes of female inferiority.
- A supervisor's *religious preaching* at the workplace showed that an employer failed to provide a workplace free of religious intimidation. Employees could believe that job security would be affected by their reaction to the supervisor's statements of religious belief.
- A manager's statement at a business dinner to a female coworker that he had heard that she had been seen engaging in *sexual activity* with another woman was sexual harassment.
- Remarks by supervisors referring to a Chinese worker as a "Chink" and as "tight eye" were the main pieces of evidence used by a court to find that a racially hostile work environment existed that unlawfully forced the worker to resign.
- Statements made by a supervisor at the *social setting* of a holiday dinner were used to show that an employee was not fired for poor performance. The supervisor praised the employee's work, indicated that she was an excellent employee, and requested at least five years' notice if the employee ever planned to leave the company. The employee claimed she was fired due to her age, and she used the statements to rebut the company's claim that poor performance was the reason for the termination.
- A supervisor's frequent *remarks about black employees* that included such language as "nig**rs" and "Swahilis" were used by a court to find a racially hostile workplace.
- A remark by a supervisor that "the lousy liberal *Jews are ruining the company* and the United States," along with the supervisor's expression of anger that a Jewish employee, in observance of his religion, left work early on Fridays to arrive home before sundown, could be used in court to show that the employee was forced to resign because of his religion.
- Remarks that college recruits had "very high" energy levels and were "very open *to learning new techniques*" were sufficient evidence to allow a jury award to a man who claimed he was fired due to age bias.

- A manager's use of the phrase "old dogs don't know how to hunt" could indirectly suggest that a 63 year-old employee was not fired because of declining performance.
- Statements that an employee would need to have "vision," embrace "new technology" and be "state of the art" raised an issue as to whether a company's reasons for replacing the 54 year-old employee were a cover-up for age discrimination.
- Performance evaluation statements that described a female accountant as "macho," advised her to "take a course in charm school" and suggested that she "overcompensated for being a woman" showed that the employer improperly engaged in stereotyping that amounted to sexual discrimination against the woman.
- A supervisor's comment that *a transsexual would lack credibility* when testifying before Congress because everyone would know that she had transitioned from male to female as *only a man would have such military experiences* showed the decision not to hire was based on discrimination due to sex stereotyping.
- Comments by a supervisor that included the words "bitch" and "whore" helped create a hostile work place environment, *despite the fact that the words were not directed at any particular individual*, because the words are offensive to women based on their gender.
- In response to an employee informing her supervisor that she was pregnant, the supervisor told her to look around to see how many pregnant women worked there. When the employee noted that there were none, the supervisor stated, "We plan on keeping it that way." After she complained to her supervisor that she felt that she was the subject of discrimination due to her pregnancy, he appeared to confirm her suspicion, stating that even if the employer had to pay for her maternity leave, she would not have a job when she came back. These statements supported the employee's claim that her subsequent termination was due to her pregnancy, rather than performance issues.
- Repeated and continuous use of *Nazi symbols and racial and ethnic slurs* in the presence of a Jewish employee gave rise to an inference that the decision to discharge him would not have been made but for the supervisor's discriminatory animus
- A remark allegedly made by a supervisor to a plaintiff that "you will never be promoted because of your complaints" was direct evidence linking her nonpromotion to her complaints about a lewd play written by the supervisor.
- A supervisor's statement that *he found an employee's prior EEOC complaint "morally repugnant,"* supported the employee's claim that he was the target of that supervisor's retaliatory behavior.
- Comments by a supervisor that another employee "got promoted because she was white" suggested that an employer committed racial discrimination.
- A supervisor's constant racist statements including frequently called African-Americans "nig**r," referring to African-Americans as only being good for drug dealers, stating that he was "tired of working with you people," and saying things like "you people are

poor" and "you people are always broke" — supported an African-American employee's claim that his termination was due to racial discrimination.

SUPERVISORS' PROMISES CAN CREATE CONTRACTS

Supervisors' promises to employees may be interpreted by courts as enforceable employment contracts. Following are examples of the types of supervisor statements that employees have alleged to create binding contracts:

- Statements made by a supervisor in annual reviews that "I am glad you work here and *hope* we will have many more years working together" and that the supervisor "desired a long-term working relationship" could have created an employment contract.
- Because an employee was told that he would be promoted within six months of starting a job and that he would *receive an annual salary* and a specific vacation period, the employee was entitled to have a jury decide whether those statements created an employment contract for a specified period of time.
- Statements that an employee could *expect job security as long as he did his job* and that he could expect a promotion if he did a good job were evidence that a contract of employment was created.
- A statement in an interview that potential employees did not have to worry about their jobs as long as the job gets done could be evidence of an offer of permanent employment.
- An employee used his supervisor's statement that "we will retire together" to allege in court that he had a lifetime employment contract.

SUPERVISORS SHOULD NOT INTERPRET BENEFIT PLANS

While it is the supervisor's responsibility to know the benefits policy of the employer, it is not the supervisor's job to handle inquiries regarding that policy. Questioners should be directed first to the employee benefit handbook (or the company's intranet site), if any, and then to the benefits administrator. Supervisors should make sure that each employee has a copy of the benefits plan and keep employees informed about any changes in the plan. However, supervisors should in no way attempt to interpret the plan's provisions for employees. Any such interpretation could become an enforceable oral modification to that plan.

SUPERVISORS SPEAK FOR THE COMPANY

The **key lesson** to be learned from the above examples is that statements made by supervisors can be directly attributed to their organization. Supervisors are considered to be **agents** of the employer. Any statements made by a supervisor can be attributed to the employer and used as evidence to show that a company acted improperly. Thus, supervisors should be careful that their statements relate only to their job of managing people to meet organization goals.

Documentation

WHY USE DOCUMENTATION?

There are several important reasons why a manager or supervisor should document actions taken while managing people:

- 1. Evidence. Documentation is essential to effective management. Personnel decisions are less subject to challenge and, when challenged, are more easily defended with documentation. Whether it's a court case, unemployment hearing, or grievance arbitration, if a company's documentation is not timely, accurate and written correctly, the company is likely to lose.
- 2. Performance management. Documentation can provide written goals or objectives that an employee must meet to improve performance, which can prevent misunderstandings about what an employee must accomplish to improve performance. And, with respect to accurate performance appraisals, thorough documentation ensures that a manager accurately remembers the goals that have been set for an employee; whether performance standards and goals were met; if they were not met, the reasons why they were not met; and how an employee has performed during the review period. Without documentation, a manager is unable to provide an employee with specific examples of performance. The more complete and accurate the documentation, the easier it is for a manager to make and substantiate an evaluation.
- **3. Communication.** The process of ongoing review and dialogue should be part of the manager/employee relationship. Documentation can improve feedback between a manager and an employee.
- **4.** A record for personnel actions. When managers need to substantiate their actions to others, they use documentation. If an evaluation, promotion, pay raise, or disciplinary action is questioned, documentation will be the key to supporting that action.
- 5. Notice to the employee. Documentation is evidence that an employee was actually or constructively aware of expectations and policies, verifies that the employee heard and understood those expectations and policies, and is evidence that policies have been consistently applied and enforced. Documentation supports a manager's position that the manager either did or did not take some action. Generally, employees are not bound by policies and procedures that have not been brought to their attention, nor should they be punished for conduct that they did not reasonably understand was a problem.
- **6.** Guidelines for future performance. Documentation eliminates any possible misunderstanding concerning work rules. It also allows a manager to state clearly what is expected of an employee in the future and to describe the consequences of future infractions. For example, when a manager becomes aware of an infraction, documentation can provide evidence that an employee was provided progressive discipline, was adequately warned about potential consequences, and was given a reasonable opportunity to improve.
- **7. Training and development.** Documentation can also be used as a record of an employee's training and development, how an employee performed during training, and the employee's career goals.

THE ROLE OF DOCUMENTATION IN DISCIPLINE AND TERMINATION

When disciplinary or termination decisions are being made, documentation is especially critical because it can provide a record that supports and substantiates the action, making personnel decisions less subject to legal challenge and, when challenged, easier to defend. More specifically, documentation is critical in these instances for the following reasons:

- 1. Adhering to company policies. Documentation can indicate whether an employee knew that the policy existed and whether a manager warned the employee about violating the policy. It can also show whether there were any mitigating circumstances, and whether the manager followed company policies and procedures when disciplining the employee.
- **2.** A valid business purpose. Documentation will provide evidence that a valid business purpose exists for the disciplinary or termination action, as well as show that the action does not violate any statute, policy, or specific employment agreement.
- **3. Evenhanded treatment.** Documentation can provide evidence that employees who have engaged in similar conduct were subject to similar discipline, thus supporting the position that an employee's protected status (race, color, religion, sex, national origin, age, disability, etc.) had nothing to do with the termination decision.
- **4. Accommodation.** If accommodation is an issue, documentation can provide evidence that an employer engaged in the interactive process of reasonable accommodation, taking into account a person's religion or disability.
- **5. Investigation.** It is important to conduct a thorough investigation prior to any disciplinary or termination decision. Documentation can provide evidence that an investigation was conducted and employees were given the opportunity to relate their side of the story.
- **6. Creating a record.** An employee's overall personnel record should support the disciplinary or termination decision. Thorough documentation can provide such evidence and substantiate the fact that an employee was told how to improve when he or she needed to improve and what the consequence of failing to improve would be.

Case illustration. The following case shows how managers can set standards and document whether employees are meeting those standards:

A 55-year-old manager was fired after new management took over a chain of retail stores. Claiming that she was fired because of her age, the manager showed that she had a long history of successful performance with the company and that she had been promoted several times. But the employer was able to prove that it had adopted higher standards of performance to improve its stores; the manager was not meeting those new, higher standards. By documenting each of the manager's failures and warning her repeatedly, the employer was able to prove every aspect of its case.

DOCUMENT COMMUNICATIONS WITH ALL EMPLOYEES

Documentation should be a standard and consistent practice. When documenting, you should create contemporaneous documents, including full name and full date at least once before using any type of shorthand notation. Never, ever backdate documents. Use a professional tone. At all times, you should avoid bias in your documentation. Similar job-related information should be documented for all employees; in other words, document both positive and negative performance, and don't document every little thing for one employee while documenting almost nothing for another. Inconsistent documentation may be used to show that a person was disciplined or discharged for discriminatory reasons.

As a general rule, any time you begin a sentence with "As we discussed before . . ." it's a good time to start documenting.

FAILURE TO DOCUMENT CAN CREATE LEGAL PROBLEMS

A supervisor's failure to document may lead to an inference of discrimination. It places your organization in a position of not being able to adequately defend itself against claims that it is treating some employees differently.

Failure to document also has a negative impact on employee relations. Employees may become poor performers simply because there is no communication from their supervisors, leading them to believe that their conduct or performance is satisfactory when, in fact, it is not. Only when a supervisor gets "fed up" or frustrated will a performance discussion take place with an employee. By that time, it may be too late and the company may lose a valuable employee.

DOCUMENTATION SHOULD GIVE DETAILS

Avoid making broad, general statements when documenting an employee's performance. Instead, deal with the facts, be specific, and tell the story. For example, don't say: "Alex is a liar." Give details about the false statement: "Alex said she couldn't come to work on Friday because her car broke down. I asked her for receipts for repairs. She couldn't provide them. I asked her for the name of the garage where the repairs were allegedly done and she couldn't remember."

In addition, you should avoid expressing personal opinions, accusations, or judgments, and you should not attempt to reach a legal conclusion in your documentation. When documenting, words such as "weakness," "shortcomings," "inadequacy," and "failure" should be avoided in favor of words describing a specific behavior, for example. Similarly, absolute expressions such as "always," "never," "every time," and "invariably" should be avoided unless they are completely accurate.

DOCUMENTATION SHOULD BE TIMELY

Timeliness is critical. Delay or inaction in documenting an incident can be construed as a waiver of a supervisor's right to take any action regarding that incident. You should make every effort to ensure that what you document has already been communicated directly to the employee.

THE EMPLOYEE SHOULD BE GIVEN A COPY

It is a good idea to give the employee a copy of the documentation. Giving the employee a copy will ensure that the employee is on notice of what is wrong and what must be changed. And, when possible, obtain the employee's signature or acknowledgment upon receipt of the copy. If the employee disagrees with the substance of the documentation, this acknowledgment provides the employee with the opportunity to express his or her disagreement, but the acknowledgment is proof that the employee received notice.

Benefits

SUPERVISORS SHOULDN'T GIVE ADVICE ON BENEFIT QUESTIONS

The best advice a manager or supervisor can give an employee regarding benefits and termination is no advice at all. There is an enormous potential for well-meaning comments about benefits made by a supervisor to lead to litigation. Although the law requires employee benefit plans to be in writing, the meaning of ambiguous written provisions can be modified based on statements made by company officials. That means that if a plan does not precisely spell out what will happen in a given termination situation, and the supervisor, in answering an employee's question, interprets the plan to provide benefits where none were intended, the employer could end up being sued for not paying benefits.

The answer to questions like "Will I get severance pay (and how much) if the company is sold and I continue to work for the new owner?" or "Will my health insurance coverage continue while I look for a new job after this worksite closes?" should be either "Consult your employee handbook" (or wherever the information is posted; for example, on the company intranet site) or "See the benefits administrator." The handbook and the benefits administrator should be the *only* sources of communication regarding benefits issues.

TELL EMPLOYEES TO CHECK BENEFIT PLAN DOCUMENTS

Senior management's role is to make sure that the company's termination policy and benefit plan documents are properly drafted. The supervisor's job is to make all employees aware of the existence of those policies and where to get accurate information. The supervisor should be able to say with confidence: "That question is addressed in the benefits information on the company intranet site" or "You should ask the benefits administrator." This will avoid putting the supervisor on the spot to answer questions and avoid having the supervisor interpret the plan.

WHAT CAN GO WRONG WITH SUPERVISOR BENEFIT STATEMENTS

Here is an example of what can go wrong when a well-meaning supervisor attempts to interpret a benefit plan:

Company A has decided to sell one of its divisions. A buyer has been found that is going to hire all of the Company A employees. The Company A severance policy contains words that can be interpreted in different ways. It states that any employee who is *terminated for reasons other than cause* will get one week's pay for every year of service with the company.

What does that mean? It can be read to mean that the employees will be entitled to severance pay since they are being terminated by Company A and will work for the buyer. At the same time, it can just as easily be argued that no severance pay is required since the employees are not losing their jobs when the buyer agrees to immediately hire them. In addition to the ambiguously worded plan, Company A has not designated someone to discuss benefits with employees.

After learning of the sale, employees start asking their supervisors whether they will get severance pay as a result of changing employers. Several employees go to the plant

supervisor, indicating that they see the change in ownership as a big change in their employment situation. Their question is: "We'll get severance pay, right?" The response from the supervisor is: "Well, it seems to me you are going to be terminated and the plan says severance pay will be provided when someone is terminated."

As a result of this unplanned discussion, the employer is facing a potential oral interpretation of the ambiguous severance pay policy. The supervisor's statement could be used as evidence to show that the company intended to provide severance pay when there is a change in ownership. That may be a result that the employer did not intend.

Interpreting benefit plans can be complex and lead to liability, so leave that task to the experts.

TERMINATIONS SHOULD NOT BE TIMED TO CUT OFF BENEFITS

A benefit issue that can arise in individual terminations concerns the employee who is about to have enough service with the company to attain eligibility for benefits. Under the Employee Retirement Income Security Act (ERISA), it is illegal to discharge an employee solely to prevent that person from vesting or qualifying for benefits.

This problem often occurs if an employee is required to work a given number of years before being eligible to receive benefits and is terminated shortly before fulfilling the time obligation. If the employee can show that the specific intent of the discharge was to stop the eligibility for benefits, the employee has the right to sue to recover the lost benefits.

- *I* An employer fired a long-term employee for allegedly violating the company's code of conduct. The discharge occurred just three months before the employee turned 55, at which point his pension benefits would have greatly increased. In 15 months, when the employee turned 56, he would have been entitled to take early retirement without any reduction in his benefits. According to the court, the closeness in time between the employee's 55th and 56th birthdays and the date of his termination met the threshold for establishing an ERISA discharge claim. Moreover, the fact that the employee's pension benefits were about to vest when he was terminated could serve as evidence of age discrimination.
- 2 The high cost of insuring a woman of child-bearing age prompted a company president to terminate its only full-time female employee after she refused to waive her participation in a newly established group health plan. The employee was awarded back pay and other damages in an ERISA suit, which alleged that the employer unlawfully discharged and discriminated against her with the specific intent to interfere with her attainment of benefits under the plan.
 - 3 A memo circulated among managers listing factors to consider in deciding whose positions to eliminate as part of a reduction in force included a factor for "competent but pensionable employees." The court found that this document indicated the company's decision to terminate the laid-off employees was unlawfully made to save on pension costs. This was especially true since the employees' excellent performance evaluations made it clear that competence was not the criteria being used but was rather benefits eligibility.

Because supervisors are often called upon to handle individual terminations, they must be aware of this potential problem. Where it is necessary to terminate an employee and the employee is about to qualify for or vest in benefits, extra care must be taken to document the reasons for the discharge in order to avoid any appearance that the discharge was designed to avoid paying benefits. While keeping careful records of reviews and employee evaluations is always an important part of a supervisor's duties, that task becomes essential in the context of a suspicious discharge.

Job Interviews

✓ CHECKLIST: THE INTERVIEW

Prepare ahead of time for the interview. To help you prepare, use the following checklist.		
	Review the job description.	
	Familiarize yourself with the duties of the job.	
	Know the promotional potential of the job.	
	Review the applicant's background information.	
	Develop a list of job-related interview questions; plan to ask all candidates the same general questions.	
	Arrange for a suitable place and time for the interview.	
	Allow enough time for the interview.	
To help you conduct the interview itself, consider using the following checklist.		
	Establish rapport.	
	Monitor your tone.	
	Outline interview objectives.	
	Ask questions.	
	Investigate red flags.	
	Listen actively.	
	Take notes.	
	Direct the interview.	
	Maintain candidate self-esteem.	
	Note nonverbal behaviors.	
	Solicit questions from the candidate.	
	Provide realistic information.	
	Avoid making promises.	
П	Close the interview graciously	

ASK APPLICANTS JOB-RELATED QUESTIONS ONLY

Interview questions that bear no actual relationship to applicants' abilities or qualifications for a job may have the effect of denying employment opportunities to members of protected groups. In choosing interview questions, ask yourself:

- 1. Will the answer to this question, if used in making a selection, have the effect of screening out members of a protected group?
- 2. Is this information really needed to judge an applicant's competence or qualifications for the job in question?

To protect against an applicant's assertion that illegal questions were asked or that an adverse employment decision was based on improper factors, it is a good idea to follow a standard format when possible and to keep a copy of the specific follow-up questions that were asked.

QUESTIONS TO AVOID

Race or color. Don't ask.

Sex and sexual preference. Don't ask.

Marital or family status. Don't ask: "Are you married?" "How many children do you have?" "How old are your children?" "Do you plan to have children?" "Are you pregnant?" or "Who will care for your children while you are at work?"

Age or date of birth. Don't ask unless age really is a job requirement. This may be necessary for minimum age requirements, in which case you can ask: "Are you of legal age to work?"

Birthplace, national origin, or ancestry. Don't ask. Be careful of small talk; don't even ask "where are you from?" as small talk.

Citizenship. Don't ask: "Are you a US citizen?" or "Do you plan to become a US citizen?" However, you may ask: "If hired, can you show that you are eligible to work in the US?"

Residence. Don't ask about an applicant's ownership or rental of a residence or length of residence at an address. However, you may ask: "Where can we reach you?"

Crimes. Don't ask: "Have you ever been arrested or charged with a crime?" or "Have you ever been convicted of a crime?" Your company's Human Resources department will be responsible for running criminal background checks. However, if there are any gaps in an applicant's employment record, you may ask why the applicant was not working during those times. If the applicant offers that he or she was convicted of a crime, find out: (1) what the crime was; (2) the date of the crime; and (3) whether he or she is subject to any parole requirements that would interfere with performance of the job. Don't make any employment decisions without consulting first with HR. Tell the applicant that a conviction won't automatically bar employment, and that the seriousness and date of the crime will be considered. Consult with HR about what to do next.

Health or disabilities. Don't ask. The Americans with Disabilities Act limits employers' ability to make disability-related inquiries or require medical exams at the following stages of the hiring process: (1) during the job interview; and (2) after applicants are given conditional job offers but before they start work. See below under "Job interview stage" for more information about disability.

Genetic information. The Genetic Information Non-Discrimination Act (GINA) prohibits employers from using an individual's genetic information when making hiring, firing, job placement, or promotion decisions. GINA also prohibits employers from intentionally acquiring genetic information, requires confidentiality with respect to genetic information (with limited exceptions), and prohibits retaliation. Genetic information includes, for example, information about an individual's genetic tests, genetic tests of a family member, and family medical history. Genetic information does not include information about the sex or age of an individual or the individual's family members, or information that an individual currently has a disease or disorder. Genetic information also does not include tests for alcohol or drug use. Genetic information and testing should be treated in the same manner as disability-related inquiries and medical exams under the Americans with Disabilities Act.

Where an employer is at risk of inadvertently obtaining genetic information, the employer may want to take action to avoid liability under GINA. For example, under the Americans with Disabilities Act, after a conditional offer of employment, employers are permitted to require as a condition of employment that individuals submit to a medical examination and sign an authorization for the release of their health records. As a result, employers may find themselves in receipt of genetic information. The risk associated with an inadvertent receipt of genetic information in this situation can be minimized by rewriting the employer's requests for medical records to clarify that custodians of health records release only non-genetic health information.

Current or future military service. Don't ask: "Do you have any military obligations?" or "Do you expect to serve in the military?"

Veteran status or military discharge. Don't ask: "Are you a veteran?" or "Were you ever in the military?" Instead, ask: "Do you have any special skills, experience, or training that would qualify you for this job?" Also don't ask: "What kind of military discharge did you receive?" or "Were you ever disciplined in the military?" But if an applicant happens to disclose that he or she was dishonorably discharged under sentence by a court martial, you should proceed as if the applicant had revealed a criminal conviction (see "Crimes," above).

Height and weight. Don't ask unless these standards are essential to the safe performance of the job.

English or foreign language skill. Don't ask unless necessary for the job for which the applicant is applying. If so, ask: "What languages do you speak, read or write fluently?"

Education. Don't ask whether an applicant has a high school or other specific educational degree unless that degree is a job-related requirement.

Religion/availability to work on weekends or holidays. Don't ask: "Are you active in any church organizations?" or "Do you have the names of any clergy as references?" If you want to

know if an applicant can work on weekends or holidays, don't ask: "Does your religion prohibit you from working on any days or at any time?" Instead, ask: "Can you work overtime?" "Can you work weekends?" "Are there any shifts that you can't work?"

Economic status. Don't ask about an applicant's credit ratings, financial status, bankruptcy proceedings, or past garnishments of wages. Instead of asking whether an applicant owns a car, ask: "Do you have a means of getting to work on time each day?" More and more employers are using credit checks for job applicants, but there are specific limitations on how to obtain that information legally. Some states have very restrictive credit check laws. Leave credit inquiries to your HR department.

Employment status. Be careful when asking about current employment. Prolonged periods of unemployment as a result of the recession that began in 2008 have brought attention to employers that will consider hiring only currently employed applicants. Although there is currently no federal law prohibiting this approach, the EEOC looks unfavorably on the practice because it potentially impacts certain protected classes disproportionately. In addition, the practice of excluding the unemployed from consideration for a job vacancy is prohibited by a handful of state laws.

Union or political affiliation. Don't ask.

Firearm possession or ownership. Don't ask; several states have restricted employer inquiries.

Alcohol or tobacco use. Don't ask. You may ask, however, whether an applicant would be able to comply with your organization's policies regarding alcohol or tobacco use.

Photograph. Never ask for a photograph before hiring.

Social media. Employers are using sources such as Google, LinkedIn, MySpace, Twitter, or Facebook to obtain additional background information about job applicants either before or after the job interview. While there are no laws prohibiting employers from using the Internet to search for information about prospective employees, employers must avoid the ethical pitfalls and should not use the Internet to obtain information that cannot be asked during an interview.

Employers must use caution when obtaining information from either Internet sources generally or social media in particular. For example, an employer should not "friend" an applicant to get around a "public" page and view an applicant's "private" page where information or images not meant for everyone's view may be on display (*i.e.* photos of applicant drinking, nudity, offensive language). Some employers, however, have gone even further by insisting that prospective employees disclose passwords to their social media sites as a condition of employment. Current employees, as well, have been asked to turn over their passwords as a condition of continued employment. Beginning in 2012, however, several states passed laws prohibiting employers from demanding user names, passwords or any other information related to social media accounts from employees and job applicants.

Employers should also keep in mind that accuracy, honesty and/or truthfulness may be an issue with the results of an Internet search, and the source of the information should always be an

important factor. Finally, be advised that reliance on Internet sources for applicant information can also result in thorny recordkeeping issues.

To minimize (though not obliterate) these risks, a conservative approach to Internet searches may be implemented; for example, searches are only conducted with prior written consent from the applicant, and only after a conditional job offer has been made.

Disability-related questions at the job interview stage. At the job interview stage, an employer may not ask applicants any disability-related questions or require them to take any medical exams, *even if* they are related to the job. Disability-related inquiries are questions that are likely to elicit information about a disability. During this stage, the employer cannot ask applicants questions about a disability, even if: (1) the applicant has voluntarily disclosed his or her disability status; or (2) the disability is visible to the employer.

Employers should focus interview questions about nonmedical job qualifications designed to determine an applicant's qualifications for a job. At this stage, don't ask: "Do you have any physical or mental disabilities that will keep you from performing this job?" "Do you have a drug or alcohol problem?" or "Have you ever received workers' compensation benefits?" Questions that are not likely to elicit information about a disability are always permitted, like asking about applicants' general well-being. Employer's can also ask: "Given the description of the job duties, can you perform any or all of the job duties with or without reasonable accommodation?" or "Can you meet my attendance requirements?" You can also ask applicants to describe how they will perform any or all of the job duties, as long as *all* applicants for the job are asked to do this.

Medical exams are procedures or tests usually given by a health care professional or in a medical setting that seek information about an individual's physical or mental impairments or health. They can include vision tests; blood, urine, and breath analyses; blood pressure screening and cholesterol testing; and diagnostic procedures, such as x-rays, CAT scans and MRIs. During the job interview stage there are a number of procedures and tests an employer can perform that generally are not considered medical exams, such as: (1) tests to determine the current illegal use of drugs; (2) physical agility tests (that are not considered medical); (3) psychological tests that measure personality traits such as honesty, preferences and habits; and (4) polygraph examinations.

Reasonable accommodations during the interview. Employers are also required to provide applicants who have disabilities with a reasonable accommodation for the job interview if one is requested, like providing applicants with readers or sign language interpreters. While an employer does not have to provide an accommodation that requires significant difficulty or expense, the employer cannot refuse to provide an accommodation solely because it entails some costs, either financial or administrative.

Conditional job offers. After an applicant is given a conditional job offer but before starting work, an employer may ask disability-related questions and conduct medical exams, regardless of whether they are related to the job, as long as the employer does so for *all* entering employees in the same job category. At this stage, the employer can ask about the applicants' workers' compensation history, prior sick leave use, illnesses/diseases/impairments, and general physical/mental health. A job offer is real if the employer has evaluated all relevant nonmedical information that it reasonably could have obtained and analyzed prior to giving the offer.

An employer cannot withdraw a job offer solely because a disability-related question or medical exam reveals that an applicant has a disability, however. For example, an employer cannot withdraw an offer to an HIV-positive applicant because of concerns about customer and client reactions or because the employer might assume that anyone with HIV will be unable to work long and stressful hours. The employer can only withdraw a job offer if it can be shown that the applicant: (1) was unable to perform any or all job duties with or without reasonable accommodation; or (2) posed a significant safety risk. At this stage, managers and supervisors should consider whether any reasonable accommodations would enable the applicant to perform the job's essential functions and/or reduce any safety risk the applicant might pose.

QUESTIONS TO ASK

The following questions are examples of those that will help you solicit valuable information from the candidate while avoiding the potential for legal troubles. Each question can be personalized to fit your organization.

What type of work environment brings out your best performance?

What type of work environment are you least likely to thrive in?
What did you like best/least about your last job and why? Why do you want to leave your current position?
Considering your greatest accomplishments in previous roles, what were the factors that allowed you to be successful?
Do you fully understand the job as we have described it? If so, could you please explain it back to me so that I know we have reached the same understanding?
Are you fully confident that you have the skills to succeed in this role and if not, what makes you think you can learn them quickly enough?
Do you feel the concerns we have shared with you should in fact be concerns?
If you were to draft your own performance appraisal, what would you like to be measured on and why?
Tell me about a difficult work situation or project you experienced and how you overcame it.
What makes you most optimistic about your chances of success here? What are the differences in the job or the environment that makes this a better fit than other jobs you have had or considered?
Will you please take three days to consider this opportunity and within those three days, please contact me to let me know if you feel this is the right decision for you?

ASK APPLICANTS THE SAME QUESTIONS

Failure to ask each applicant the same questions potentially can lead to hiring discrimination claims. Have *one* list of questions that you will ask of *all* applicants. Keep that list for each applicant interviewed, and document that you asked all interviewees the same questions.

DON'T MAKE EMPLOYMENT PROMISES

Promises made to job applicants may be interpreted by courts as implied employment contracts. Therefore, avoid statements like these:

- 1. You will have a long, rewarding and satisfying career ahead of you.
- 2. We will pay your moving expenses after one year of service.
- 3. You will be with us as long as you do your job.
- 4. You will not be fired without just cause.
- 5. This is a company where you can stay and grow.
- 6. In this company you'll have lots of job security.
- 7. Your salary will be \$xxx annually. (Instead, quote salary on a weekly or monthly basis.)
- 8. There are no layoffs within this organization.

TAKE NOTES DURING THE INTERVIEW

Notes that you can refer to later will help you make an informed hiring decision. Your notes should contain the information listed below, as long as it is truly pertinent to the job that is available.

- On time or late for interview.
- Skills, knowledge, qualifications, training for the job.
- Specific experience in similar duties using similar skills.
- Potential to handle all aspects of the job.
- Reason for leaving prior employer.
- Reason(s) for gaps in employment record.
- Probability of success for job expansion—growth and promotion potential.
- General intelligence, alertness, comprehension.

- Ability to communicate orally—thoughts logically and clearly expressed (if applicable).
- Writing skills—evaluation of writing sample (if applicable).
- Desire demonstrated for the job—initiative and enthusiasm.
- Attitude toward work and dealing with others.
- Honesty and sincerity.
- Personal manner—confident, composed, nervous, etc.
- Personal feelings toward present and prior employers.
- Ability to do the essential job functions with or without reasonable accommodation.
- Hobbies, community activities—look for job-related qualities, such as leadership, responsibility, initiative.

All documentation relating to the interview should be kept for up to one year after a decision to hire or not has been made. Of course, if the applicant is hired, hiring documentation will become part of his or her personnel file anyway.

ALTERNATIVES TO IN-PERSON INTERVIEWS

Due to the growth of Internet-based job searches and remote or telecommuting employees, an in-person interview is not necessarily required for every job. Alternatives such as phone or even videotaped interviews are an option. Phone interviews or videotaped interviews can be conducted by placement or employee search firms, allowing hiring managers to listen or view a set of recorded or videotaped interviews and then select a few candidates from a larger pool of applicants. As desired, the organization can then invite the few selected candidates in for a final interview.

In addition to saving time and resources, electronic interviews allow hiring managers to compare responses of multiple interviewes; listen to the recordings or view the tapes at their convenience; and view, analyze and discuss the interviews with other managers, regardless of location. But there are disadvantages to such "canned" interviews, including stifled dialogue, no opportunity for follow-up questions, and candidates' varying comfort levels with being recorded or videotaped that may inaccurately convey their qualifications for the job. Especially with respect to videotaped interviews, some candidates may be taped using more sophisticated equipment than others. These videos may unfairly represent one candidate over another and "unlevel" the playing field.

Note that if you decide to utilize videotapes in the interview process, they should be treated just as you would any documents or notes developed during the interview process and therefore retained for up to a year after a decision to hire or not has been made.

Harassment/Improper Behavior

WHAT IS SEXUAL HARASSMENT?

Sexual harassment prohibited by law is unwelcome verbal or physical conduct of a sexual nature when:

- 1. submitting to the conduct is made either an explicit or implicit term or condition of employment (such as promotion, training, overtime assignments, leaves of absence); *or*
- 2. submitting to or rejecting the conduct is used as a basis for making employment decisions; *or*
- 3. the conduct is severe or pervasive and substantially interferes with an individual's work performance, or creates an intimidating, hostile, or offensive work environment.

IMPORTANT FACTS ABOUT SEXUAL HARASSMENT

- Sexual harassers may be coworkers, management personnel, or even nonemployees (such as customers, vendors, sales representatives, or repair workers).
- Both men and women may be the victims of sexual harassment.
- Either a woman or a man may be the harasser.
- The parties to a sexual harassment lawsuit do not have to be of the opposite sex.
- The person who brings a sexual harassment lawsuit does not have to be the one at whom the sexual conduct was directed—it may be someone else who was affected by such conduct.
- Submitting to the conduct does not necessarily mean the conduct was welcome.
- A single incident of unwanted touching, if severe enough, can amount to sexual harassment.
- Managers and supervisors can be sued personally for sexual harassment.
- An employee who has joined in with sex jokes or sexual banter in the workplace may become a victim of sexual harassment.
- Abusive behavior aimed at one sex that is not "sexual" in nature (e.g., a supervisor who is constantly rude to female employees and tells them that they are "stupid bitches") can be unlawful harassment.

OTHER TYPES OF ILLEGAL HARASSMENT

Sexual harassment is not the only type of harassment that is against the law. Harassment on the basis of race, color, religion, national origin, genetic information, age, disability, or military

status is also illegal. Nonsexual harassment of an employee because of the employee's gender is unlawful as well.

Illegal "harassment" on the basis of race, color, religion, national origin, gender, disability, genetic information, veteran or military status, or age exits when:

- 1. an employee is subjected to verbal or physical conduct that shows hostility toward the employee because of the employee's race, color, religion, national origin, gender, disability, genetic information, veteran or military status, or age; *and*
- 2. the conduct has the purpose or effect of interfering with the employee's work performance or opportunities, or creating an intimidating, hostile or offensive work environment.

Non-minority workers as well can be subjected to harassment.

HARASSMENT EXAMPLES

- Offering or implying an employment-related reward (such as a promotion or raise) in exchange for sexual favors or submission to sexual conduct.
- Threatening or taking a negative employment action (such as termination, demotion, denial of a leave of absence) if sexual conduct is rejected.
 - Unwelcome sexual advances or repeated flirtations.
- Unwelcome intentional touching of another person or other unwanted intentional physical contact (including patting, pinching, or brushing against another person's body).
 - Unwelcome whistling, staring, or leering at another person.
- Asking unwelcome questions or making unwelcome comments about another person's sexual activities, dating, personal or intimate relationships, or appearance; their religion or religious practices; or their disability.
 - Unwelcome sexually suggestive or flirtatious gifts.
 - Unwelcome sexually suggestive or flirtatious letters, notes, e-mail, or voice mail.
- Conduct or remarks that are sexually suggestive or that demean or show hostility to a person because of the person's race, color, religion, national origin, gender, disability, genetic information, veteran or military status, or age (including jokes, pranks, teasing, verbal abuse, obscenities, obscene or rude gestures or noises, slurs, epithets, taunts, negative stereotyping, threats, intimidation, blocking of physical movement, refusal to cooperate in work that requires a team effort, etc.).
- Displaying or circulating pictures, objects, or written materials (including e-mail, graffiti, cartoons, photographs, pinups, calendars, magazines, figurines, novelty items) that are sexually

suggestive or that demean or show hostility to a person because of the person's race, color, religion, national origin, gender, disability, genetic information, veteran or military status, or age.

RUDE BEHAVIOR THAT DOESN'T QUALIFY AS HARASSMENT

Even if rude treatment of employees in the workplace does not meet the legal definition of harassment, the conduct still should not be tolerated. Although not illegal under an employment statute, the conduct may be considered a common law civil wrong, such as assault, battery, or intentional infliction of emotional distress. Depending on its severity, the conduct may even violate a criminal statute. Moreover, an employee who finds the conduct so intolerable that he or she quits may bring a constructive discharge lawsuit.

TAKE COMPLAINTS ABOUT IMPROPER BEHAVIOR SERIOUSLY

Even if the person who complains about alleged harassment or other rude conduct is a chronic complainer or if the behavior initially does not seem to be improper, take every complaint seriously. Further investigation may reveal that the conduct is unlawful or against employer policy. Moreover, if the employee quits because he or she has come away with the impression that the organization did not take the complaint seriously, the employer could face a constructive discharge lawsuit. Show the employee that the complaint is taken seriously by listening attentively and refraining from comments like "You're overreacting—I'm sure no harm was intended."

RESPONDING TO A COMPLAINT OF MISCONDUCT

Reporting harassing or offensive conduct can be a hard thing for an employee to do. It's the job of managers and supervisors to make it as painless as possible. Effectively responding to a complaint of inappropriate conduct requires that managers and supervisors act as a "LEADER."

Listen: Take every complaint seriously, no matter how silly or insignificant you personally believe the behavior to be. Adopt a nonjudgmental, professional attitude toward the employee who brought the complaint.
Encourage: Thank the employee for coming forward; try to make the employee feel calm and comfortable about talking to you; acknowledge the employee's feelings.
Ask questions: Get answers to who did what to whom, when, where, how, and why. Ask if there are any witnesses; ask if there is any documentation, such as letters, notes, or email messages that may support the complaint. Find out if the employee is afraid of retaliation from the person who committed the alleged improper conduct. Ask what the employee wants to happen to resolve the problem, but don't promise the employer will take that action.
D ocument: Immediately create a written record of the employee's statement; make sure it reflects exactly what was said; ask the reporting employee to review and sign your documentation.
Explain: Explain your employer's policy to the employee and that there will be a prompt and through investigation with appropriate remedial action taken if misconduct is found;

answer any questions the employee may have; assure the employee that your conversation is confidential, though not a secret, and that no retaliation will occur. Caution the employee of the risk of personal defamation liability if malicious or false statements are made during the investigation; stress the importance of confidentiality in protecting the integrity of the investigation, but do not threaten to discipline an employee if confidentiality is breached.

Report: Immediately and confidentially submit the information to Human Resources or other management official as outlined in your employer's policy. Never try to handle the situation alone.

WHAT IF NOBODY HAS COMPLAINED?

What if a supervisor has not received a complaint but suspects that harassment or other improper behavior is going on? Regardless of how the supervisor became aware of the suspected misconduct, the supervisor must *immediately* and *confidentially* notify the person designated by company policy to investigate improper behavior. Even if the suspected misconduct seems welcome or involves persons who work in another department, the supervisor still must report it.

Reporting the suspected misconduct will ensure that a thorough investigation will take place and that appropriate corrective action will be taken if the investigation confirms the supervisor's suspicions. By taking such action, legal problems can be avoided. On the other hand, failure by the supervisor to report the conduct can result in liability. For example, an employer will be held liable for sexual harassment if a supervisor knew about the harassment but ignored it.

BE DISCREET

The privacy rights of both the accuser and accused must be respected by management at all times. Never discuss a complaint against an employee or information concerning the complaint with anyone who does not have a legitimate interest in and duty to receive that information. Ensure that all of your communications about the matter are strictly private and cannot be overheard. Never broadcast the results of an investigation as an example to others or as a training tool.

Workers with Disabilities/Injuries

WHO IS PROTECTED FROM DISABILITY DISCRIMINATION?

The Americans with Disabilities Act (ADA), as amended by the ADA Amendments Act (ADAAA) and other disability laws, bans job discrimination on the basis of disability against any person who is a "qualified individual with a disability." The ADAAA broadened the definition of who is disabled under the ADA, making more persons subject to the Act's nondiscrimination and reasonable accommodation protections. Accordingly, managers and supervisors need a working understanding of disability laws so they don't inadvertently discriminate against a qualified employee with a disability.

Two requirements must be met before a person is protected from disability bias: (1) the person must have a disability; and (2) the person must be qualified for the job.

"Individual with a disability." A person has a disability if the person falls into *any* of the following three categories:

- 1. The person has a physical or mental impairment that substantially limits one or more of the person's major life activities (a non-exhaustive list of "major life activities" includes caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working. "Major life activities" can also include the operation of major bodily functions).
- 2. The person is not currently impaired, but has a record of a physical or mental impairment that substantially limited a major life activity.
- 3. The person has no such impairment but is regarded by the employer as being impaired. An individual only has to establish that the employer discriminated against him or her because of the impairment, regardless of whether the impairment limits or is perceived to limit a major life activity. Individuals who have impairments that are "transitory and minor" (with an actual or expected duration of six months or less) cannot be regarded as disabled, however.

Managers and supervisors should not engage in disability status determinations. Know that unless you are a doctor, you should not make any medical judgments about a person with a disability. Managers and supervisors should avoid, as much as they possibly can, any discussions of an employee's health, physical restrictions or similar issues.

Is pregnancy a disability? No, pregnancy is not an impairment under the ADA, and as a result, an employer's duty to reasonably accommodate a pregnant employee doesn't come into play. However, impairments resulting from pregnancy (for example, gestational diabetes, severe morning sickness, other complications, etc.) could be a disability if they substantially limit a major life activity.

Qualification. An individual with a disability is "qualified" for a job if the person meets *both* of the following requirements:

- 1. The person meets the employer's job requirements for educational background, employment experience, skills, licenses, and any other qualification standards that are related to the job; and
- 2. The person can perform the essential functions of the job either with or without a reasonable accommodation of the person's disability. (Employers should carefully examine each job to determine which functions or tasks are essential to performance.)

The ADA does not require employers to hire unqualified applicants with disabilities, nor does it require employers to retain employees who can no longer perform the essential functions of their jobs because of a disability. However, employers may not: (1) use unnecessary qualification standards to weed out applicants with disabilities; or (2) rely on inaccurate job descriptions to determine that an employee with a disability can no longer perform her job. As a practical matter, hiring managers and supervisors should ask questions about the employee's ability to perform those job functions in the written job description. Be careful not to phrase those questions in terms of a disability, however.

Substantially limits. Determining whether an individual is experiencing a substantial limitation in performing a major life activity is intended to be a common-sense assessment based on comparing an individual's ability to perform a specific major life activity with that of most people in the general population. An impairment need not completely prevent, or significantly or severely restrict, the individual in performing a major life activity to be considered "substantially limiting." In addition, an impairment that is either episodic or in remission, like asthma or cancer, constitutes a disability if it would substantially limit a major life activity when the impairment is active. If you have questions about a particular situation involving an employee, consult with your Human Resources representative.

A simple physical characteristic is not a physical impairment. Only in rare cases has obesity been considered a disabling impairment under the ADA, typically only when an individual meets the medical definition of morbidly obese. But some experts suggest that the ADA Amendments Act, with its broader definition of disability, could cover weight discrimination and perhaps personal appearance based on disfigurement. This may include individuals who are overweight but not morbidly obese.

Weight issues in particular put employers in a very difficult position. While there is no question that weight bias exists, there also is little doubt that obesity, and the underlying medical problems that often accompany it, causes an increase in lost time, health insurance costs, and, less often, safety problems. As a result, managers and supervisors must be extremely cautious when confronted with an issue involving an employee's weight or personal appearance. When in doubt, seek help from HR.

Mitigating measures. Whether an impairment substantially limits a major life activity is determined without regard to the use of mitigating measures (*i.e.*, medication or medical supplies, assistive technology, reasonable accommodations, aids or services, physical or behavioral therapy, and learned behavioral or adaptive neurological modifications). For example, the effect of the

insulin an individual uses must *not* be considered when determining if his or her diabetes is a disability. The one exception to this rule is the use of "ordinary eyeglasses or contact lenses." So, when determining if an individual is substantially limited in the major life activity of seeing, the individual's vision should be assessed in its corrected state when using eyeglasses or contact lenses.

Relationship with person with a disability. Persons who have a relationship or association with a person with a disability are also protected from discrimination; this is often known as associational discrimination. This means that managers and supervisors are prohibited from making negative employment decisions based on unfounded concerns about the known disability of a family member—or anyone else with whom the applicant or employee has a relationship. For example, it is illegal to refuse to hire a qualified applicant because the applicant does volunteer work helping people with AIDS. Case law suggests that it would be illegal to fire an employee who requested a modified schedule in order to care for her son with muscular dystrophy, or to cut off health benefits to an employee because the employee's son had a disability requiring substantial care. Also, it is improper to take an adverse employment action against someone on the basis of their advocacy of persons with disabilities.

THE REASONABLE ACCOMMODATION DUTY

Employers have a duty to provide reasonable accommodations to the known physical or mental limitations of a qualified person with a disability, and managers and supervisors are often on the front lines of these requests. However, only individuals who are actually disabled or have a record of a disability are entitled to accommodations; individuals who are regarded as disabled are not entitled to accommodations. For example, an employer would have no duty to accommodate an HIV-positive employee who did not make his illness known to the employer and who bore no signs of the illness.

A reasonable accommodation is any change or adjustment to a job or work environment that permits a "qualified" applicant or employee with a disability to participate in the job application process, to perform the essential functions of a job, or to enjoy benefits and privileges of employment (such as access to meetings, lunchrooms, or social events) equal to those enjoyed by employees without disabilities.

Accommodation examples:

- Job restructuring
- Part-time or modified work schedules
- Leaves of absence
- Reassignment to a vacant position
- Acquiring or modifying equipment or devices
- Readers or interpreters
- Personal assistants

- Facility modifications
- Working from home
- Adjusting or modifying exams, training materials or policies

Notice of need for accommodation. Reasonable accommodations must be made only to the *known* physical or mental limitations of persons with disabilities. Generally, an accommodation request from an employee or applicant triggers the duty to accommodate. However, if an employee with a known disability is not performing well, a manager, supervisor or properly designated individual in the company, like an ADA coordinator, may want to inquire whether the employee needs an accommodation.

Take all requests for accommodation seriously. If an appropriate accommodation is not readily apparent, an employer must make all reasonable efforts to identify one. The best way to do this is to consult informally with the applicant or employee about potential accommodations that would enable the individual to participate in the application process or perform the essential functions of the job. Do not immediately refuse the request or retaliate in any way against the individual for making the request. Instead, ask how the employee may be helped.

Arriving at an accommodation occurs through give-and-take with the person who requests the accommodation. This is called the interactive process. It is important to promptly respond to an employee's request and develop appropriate time frames within which accommodations are provided. Consider putting procedures for providing reasonable accommodations in writing (though this may not be necessary, particularly if you are a very small employer and have one person designated to receive and process accommodation requests).

While participating in the interactive process, employers must be careful not to condition continued employment on impossible-to-fulfill conditions. Similarly, employers must consider reassignment as an accommodation if the employee is qualified to perform the duties of the new position. Most importantly, managers and supervisors need to avoid immediate rejection of potential accommodations and direct the requests to HR or whichever department is responsible for accommodation requests.

If the consultation does not identify an appropriate accommodation, the manager, supervisor or ADA coordinator may want to contact the US Equal Employment Opportunity Commission, state or local vocational rehabilitation agencies, or state or local organizations representing or providing services to individuals with disabilities. Another resource is the Job Accommodation Network (JAN). JAN is a free consultant service that helps employers make individualized accommodations that can be reached on the Internet at http://www.jan.wvu.edu/ or by calling (800) 526-7234 (V); (877) 781-9403 (TTY).

Undue hardship. Accommodations that would impose an undue hardship on the employer's business are not required. An "undue hardship" means that an accommodation would be unduly costly, extensive, substantial or disruptive, or would fundamentally alter the nature or operation of the employer's business. This is a difficult threshold to meet. If a particular accommodation would be an undue hardship, the employer must try to identify another accommodation that will not pose such a hardship. Consider whether funding for an accommodation is available from an outside

source, such as a vocational rehabilitation agency, and if the cost of providing the accommodation can be offset by state or federal tax credits or deductions. The employer must also give the applicant or employee with a disability the opportunity to provide the accommodation or pay for the portion of the accommodation that constitutes an undue hardship. Undue hardship decisions usually are made by upper management in conjunction with Human Resources or the company's legal counsel.

Role of manager or supervisor. Managers and supervisors must refrain from engaging in disability status determinations, recognize accommodation requests, and remember who to contact for assistance. In addition, making negative or derogatory remarks in response to an accommodation request can be considered retaliation and, obviously, managers and supervisors must refrain from making such comments.

✓ CHECKLIST: FINDING A REASONABLE ACCOMMODATION

Look at the particular job and determine its purpose and key functions. Employers do not have to remove essential functions, create new jobs, or lower production standards as an accommodation. Employers also do not have to make an accommodation for an individual who is not otherwise qualified for a position.
Consult with the person with a disability to find out the precise job-related limitations imposed by the person's disability.
In consultation with the individual, identify possible accommodations and assess how effective each accommodation would be in enabling the person to perform key job functions.
If there are several possible accommodations, consider the person's preference and select the accommodation that best serves the needs of the person and the employer. However, the employer can choose from among all effective accommodation options; it does not always have to provide the accommodation the employee requested
Notify the person responsible for approving employer accommodations of: (1) the accommodation chosen; and (2) other accommodations to consider if that accommodation is rejected because of undue hardship.

PERIODIC MEDICAL EXAMS

After employment begins, an employer may make disability-related inquiries and require medical exams only if they are related to the job. If a manager or supervisor decides to fire or demote an employee with a disability based on the results of a medical exam, the manager or supervisor must demonstrate that the employee is unable to perform the essential job functions or, in fact, poses a threat that cannot be eliminated or reduced by a reasonable accommodation.

Alcohol and drug testing. Remember that employers can always test for the current illegal use of drugs because that is not considered a medical exam under the ADA, but they may not generally subject employees to *periodic* alcohol testing. However, employees who have been in alcohol rehabilitation programs may be subject to periodic alcohol testing only when the employer

has a reasonable belief that particular employees will pose a threat to themselves or others. Employers can always maintain and enforce rules prohibiting employees from being under the influence of alcohol in the workplace and may conduct alcohol testing for this purpose if there is a reasonable belief that an employee has been drinking during work hours.

Fitness for duty exams. Employers may also require employees to submit to periodic fitness for duty exams. Employers may preemptively require a medical exam when it is warranted by an employee's erratic behavior, especially when the employer is engaged in dangerous work. The business necessity standard may be met even before an employee's work performance declines if the employer is faced with significant evidence that could cause a reasonable person to inquire as to whether an employee is still capable of performing his job. However, an employer's behavior must be more than annoying in order to justify the fitness for duty exam request.

CONFIDENTIALITY OF MEDICAL INFORMATION

With limited exceptions, managers and supervisors must keep any medical information learned about an applicant or employee confidential. Information can be confidential even if it contains no medical diagnosis or treatment and even if it is not generated by a health care professional. For example, an employee's request for a reasonable accommodation would be considered confidential medical information. Managers and supervisors should not place medical information in regular personnel files. Rather, keep medical information in a separate file that is accessible only to designated officials. Medical information stored electronically must be similarly protected by storing it on a separate database.

Sometimes medical information about applicants or employees must be disclosed. Information that is otherwise confidential under the ADA may be disclosed: (1) to supervisors and managers where they need the information in order to provide a reasonable accommodation or to meet an employee's work restrictions; (2) to first aid and safety personnel if an employee would need emergency treatment or require some other assistance (such as help during an emergency evacuation) because of a medical condition; (3) to individuals investigating compliance with the ADA and other disability bias laws; and (4) pursuant to workers' compensation laws for insurance purposes.

Certain medical inquiries are impermissible. An employee alleged his company's president demanded to know whether "something medical [was] going on" and continued to insist there was something physical or mental affecting the employee; based on the repeated questions, the employee successfully argued that he felt compelled to tell the president he was HIV-positive. This solicitation of private medical information was unlawful.

RIGHTS OF PERSONS INJURED ON THE JOB

Employees who are injured on the job or who become disabled due to an on-the-job injury or illness are entitled to benefits required by state workers' compensation laws. Workers' compensation laws usually provide for reimbursement of medical costs and wage-loss benefits. If an employee's work-related illness is a "serious health condition" under the Family and Medical Leave Act (FMLA), the employee will also be entitled to the FMLA's leave-of-absence and return-to-work rights. Moreover, if the employee meets the ADA's definition of "qualified individual with

a disability," the employee will have job accommodation rights too. Leave-of-absence rights under the FMLA and ADA are discussed in the next chapter.

TREAT EVERY INJURY AS LEGITIMATE

The manager or supervisor is usually the first person on the scene of an injury at work. Respond immediately to injured workers and create a supportive environment for them. Treat *every* injury as legitimate, even if there are suspicious circumstances. Injured workers who are not treated seriously may file a lawsuit.

✓ CHECKLIST: WHAT TO DO WHEN A WORKER IS INJURED

	Immediately administer first aid.
	Accompany the injured worker to a selected medical provider.
	Report incident within company.
	Notify the worker's family.
	Report to claim handler outside company (insurance company or third-party administrator) if required to do so under company policy.
	Determine whether the injury is covered by workers' compensation.
	Contact union, if applicable.
	If the employee misses work because of the injury, determine whether the injury is a "serious health condition" under the FMLA. If the injury is determined to be a serious health condition, notify the employee within five business days of determining that the leave is designated as FMLA leave.
	Follow up with the employee and/or family.
	Develop return-to-work plan.
	Forward mail.
	Use a "wellness" approach (cards, phone calls, visits) to continue to reinforce company's concern.
	Update return-to-work plan.
	Refer for pain management evaluation of chronic pain, if appropriate.
П	Maintain contact with the injured employee and/or the family

✓ CHECKLIST: DATA TO GATHER FOR EACH INJURY

As the manager or supervisor of someone who has suffered a work-related injury or illness, you will need to have certain kinds of information available. You will be communicating with the injured worker and the family, with the treating physician, with the in-house benefits or claims department, and possibly with the insurance company. Following is a list of information that you will need to know to make the job go smoothly:

ABOUT THE EMPLOYEE

Name
Address
Phone (home/mobile)
Social Security number
Sex
Date of birth
Marital status
Dependents
State hired
Date of hire
Job classification (insurance class or company classification)
ABOUT THE INJURY
Date of injury
Date of death (if applicable)
State of injury
Nature of injury (sprain, fracture, etc.)
Body part(s) affected
Source of injury (machines, hand tools, buildings, etc.)
Type of injury (fall, struck by, overexertion, repetitive motion trauma)
Witnesses

	Work process involved (i.e. lifting, carrying, etc.)
	Industry
	Division
	Plant or location
	Department
	Supervisor
	Job
	Time of day
	Shift
	ABOUT THE CLAIM
	Date employer first notified
	Who was notified? By whom?
	Date employer's workers' compensation claims department notified
	Other benefits lost (Did the company stop paying vacation, health benefits, etc.?)
	Other benefits received
	Date of first payment
	Projected return-to-work date
	Date case closed
	Lost days
	Total benefits paid
П	Vocational rehabilitation activity

Time Off from Work

FAMILY AND MEDICAL LEAVE

Appropriately handling requests for leave can be one of the most difficult and confusing responsibilities of managers and supervisors. While generally the Human Resources or Benefits department (or a third-party provider) is responsible for administering leave, managers need a basic understanding of the types of leave and how they work.

Types of leave. The Family and Medical Leave Act (FMLA) guarantees an employee up to **12 weeks** of job-protected leave each year for any one or more of the following reasons:

- birth of child
- · adoption of child
- foster care of child
- child's serious health condition
- spouse's serious health condition
- parent's (but not parent-in-law) serious health condition
- employee's own serious health condition
- employee's pregnancy
- "any qualifying exigency" for a spouse, son, daughter or parent of a military member (in either a regular or reserve component) who is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces

Qualifying exigency. Types of qualifying exigencies include:

- short-notice deployment
- military events and related activities
- · childcare and school activities
- financial and legal arrangements
- counseling
- rest and recuperation
- post-deployment activities
- additional activities where the employer and employee agree to the leave

Maternity and paternity leave. FMLA leave for the birth, adoption, or foster care of a child can be taken by men and women. Denying leave to an eligible employee on the basis of gender can result in FMLA *and* sex discrimination liability.

Parent/child relationship. Leave rights can belong to those who do not have a legal or biological relationship. Managers and supervisors must realize that this goes beyond the more typical situations involving divorce, death, and remarriage. For example, FMLA leave rights extend to an employee who provides day-to-day care for his or her unmarried partner's child as well as an employee who will share equally in the raising of an adoptive child with a same-sex partner. Similar leave rights may extend to grandparents who have assumed parental responsibilities for their grandchildren. This is true regardless of whether the biological parents are alive or available.

Leave for families of injured military personnel. Family members (the spouse, son, daughter, parent or next of kin) of injured military personnel may take up to 26 weeks of unpaid leave to care for service members injured in combat. A covered service member is defined as "a member of the Armed Forces (including a member of the National Guard or Reserves) who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list for a serious injury or illness." Veterans within five years of separation are also covered service members when undergoing such treatment.

"Serious health condition." A "serious health condition" is an illness, injury, impairment, or physical or mental condition that involves any of the following:

- Any period of incapacity connected with inpatient care (overnight stay) in a hospital, hospice, or residential medical care facility.
- Any period of incapacity requiring absence of more than three consecutive, full calendar days from work, school, or other regular daily activities that also involves continuing treatment by or under the supervision of a health care provider.
- Continuing treatment by or under the supervision of a health care provider for a chronic or long-term health condition that is incurable or is so serious that, if not treated, would likely result in a period of incapacity for more than three consecutive, full calendar days.
- Incapacity due to pregnancy or prenatal care.

Examples of serious health conditions:

- heart attacks
- heart conditions requiring bypass surgery
- strokes
- most types of cancer
- back conditions requiring extensive therapy or surgery

- severe respiratory conditions, such as pneumonia, emphysema, or asthma
- severe arthritis
- severe nervous disorders
- injuries caused by serious accidents (on or off the job)
- pregnancy, miscarriage, or complications related to pregnancy (for example, severe morning sickness)
- childbirth, recovery from childbirth
- long-term chronic conditions (such as Alzheimer's or other diseases in terminal stage)
- kidney disease
- diabetes
- epilepsy
- migraines
- appendicitis

Nonserious health conditions. Unless complications develop, the following conditions generally are not serious health conditions: the common cold, flu, ear aches, upset stomach, minor ulcers, headaches other than migraines, routine dental or orthodontia problems, or periodontal disease. Cosmetic treatments are serious health conditions only if inpatient care is required or complications develop. FMLA leave in connection with substance abuse may only be taken for treatment of substance abuse; absence because of the employee's use of the substance does not qualify for FMLA leave.

Employee eligibility. To be eligible for FMLA leave, an employee must have worked for the employer at least 12 months before the start of leave. The 12 months do not have to be continuous—there can be up to a seven-year gap (or more in some cases) in service and the prior service is still counted. Additionally, the employee must have worked 1,250 hours during the 12 months preceding the leave. Managers or supervisors who are unsure whether an employee meets these requirements should notify their Human Resources department.

Employee notice of leave. When possible, employees must give 30 days' advance notice of their intent to take leave. If 30-day advance notice is impractical, as in case of medical emergency, notice must be given as soon as possible (usually within the time frame of the employer's usual and customary notice requirements). For foreseeable leave for a qualifying exigency, notice must be given as soon as practicable no matter how far in advance leave is foreseeable.

In giving notice, employees do not have to specifically state that they are taking FMLA leave. Rather, it is the responsibility of the individual who oversees FMLA matters for the employer to

determine whether the leave may qualify as FMLA leave based on information received directly from the employee (or the employee's spokesperson, like a family member, if the employee is incapacitated). However, if the employee is seeking leave for a previously-certified FMLA condition or for which the employee has previously taken FMLA leave, the employee must specifically reference the particular reason or need for leave.

Unless there are unusual circumstances, for either foreseeable or unforeseeable leave, the employer may require an employee to comply with its usual and customary notice and procedural requirements for requesting leave (who to call, how to leave a message, etc.). But those requirements can't require notice to be given any sooner than the FMLA time frames just discussed.

Remember, though, that if an employee requires emergency medical treatment, he or she would not be required to follow a standard call-in procedure until his or her condition is stabilized and he or she has access to, and is able to use, a phone. Similarly, in the case of an emergency requiring leave because of a FMLA-qualifying reason, written advance notice pursuant to an employer's internal rules and procedures may not be required when FMLA leave is involved.

Eligibility notice. Whoever oversees FMLA matters for the employer must act quickly in deciding whether employees are eligible for FMLA leave. Once an employee requests leave or enough information is acquired to know that leave may be FMLA-qualifying, the employee must be told within five business days whether or not he or she is *eligible* to take FMLA leave. At this time, eligible employees must be given written notice of their rights and responsibilities. Ineligible employees must be told why they are ineligible. Notice of eligibility may be oral or written.

Designation of FMLA leave. Once an employer has enough information to determine whether leave is indeed for an FMLA-qualifying reason, the employee must be told—either orally or in writing—within five business days that the leave will or will not be *counted* as FMLA leave. If the notice is oral, it must be confirmed in writing no later than the next payroll period. Designation and eligibility notices may be given simultaneously. There is no longer a need to make a "provisional designation" that is later finalized or withdrawn.

Certification of qualifying exigency. The first time an eligible employee requests leave because of a qualifying exigency, the employee may be required to provide a copy of the military member's active duty orders or other documentation from the military. New active duty orders or documentation can be requested if the need for leave arises out of a different active duty or call to active duty status of the same or different covered military member.

Medical certification. Employers can require certification by a health care provider of a serious health condition. Certification can also be required to confirm fitness to return to work. Any certification requirement must be included in the rights and responsibilities notice.

Employers have five business days to request certification and employees have 15 days to provide it. When incomplete or insufficient certification is provided, an employee must be told in writing what additional information is required; the employee has seven calendar days to cure

deficiencies. Under no circumstances is an employee's direct supervisor permitted to make direct contact with the employee's health care provider.

When leave is taken due to a service member's serious injury or illness, certification from the service member's health care provider may be required

Pay. FMLA leave is unpaid. However, both the employer and the employee have the option to substitute paid leave the employee has already earned (such as vacation or sick leave) during FMLA leave. The rights and responsibilities notice must specify any conditions surrounding substitution of paid leave. Additionally, employees must be told of their right to take unpaid leave if they do not meet the conditions for using paid leave. If neither the employee nor the employer elects to substitute paid leave for unpaid FMLA leave, the employee remains entitled to all earned paid leave.

Notice of intent to return to work. Managers and supervisors have the right to require employees on FMLA to report periodically regarding their status and their intent to return to work once their leave expires. Requests for status reports must be reasonable under the particular circumstances of the employee's case.

FMLA protections end for employees who say they are definitely not returning to work. Be careful: the law requires that an employee's intention not to return to work be absolutely clear, certain, and subject to no possible misunderstanding. An employee's statement that "I don't think I'll be able to come back to work, but I'll sure try" would thus not be definite notice.

Job restoration. Upon returning from FMLA leave, an employee must be restored to his or her original job, or to a job with equivalent pay, benefits, and working conditions. The employee cannot be forced to return early into a "light duty" job. Although the FMLA generally requires that employees be restored to their same or equivalent positions upon returning from approved leave, if an employer discovers evidence of the employee's misconduct while he or she is on leave, that evidence may form the basis of a valid discharge even though the employee's reason for taking leave was job-protected. Employers may lawfully and appropriately discipline and discharge employees on FMLA leave on the same basis as every other employee, but make sure your investigation is both complete and honest.

Do's and Don'ts for managers and supervisors. To sum up, remember these FMLA "do's and don'ts":

- **DO** ask certain questions if an employee requests time off (keeping privacy concerns in mind): Is there a serious health condition of a child or parent? A serious health condition of the employee? What is the nature of the requested qualifying exigency leave?
- **DO** remember that pregnancy is a special case under the FMLA: **Any** period of incapacity due to pregnancy or for prenatal care is treated as a serious health condition.
- **DO** refer the employee to the appropriate office if it appears leave may qualify for family medical leave—Human Resources, personnel or benefits, for example.
- **DO** document all time off

- **DON'T** commit to the leave (or refuse to grant it) until Human Resources can determine whether it qualifies as FMLA leave, whether medical certification will be required, and until other relevant information is gathered.
- **DON'T** discourage an employee from taking FMLA leave. Do not say, for example, "Again?" or "We'll never get the work done," or "I can't promise you'll have your job back."
- **DON'T** retaliate against an employee who takes FMLA leave. Do not threaten possible job consequences. Do not demote, refuse to promote, discipline, or target the employee for layoff based on the fact that he or she has missed a lot of time because of FMLA leave or because of your concern that he or she might take leave again.

AVOID DISABILITY BIAS PITFALLS

Leave as accommodation. If an employee who requests medically related time off from work is not entitled to FMLA leave, workers' compensation leave, or leave under company policy, do not automatically deny leave. Consider whether the person is a "qualified individual with a disability" under the Americans with Disabilities Act (ADA) for whom the requested absence may be a reasonable accommodation.

Extension of leave. If an employee's medically related absence continues beyond the amount of leave permitted under the FMLA, workers' compensation, or company policy, do not automatically take disciplinary action. Consider whether the person is a "qualified individual with a disability" for whom extension of leave may be a reasonable accommodation.

Reinstatement after accommodation leave. If a qualified employee with a disability is provided leave as a reasonable accommodation, the employee must be placed in the *same* job upon returning to work, unless doing so would impose an undue hardship on the company.

Accommodation upon return. If an employee is unable to perform his or her former job after returning from a medically related absence, do not automatically demote or terminate the employee. Consider whether the person is a "qualified individual with a disability" who can be reasonably accommodated to perform that job. If accommodation is not possible in the employee's former job, determine whether a vacant, equivalent position is available that the employee can perform, with or without reasonable accommodation.

Confidentiality of medical information. Medical information relating to employees or their family members must be kept in separate, confidential files. Special rules for medical records are noted in the chapter titled "References/Defamation/Privacy."

MILITARY LEAVE

Employee eligibility. The federal Uniformed Services Employment and Reemployment Rights Act (USERRA) requires that an employee be granted leave for military service if the following two criteria are met:

- 1. The employee or an appropriate military officer provides advance oral or written notice of military service. (USERRA does not require any specific time for giving advance notice.) However, no notice is required if doing so is impossible or unreasonable due to military necessity or other reasons.
- 2. The combined length of the employee's prior military absences from the company does not exceed five years (see "Duration of service," below).

Reasonableness of leave request. An eligible employee's leave request must be granted. Even if a manager or supervisor finds the timing, duration, frequency, or nature of an eligible employee's military service to be unreasonable, the employee cannot be denied leave from work.

Types of military service. Military service for which leave may be taken includes not just absences for active duty, but also absences for training, weekend drills, summer camp, funeral honors duty, fitness-for-duty examinations, and volunteer service as a member of the National Disaster Medical System.

Duration of leave. USERRA places a five-year limit on the *combined* length of an employee's military service absences from an employer. However, some types of service, including annual summer training and monthly weekend drills required for reservists and National Guard members, are exempt from the five-year limit. Ask your Human Resources department to do the five-year calculation, which can be quite tricky.

Pay. USERRA does not require pay during military leave. However, some companies voluntarily pay reservists the difference between their regular wage and the military pay received during annual summer training.

Employees on military leave have the *right* to use any accrued vacation or similar leave with pay during military service. However, it is against the law to *require* an employee to do so.

Notice of return. If an employee's military service is 31 or fewer days, the employee must, barring excusable circumstances, report to work by the beginning of the first regularly scheduled work day that falls eight hours after the employee returns home. If the employee's service is 31 to 180 days, the employee must, barring excusable circumstances, submit an application for reemployment within 14 days after completing military service. The employee must submit an application for reemployment within 90 after completing military service if the employee's service was 181 or more days. "Applications" for reemployment can be written or oral.

Reemployment rights are not automatically lost if an employee fails to meet these limits. Rather, the employee will then be subject to the company's rules governing unexcused absences.

Reemployment eligibility. Generally, a person must be promptly rehired (usually within two weeks of the date the service member applies for reemployment, absent unusual circumstances) after military service if the person provided advance oral or written notice (unless doing so would have been impossible or unreasonable); the person did not exceed the five-years service limit; and the person timely reported to work or applied for reemployment. If a person's reemployment eligibility is in doubt, the matter should immediately be referred to the Human Resources department.

Notice of intent not to return to work. Resigning from a job in order to enter military service does *not* cut off a person's reemployment rights. As long as the person meets the eligibility requirements, he or she must be reemployed. The person may lose entitlement to certain job benefits *during* military service if the person voluntarily gives written notice of an intent not to return to work after military service. But such a notice will not deprive the person of reemployment rights and benefits when the person returns from military service.

Reinstatement after leave. Generally, a person returning from military service must be placed in the job the person would have held if the person remained continuously employed or, if the person is unqualified or cannot become qualified for that job, in the person's pre-service job. If the person cannot be trained to perform either of those jobs, the person must be placed in any other job that the person can perform. Reasonable accommodations must be provided to persons with service-connected disabilities.

OTHER LEAVES REQUIRED BY LAW

State military and disaster service leave. In addition to the federal military leave requirements just discussed, a number of states have their own military or disaster service leave provisions.

Jury duty leave. Federal law gives employees the right to take time off to serve as jurors in federal courts. State laws give employees the right to serve on state and local juries.

Witness duty leave. A number of states have laws permitting employees to serve as witnesses in court.

Domestic violence leave. A trend in state law is to provide leave to victims of domestic or sexual violence, or sometimes to their family members, to participate in legal proceedings, receive medical treatment, or obtain other necessary services.

Time off to vote. State laws generally allow employees at least two hours of time off to vote.

Time off for school functions. A growing number of states have laws requiring employers to give employees time off to attend certain functions at their children's schools.

Blood, bone marrow or organ donation. Some states require employers to grant employee requests for time off to donate blood, bone marrow or organs.

Paid sick leave. A handful of municipalities have passed laws mandating private businesses within the city to provide paid sick leave, and one state, Connecticut, has passed such a law. A number of states have also introduced similar legislation. Contact the Human Resources department for information regarding municipal and/or state law requirements.

COMPANY-OFFERED LEAVES

Employers often make available to employees various types of leave that are not required by law. These may include:

- Vacations
- Scheduled holidays
- "Floating" personal holidays
- · Bereavement leave
- Marriage leave
- Educational leave
- Sabbaticals
- Sick leave
- Short-term disability leave
- Long-term disability leave

Moreover, some companies may "add on" to a leave-of-absence statute by providing for even more rights than the law requires. For example, company policy may allow a longer period of family and medical leave than is required by statute or permit leave for reasons broader than those extended by law, such as to care for the serious illness of grandparents, in-laws, or unmarried partners. Or, a company may voluntarily choose to pay employees for certain military-related absences.

BE FAMILIAR WITH COMPANY POLICY

Managers and supervisors must know and follow their company's leave-of-absence policies. Failure to observe employees' rights under company policy can result in lawsuits. Specifically, managers and supervisors should at least know:

- The types of leave available under company policy.
- Leave documentation requirements.
- Which types of leave accrue and carry over into the next year.
- Who is eligible for each type of leave.
- Whether proof of a need to take leave is required.
- Employee notice requirements: When must notice of a need to take leave be given? Who must be notified? Must the notice be in writing?
- Company notice requirements: What kinds of notice must be given to employees for each type of leave? When must notice be given? Who is responsible for giving notice?

- How much leave may be taken.
- Whether pay will continue during leave.
- Types of leave that run concurrently.
- Impact on seniority.
- The position to which a returning employee is entitled.
- Consequences of failure to return to work on time.

Drug and Alcohol Problems

HOW BIG IS THE PROBLEM?

Drug and alcohol use continues to cause workplace problems. The overall rate of current illicit drug use in the US in 2011, the latest year for which information is available, has remained consistent at around 8.7 percent of the population aged 12 and older. Most importantly for employers, of the 19.9 million current illicit drug users aged 18 or older in 2011, 13.1 million (65.7 percent) were employed either full or part time.

Alcoholics and addicts. Alcoholism and other drug addictions are chronic and potentially fatal diseases if not treated. Alcoholics are protected from discrimination by the Americans with Disabilities Act (ADA) and other disability bias laws. However, an alcoholic employee can be disciplined if the employee's alcohol use affects job performance or conduct to the point that the employee is not qualified for the job. Discipline must be based on the employee's unacceptable performance or misconduct, not the person's disease of alcoholism. Any discipline imposed may not be harsher than that imposed on other employees for the same performance or conduct.

An alcoholic employee is late to work. The employee may be disciplined for tardiness, even if alcohol use caused the employee to be late. But the employee may not be more severely disciplined than other employees who are tardy.

Illegal drug users. Current users of illegal drugs are not protected by the ADA. Consequently, employees may be disciplined or fired for their current use of illegal drugs. "Illegal drugs" do not include drugs prescribed by a doctor or other licensed health care professional, however. "Current" illegal drug use means that the illegal use of drugs is occurring or has occurred recently enough to indicate that an employee's involvement with drugs is an ongoing problem.

Former drug addicts. The ADA does protect rehabilitated drug addicts who no longer use illegal drugs. Recovering drug addicts who are participating in a drug treatment program and who have stopped using illegal drugs are also protected.

An employee is involved in a workplace accident that damages equipment. If a drug test indicates recent illegal use of drugs, the employee may be disciplined for illegal drug use. But if the test shows no recent illegal drug use and the employee is currently participating in a drug treatment program, disciplining the employee may violate the ADA if other employees who had similar accidents were not disciplined.

Persons mistakenly thought to be addicts. Never discipline or fire someone for illegal drug use in the absence of solid evidence that the person really is using illegal drugs. Disciplining or firing an employee based on a mistaken belief that the employee is addicted to illegal drugs may result in liability under the ADA. Liability for defamation could also result.

Medical use of marijuana. In the late 1990s, states began legalizing the use of marijuana for medical purposes. A minority of states have some type of law allowing the medical use of marijuana, and a handful of states typically introduce similar legislation every year. The majority of these laws specify that employers are not required to accommodate the medical use of marijuana or to pay for it under their health insurance programs.

When state medical marijuana laws don't exclude an employer's obligation to accommodate a disability, the argument could be made that accommodation is required because the medical use of marijuana is legal. But in 2005, the US Supreme Court made it clear that possession and use of marijuana is illegal under federal law regardless of its purpose, even if such use will not be prosecuted at the state level. According to an October 2009 memo from the US Attorney General's office, federal prosecution of patients with serious illnesses or their caregivers who are complying with state laws on medical marijuana will not be a priority. But this memo does not "legalize" marijuana or provide a legal defense to a violation of federal law; it is only a guide to the federal government's position. As a result, while managers and supervisors should guard against discriminating on the basis of an individual's status as a medical marijuana user, most state courts have not provided employment protections to medical marijuana users.

Leave for treatment. FMLA leave is available for treatment for substance abuse provided that the employee meets the requirements for having a serious health condition. Absence *because* of an employee's use of a substance, rather than for *treatment*, does not qualify for FMLA leave. Treatment for substance abuse does not prevent an employer from taking employment action against an employee if the employer has an established policy that is applied in a nondiscriminatory manner and has been communicated to all employees. An employee may be terminated under an established policy, whether or not the employee is presently taking FMLA leave.

PUNISHMENT OR REHABILITATION?

If alcohol or drug use has caused an employee to have a dangerous accident, endanger another employee, or frequently not show up for work, it may be tempting to simply fire or suspend the employee. Managers and supervisors should keep in mind, however, that the employee may be protected by the ADA. And, from a bottom-line perspective—if the employee was once productive—it may be in the employer's best interest to give rehabilitation a chance rather than to fire the employee first and ask questions later. Otherwise, the organization may lose time and money in selecting and training a replacement who does not perform at the level this employee once performed.

It is also tempting to simply ignore the problem by letting the employee get by with mistakes or absences. Instead of covering up for problems, the supervisor should let the employee incur the natural consequences of his or her actions. If a sick day normally requires a doctor's note, insist on a doctor's note. If a slowdown in production would normally mean a warning, give the appropriate warning.

Rehabilitation *is* possible—the supervisor does not need to give up on the employee. Experts say that although employees with substance abuse problems will endure the loss of their driver's license and even their marriage or family, they often are shocked into accepting help when faced with losing their job. At the same time, if they suspect that an employee has a problem with alcohol or drugs, managers and supervisors should contact Human Resources for support and guidance before taking any action.

HOW TO CONFRONT AN EMPLOYEE

Employers who notice an employee having performance or misconduct problems should assess whether alcohol or drug use is affecting the employee's productivity. First-level supervisors likely will be the first to observe signs of a substance abuse problem that affects a person's job. Increased absenteeism, long breaks from work, an unexplained decrease in productivity, frequent trips to the restroom, changes in appearance, changes in speech, on-the-job injuries, and unusual difficulty in following instructions or recalling things all are signs that may indicate a substance abuse problem.

Experts say that the supervisor should confront the employee about the job performance problem with a caring but firm attitude. Clarify that the organization does not want to lose the employee's services and expertise, but that it will not tolerate the decline in performance. Hazelden, an alcohol and drug rehabilitation center, suggests the following steps to begin a discussion about alcohol and drugs in the workplace:

- Educate. Educate employees about company policies regarding alcohol and drug use.
- **Document.** Keep a record of the employee's work performance—good and bad. Make expectations clear by communicating acceptable levels of job performance and pointing out where the employee falls short. Be prepared to show the employee records that objectively indicate performance mistakes, absenteeism or other problems.
- Warn. Have an informal talk to alert the employee to his or her unsatisfactory job performance, communicate your expectations, and discuss the consequences. Do not discuss drug and alcohol abuse specifically. Keep the conversation focused on job performance issues; let the employee know that you are concerned about the slipping job performance and are there to help.
- Refer. Don't try to diagnose the employee's problem—that is not your area of expertise. Focus on job performance, not on the suspected alcoholism or drug abuse, unless there is objective, verifiable proof that substance abuse is the root of the problem. Contact whoever is designated by your organization—whether it's your Employee Assistance Program (EAP), HR professional, a medical professional or others—to advise you about confronting an employee with suspected substance abuse problems. They can give you advice for your initial discussion and then inform the employee of available help.
- **Intervene.** If it is determined that the employee does have an alcohol or drug abuse problem, job performance is not likely to improve unless the employee gets help for the problem. Offer the employee help through the company's Employee Assistance Program or refer the employee to social services agencies. Don't delay or beat around the bush. The sooner you talk to an employee, the sooner he or she can get help.
- **Confirm.** Evaluate the extent of any problem through professional assessment.
- **Follow up.** Once you have confronted an employee, following through with appropriate support is extremely important. Be firm in encouraging the employee to seek assistance before performance problems or misconduct get worse and job loss becomes a

possibility—or a certainty. Let the employee know that he or she is the only one who can agree to accept help.

Experts also recommend that you avoid being judgmental. Say calmly that "this behavior can cost you your job," rather than shaming an employee or saying, "you should know better." Similarly, don't ask why—that only gives the employee the chance to make excuses and tell sympathy-evoking stories. The excuse or story doesn't matter—the employee is always responsible for his or her behavior and job performance. Finally, don't make idle disciplinary threats. Instead, establish specific check-back dates and follow through with warnings if performance doesn't improve.

PROVIDE RIDES HOME FOR INTOXICATED EMPLOYEES

An employer that sends an impaired employee home invites legal problems, whether the employee's intoxication resulted from employer-provided alcohol (at a company-sponsored function, perhaps) or the employee's own actions. For example, an employee returns to work after lunch clearly intoxicated and unable to work. Is it proper for the supervisor to order the employee to clock out and leave the workplace?

In this situation, the employer is exercising control over the situation, telling the employee to leave the premises, often by car. If the employee later gets in an accident, the employer can be sued for negligently allowing an impaired person to operate a motor vehicle. The better handling of the situation would be to require the employee to take a cab home or for the employer to arrange for some other form of transportation. That may invite hard feelings, but there will be fewer legal problems.

Union Activities

WORKERS' PROTECTED LABOR RIGHTS

The National Labor Relations Act (NLRA) gives employees four basic rights:

- 1. The right to join or form a union.
- 2. The right to bargain collectively, through employee-chosen representatives, about wages, hours, and working conditions.
- 3. The right for employees to act together to improve their working conditions, whether or not they are unionized.
- 4. The right to refrain from taking part in labor activities.

PROHIBITED LABOR PRACTICES

Managers and supervisors should be aware of the following broad categories of "unfair labor practices" that the NLRA prohibits:

- Interfering with, restraining, or coercing employees who are exercising their protected labor rights.
- Dominating or interfering with the formation of a union, or contributing financial or other support to a union.
- Discriminating against employees or applicants on the basis of union membership.
- Refusing to bargain with a union that represents a majority of employees.
- Entering into an agreement with a union to not do business with another company.

UNION REPRESENTATION AT INVESTIGATORY INTERVIEWS

If an employee in a unionized workplace requests that a union representative be present at an interview with a manager or supervisor, the request should not automatically be refused. The employee has a right to bring a union representative if the interview is part of an investigation and may result in the employee being disciplined or fired.

If the purpose of the interview is to inform the employee about a final disciplinary decision that *already has been made*, or if the employee did not ask for representation, the employee does not have a right to have a representative present.

Once an employee in a unionized workplace requests representation at an investigatory interview, the employer can either: (1) grant the request; (2) stop the interview; or (3) offer the employee the choice of continuing the interview without a representative present or of having no interview at all. However, it is illegal to go ahead with the interview without a union representative if the employee makes neither choice and still wants a union representative there.

Employees can request a specific representative to assist them during an investigatory interview — as long as there are no extenuating circumstances. For example, the selected representative must be available at the time of the meeting. An individual with no official union status can also serve as a union employee's representative.

TIPS FOR AVOIDING LIABILITY DURING UNION CAMPAIGNS

- DON'T fire or take other negative action against employees for participating in union activity.
- DON'T assign only union supporters to unpleasant or non-routine tasks.
- DON'T tell employees that they will be fired or that anything else negative will occur for participating in union activities.
- DON'T visit employees in their homes to discuss a union.
- DON'T promise or grant benefits to employees in order to dissuade them from voting for a union.
- DON'T question employees or applicants about their union sympathies, activities, or knowledge of union affairs.
- DON'T attend union meetings, spy on union organizing activities, or in any other way appear to be watching organizing activity.
- DON'T prohibit employees from soliciting union membership or distributing union literature during meal periods, breaks, or other **nonworking time**.
- DON'T stop employees from carrying union cards, displaying union buttons, or wearing T-shirts that bear union legends (unless those actions interfere with work activity or the company prohibits similar nonunion propaganda to be worn or displayed).
- DON'T take union literature from employees.
- DON'T take part in any activity that is a direct rejection of a union, such as a petition to reject the union.
- DON'T financially support a union.
- DON'T try to influence employees' choice of a union.

NONUNION ACTIVITY CAN BE PROTECTED

Unlike their union counterparts, employees in nonunionized workplaces do not have a right to have a coworker present during an investigatory interview that may result in discipline. However, the right of employees to act together for their mutual aid and protection applies not just to unionized employees but also to employees who work in nonunionized workplaces. This right is explained in the next chapter.

Whistleblowing/Group Complaints

WHAT IS WHISTLEBLOWER PROTECTION?

Discharged employees often claim that they were fired because they "blew the whistle" on their employer; that is, they reported something that the employer did that may violate the law or a clear public policy. The most common successful claims involve complaints about safety, environmental hazards, or fraudulent practices.

Whistleblowing does not always involve big, eventful disclosures — it can arise from situations as simple as an employee making a complaint about another employee's actions or refusing to do something that the employee feels is illegal. Sometimes the complaint may seem insignificant to the supervisor and unrelated to a subsequent termination. Consequently, in every termination, the supervisor should examine whether the employee may feel like he or she has been fired for making complaints or for reporting any wrongdoing.

WHO ARE PROTECTED WHISTLEBLOWERS?

Most states have enacted laws to protect employees who are whistleblowers. Even if a state does not have a statute giving whistleblower protection, the state may allow common law violation-of-public-policy lawsuits. Some state courts have ruled that it violates public policy to fire someone for disclosing a practice that could harm the public or violate the law.

There are also various federal laws that give covered employees whistleblower protection. These laws not only protect the disclosure of waste or fraud, they also cover a broad range of disclosures relating to such things as environmental hazards and workplace and consumer safety. One federal law gives whistleblower protection to employees of publicly traded companies (and their subsidiaries) and nationally recognized statistical rating organizations who provide information to governmental authorities about conduct they believe to be mail, wire, securities, or shareholder fraud, while yet another law provides incentive programs that pay whistleblowers who provide information. Even the federal health care law extends protections to employees who provide information, or cause information to be provided, about potential violations. Moreover, the federal employment laws discussed in this book contain anti-retaliation provisions that prohibit firing or disciplining an employee for filing a complaint or for testifying or exercising other rights under those laws.

Coverage under state laws varies. Some laws require an employee to complain first to company officials to give the company a chance to correct the problem before going "public." Other laws only protect people who report alleged misconduct to those public officials who have authority to investigate the allegations. These complaints or reports do not always have to be eventually found valid — some courts will require only a reasonable belief that the company was doing something wrong. If an employee then makes a claim that his or her discharge is a public policy violation, the exact circumstances under which the employee will qualify for whistleblower protection are even more vague. Generally, a court will examine whether the employee made the disclosures in good faith, rather than maliciously, and whether the alleged wrongdoing is a violation or a danger that people clearly should not be fired for reporting.

WHISTLEBLOWING EXAMPLES

- *I* An insurance company employee reported to senior management that serious deficiencies and irregularities in the company's claims department amounted to violation of a state law on unfair insurance claim settlements. The employee was fired shortly afterward. A court ruled that the employee was wrongfully discharged in violation of public policy.
- 2 A financial officer was fired after he told his superiors that the company's accounting practices may violate federal securities law by overvaluing certain assets. The employee's wrongful discharge claim was valid, even though he voiced the objection only to superiors rather than to regulatory authorities. He did not have to show that the accounting practices were definitely a violation of securities laws only that he reasonably believed the practices to be illegal.
- 3 A gas station attendant claimed that he was fired for refusing to pump leaded gas into a car requiring unleaded fuel. Federal laws designed to ensure clean air showed a clear public policy against firing someone for such an action. If the employee could prove that his refusal to commit an illegal act was the reason for his discharge, he would have a valid wrongful discharge claim, a court ruled.
- 4 An employee for a medical care provider, who was discharged after he filed a complaint with the state Board of Nursing reporting that a nurse practitioner provided medical care while under the influence of a narcotic, was unable to pursue his claim for wrongful discharge under his state's whistleblower law because he failed to provide the required notice to his employer. Specifically, the whistleblower law required the employee first to notify his employer orally and in writing in order to provide it with the opportunity to correct the alleged negligence or malpractice.

PROTECTED GROUP COMPLAINTS

In addition to giving all employees, whether they are unionized or not, the right to form unions and to bargain, the National Labor Relations Act also gives employees the right to engage in other activities for their mutual aid and protection. Just as employers cannot fire or discipline someone for union activities, they cannot fire or discipline employees for these other "protected concerted activities." An employee does not have to belong to a union or be in a union shop to be protected. How do you know when an action that an employee takes is protected concerted activity?

1. The activity must be "concerted."—First, the employee must be acting "in concert" with other employees. The clearest form of concerted activity is when two or more employees as a group bring a common complaint. For instance, three employees may refuse to do any more work until the boss raises their pay. This is protected concerted activity for which they cannot be disciplined. However, they can be treated as economic strikers and be permanently replaced by other workers.

A more difficult call is when a single employee brings a complaint to a manager. If the complaint is strictly about the employee's *own personal* working conditions, pay, or safety, it is not concerted activity. But the activity may be concerted if the employee acts alone to raise concerns about working conditions that affect other employees, or if several employees select one employee

as a spokesperson to voice a complaint. However, simply getting other employees to join in on one employee's personal complaint does not make the activity concerted.

The basic point for supervisors and managers to remember is that if two or more people come forward with a complaint or suggestion, there is a labor law issue. Also, if one person comes forward to make a general complaint or suggestion about working conditions affecting several employees, that employee may also have protections under labor law.

2. The activity must be "protected."—The employee's action must also be "protected." The complaint must be about working conditions that affect employees on the job. This may include wages, benefits, hours, or worksite and equipment conditions. Employee discussions that take place on a social networking platform — Facebook postings, for example — may also be protected if they involve terms and conditions of employment. However, a complaint about a supervisor's philosophy and managerial policies is not protected if it does not relate to employees' jobs or working conditions.

Some undesirable activities are not protected even if they are job-related. For instance, work slowdowns are not a protected activity. Employees can apply pressure to their employer by stopping work altogether and refusing pay — a strike — but they cannot lawfully accept pay without giving the company a full day of work in return. Similarly, a refusal to perform part of a job — say, overtime work—is an unprotected, recurrent work stoppage. Courts view this as employees merely trying to set their own terms of employment.

Employees who get carried away with actions that are malicious, defamatory, or insubordinate are also not engaging in "protected" activity. However, not every derogatory, loud, or obscene workplace comment will qualify as malicious and consequently not protected. If the comments or actions are connected with a legitimate dispute and are not accompanied by threatening gestures, the activity is more likely to be "protected."

USE OF SOCIAL MEDIA IN PROTECTED, CONCERTED ACTIVITIES

Managers and supervisors also must be careful in their responses to the use by their employees of social media. In 2010, the National Labor Relations Board began analyzing when an employee's use of social media sites constitutes protected, concerted activities. Although the answer still isn't crystal clear, the general rule is that posts on social media sites such as Facebook and Twitter constitute protected, concerted activity when the conversation around those posts relates to the terms and conditions of employment. Employers retain the right to discipline employees over posts and messages that relate solely to individual complaints, including disparaging their bosses or their employer's products or services, but managers should take great care in disciplining employees over group social media discussions that tend to relate to terms and conditions of employment, wages and hours, and benefits.

Historically, the NLRB has taken a broad interpretation of working terms and conditions in deciding whether a communication involves protected, concerted activity. Unfortunately, what is or is not protected, concerted activity will often be determined on a case-by-case basis. Some work topics are almost always protected under the NLRA; for example, wages, benefits, hours of work,

and most work policies. Absolute bans against discussing those types of topics, whether on or off duty, will likely run afoul of labor laws.

GROUP COMPLAINT EXAMPLES

I Several mechanics gathered in a break area and refused to clock in and go to work until the company president would agree to meet with them to discuss wages. They left after a few hours in response to a message from the president telling them that they could either go to work, leave the premises, or stay and be fired. The employees were fired a few days later. These discharges were unlawful because the attempt to meet with management was a peaceful, protected work stoppage. By staying in the break area, the mechanics made sure they did not interfere with the employer's business or other employees. An employer can refuse to pay employees who engage in a work stoppage — and it can even put them on inactive status and hire replacement workers — but it cannot discipline them.

- 2 A group of employees put their grievances about wages and working conditions in writing and went to see their supervisor. Unsatisfied with the results of their meetings with management, they arranged a "sick-out" in protest of the unresolved grievances, with everyone calling in sick on the same day (which is legally a protected strike). In response, the employer required the employees to present a doctor's certificate before they could return to work. The company's action was unlawful since the company didn't usually require doctors' certificates for one-day absences.
- 3 Because of a dispute about overtime wages, a group of employees announced that they would not work overtime hours. They left at the end of their regular hours. The employer lawfully fired them. Their refusal to work overtime was not a protected activity since it was a recurrent partial withholding of work aimed at setting the terms of their own work.
- 4 A luxury car salesman's criticism about an employer's offering hotdogs at a sales event related to terms and conditions of employment. Postings about the sales event (and subsequent exchange of comments) were protected because they involved coworkers who were concerned about the effect of the low-cost food on the dealership's image and, ultimately, their commissions. These comments did not rise to the level of inappropriate disparagement. But the same salesman's Facebook photos of an embarrassing and potentially dangerous accident involving a vehicle from an adjacent dealership (also owned by his employer) that had been driven into a pond were not protected.

Performance Appraisals

WHY CONDUCT PERFORMANCE APPRAISALS?

Performance appraisals provide a framework to direct employee efforts toward business objectives, to reinforce accomplishments, and to coach and develop employees to improved performance. In an organization where there are no clear goals or where employee performance is not measured relative to those goals, there can be a collective lack of focus that costs the employer in market share and bottom-line profit.

Whether your organization uses a software-based system or paper forms, it's best not to think of the appraisal as just a once-a-year event to go over the review. Instead, think of it as part of an ongoing process for providing employees with performance feedback.

Five good reasons to conduct performance appraisals include:

- 1. **Supporting business strategy.** A well-designed appraisal process, with department and individual goals that cascade down from the organization's business plan, is a good way to ensure that no one is focusing on the wrong thing.
- 2. **Supporting legally defensible personnel decisions.** The appraisal process should create a written record of performance, both acceptable and unacceptable. Written performance appraisals provide a legitimate basis for making personnel decisions. If an employee must be fired, performance documentation is often the most persuasive proof that an employee was justifiably terminated.
- 3. **Increasing communication between employees and managers.** Effective performance appraisals foster ongoing communications between managers and employees, with the manager acting in a coaching capacity.
- 4. **Improving employee performance.** Appraisals are a good way to identify employees who need more training or counseling in order to perform effectively.
- 5. **Linking performance with pay.** Performance appraisals also provide a means for differentiating rewards and recognition based on the level of work contribution.

WHAT ARE THE ELEMENTS OF GOOD PERFORMANCE APPRAISALS?

Remember two basic rules for effective performance appraisals:

- 1. **Job-related.** Descriptions of employee performance must be based on factors relevant to the job.
- 2. **Specific, observable behavior.** Performance must be described in specific, objective terms, measured in terms of behavior or actions on the job that can be observed. Avoid subjective, vague or overly broad descriptions such as "poor attitude" or "no initiative."

The use of subjective criteria, such as "failing to get along with employees, failing to manage properly, and failing to communicate clearly" could support a finding that an employer's stated reasons for terminating an employee were untrue. Courts view with skepticism the use of subjective evaluations in making termination decisions, a court noted. Thus, an employee who was discharged for alleged performance issues was allowed to proceed with his claims of disability bias and ERISA interference.

Compare the following examples of subjective, vague descriptions of behavior with the more objective and specific descriptions of on-the-job activity.

Subjective Objective

Lacks customer orientation. Does not greet customers within defined timeframe.

Chronically absent. Absent six workdays in last month.

Does not care about quality. Has error rate of 10 percent.

Lacks interest in work. Missed three assignment deadlines in May.

PERFORMANCE APPRAISALS MUST BE ACCURATE

Performance appraisal records are one of the first things lawyers will look at if an employee files a lawsuit. Appraisals that do not accurately reflect a record of poor performance can be used against an employer. For instance, appraisals that do not identify performance problems can be used to refute a supervisor's contention that an employee was fired for poor performance.

Accurate appraisals verify the performance reasons why an employee was disciplined or discharged. If an employee claims that he was unlawfully fired because of his age, race or for taking FMLA leave, for example, effective performance appraisals can show that the employee was fired solely because of his poor job performance.

The following examples show how accurate performance appraisals can help companies defend against lawsuits alleging that a termination was unlawful.

I A 53-year-old manufacturing manager filed a lawsuit alleging that he was fired because of his age. He argued that his plant's production performance was excellent in the past and that any recent decline in production was due to general economic conditions. The employer showed, however, that the decision to fire was based on the manager's inability to get along with people. Evaluation records showed that the manager had been repeatedly warned about his inability to communicate effectively with superiors and subordinates. The court found that those appraisals showed that the manager was not performing up to expectations.

2 A sales representative claimed he was fired due to his race. According to company performance appraisal records, however, the employee did not respond to a performance improvement program that identified specific deficiencies in performance and set out specific goals for improvement. These goals included objective descriptions of improved selling techniques, including the elimination of customer complaints, better organization and planning, and utilization of more sophisticated sales methods. The company's defense was successful.

Conversely, performance appraisals that do not effectively show a history of poor performance, when there is one, can hinder an employer's defense.

3 A lineman claimed he was fired in retaliation for taking FMLA leave, but his employer contended that the discharge was due to poor performance. The lineman was able to rebut his employer's assertion by showing that there was no documentary evidence of poor performance and that ratings on his past performance evaluations were "standard" or above. The court allowed the retaliation claim to proceed to a jury.

✓ CHECKLIST: PREPARING FOR THE APPRAISAL MEETING

Know the employee's job functions. Which functions are the most critical? Define the specific activities and responsibilities that contribute to those functions.
Gather information. Compare the employee's actual performance to performance standards. Use notes, production reports, customer and coworker feedback, and any other available records to back up your appraisal. Always ask the employee to provide a self-assessment; appraisals should not be one-way communications.
Identify critical incidents. Identify situations where the employee has made an outstanding contribution or has fallen short when attempting to fulfill an important job function.
Review previous appraisals. Determine whether the employee has met realistic performance goals set in previous reviews.
Prepare a development plan. The plan should aim to strengthen conduct that leads to good performance and to change conduct that pulls performance down.
Plan for the appraisal discussion. Limit the discussion to only those elements of performance that are critical, very important, or important. Also, allow time to discuss the employee's self-assessment and to explore the causes of any problems, as well as time to set goals and work out a development plan for the next review period.
Give the employee an advance copy of the appraisal. Allow the employee sufficient time to review the evaluation before your meeting.
Choose a time and place for the meeting. Plan enough time for the meeting. Make sure the meeting does not conflict with either your schedule or the employee's. Give the employee enough advance notice to prepare psychologically for the meeting. Choose a private place for the meeting where you both will not be interrupted.

AVOID THE TEMPTATION TO "SOFTEN" A NEGATIVE APPRAISAL

Performance appraisals must be an accurate reflection of what an employee actually did on the job. Be realistic in your assessment; don't sugarcoat a negative performance appraisal. Softening a negative performance appraisal can result in the employee failing to understand that he or she is doing a poor job.

Remember that negative appraisals are not designed to punish people. Rather, negative feedback is intended to notify an employee of behavior that falls below expectations and provide an opportunity to improve that behavior before more serious discipline is imposed.

TIPS FOR MAKING NEGATIVE APPRAISALS POSITIVE

- View the appraisal meeting not as a punishment but as a positive tool for helping the employee to improve.
- Be familiar with the details of the employee's job, workload, working conditions, and resources available.
- Be prepared to describe performance deficiencies objectively, specifically, and honestly.
- Keep a positive tone. Don't point fingers, literally or figuratively, at the employee. Focus on the conduct and not the person.
- Emphasize the behavior that is desired in the future, rather than dwelling on past misconduct.
- Ask questions. Seek the employee's input as to why he or she is performing poorly.
- Listen. Be respectful of the employee's opinions, even if you disagree.
- Jointly develop strategies for improving poor job performance. Explore with the employee how poor performance can be turned into success.
- Have a positive outlook. Let the employee know that you are confident that he or she can improve.

Employee Discipline

NOTICE OF MISCONDUCT AND OPPORTUNITY TO CHANGE

Employees who do not meet performance standards or who violate workplace rules may *eventually* be fired. However, good management practices require that employees be given:

- general notice of their employer's expectations of acceptable performance and workplace conduct;
- specific notice of their unacceptable performance or conduct; and
- an opportunity to make necessary changes in behavior.

Clear notice and the opportunity to change is the basic structure of an effective discipline system. Discipline is not used to punish an employee. When you treat employees as children, they are likely to respond as children. When you treat employees as adults, they are likely to respond as adults. Make employees responsible for their own behavior. Effective discipline attempts to work with an employee to establish the employee's accountability and responsibility to change unacceptable conduct. Effective discipline minimizes workforce dissatisfaction, increases productivity, boosts morale, and withstands legal challenges.

BASIC STEPS OF DISCIPLINE

- 1. Inform the employee that he or she has engaged in specific conduct that is unacceptable; remind the employee that certain conduct is expected.
 - **2.** Explain that the improper conduct must change.
- **3.** Discuss the negative consequences that will occur if the employee fails to accept responsibility for and to change unacceptable behavior, as well as the potential benefits of changing the improper behavior.
 - **4.** Explore the reasons for the unacceptable behavior.
- **5.** Working with the employee, jointly develop an agreed-upon action plan that the employee will undertake to change the unacceptable behavior.
 - **6.** Document the disciplinary process.

✓ PRE-DISCIPLINE CHECKLIST FOR MISCONDUCT

Before disciplining an employee for violating work rules or otherwise engaging in workplace misconduct, ask the following questions:

Did the employee have advance notice of expected workplace conduct or work rules and the consequences for not meeting those expectations or violating those rules?

Are the expectations or work rules reasonably related to the orderly, efficient, and safe operation of the organization?
Do the expectations or work rules require conduct that can be reasonably expected of the employee?
Was there an investigation to determine whether the employee actually engaged in misconduct or violated work rules?
Was the investigation fair and objective, focused on the misconduct and not on the employee's personality or protected class? Did the investigation include the employee's version of events?
Did the investigation uncover facts to establish that the employee acted improperly?
Have the work rules or policies in question been applied consistently to all employees who have engaged in similar misconduct? Would the planned discipline be different from discipline imposed in similar situations involving other employees?
Does the planned "punishment" fit the "crime" in view of: (a) the seriousness of the proven misconduct; (b) the employee's record (both performance and disciplinary) at the organization; and (c) how long the employee has worked at the organization?
Have all relevant procedures in the organization's disciplinary policy been followed? If the employee is covered by a union contract, have all relevant disciplinary procedures set forth in the contract been followed?

Don't discipline the employee if "no" is the answer to any of these questions. Disciplining the employee when "no" is the answer to one or more of the questions is potentially inviting a lawsuit and could make it difficult to justify the discipline in court.

COUNSEL TO IMPROVE UNACCEPTABLE PERFORMANCE

Disciplining employees for inadequate or unacceptable performance requires a different focus than disciplining employees who violate policies and work rules or engage in misconduct. Managers or supervisors must become more like coaches or counselors instead of "enforcers." A counseling session to improve poor performance may contain the following steps:

- 1. Express the performance standards for the job and review past performance of the employee. Explain why it is important to the department and the organization for the employee to perform well.
- **2.** Describe the areas of performance that the employee must improve in terms of results that are to be achieved. To the extent possible, focus on the future. Describe what good performance looks like.

- **3.** Ask for the employee's perspective on his or her performance. Does the employee believe there is a problem? Explain the impact on peers, other departments, customers, and the organization overall when the employee does not perform well.
- **4.** Discuss possible solutions. What does the employee propose to do to solve the problem? Have the employee develop steps to solve the problem to create a sense of ownership in the solution. Suspend the session if the employee needs more time to develop a plan. Only if the employee cannot develop a plan should you develop one for the employee.
- **5.** Agree to a written action plan containing specific goals and timetables for meeting those goals.
- **6.** Have the employee verbally commit to the action plan and provide the employee with a copy of the plan. Retain another copy as documentation of the meeting.
- 7. Follow up on performance based on the goals stated in the action plan. Provide specific factual feedback on how the employee is doing. Offer concrete suggestions to improve performance. Praise instances where performance has improved; be as specific as possible.

PROGRESSIVE DISCIPLINE FOR "REPEAT OFFENDERS"

The steps outlined above to address misconduct or improve poor performance often are the first steps in the progressive discipline process. If the employee is unable or unwilling to change his or her conduct or improve performance, however, the manager will need to take additional disciplinary steps.

Many organizations follow progressive discipline systems, either formal or informal. Such an approach provides an organization with a system that is fair and defensible against a legal challenge. In a progressive discipline system, the employee and the supervisor generally know in advance what discipline is appropriate for misconduct or performance deficiencies, and the consequences become more severe if misconduct is repeated or poor performance continues. All similar violations are treated the same unless there are unusual mitigating or aggravating circumstances. Progressive discipline systems serve the goals of providing notice of unacceptable conduct and an opportunity to change. They also help to ensure that employees who engage in similar conduct are disciplined in a similar manner.

Usually—but not always—the progressive discipline steps are:

- 1. Oral warning
- 2. Written warning
- 3. Suspension
- 4. Termination

Consider "last chance agreements." Last chance agreements are a way to underscore that employees will lose their jobs as a consequence of their behavior. They differ from a typical final

warning in that they are more focused, direct, personal and specific. Some employees appear not to understand that they will be fired because of their behavior even after receiving a final warning, and too often these types of "misunderstandings" lead to litigation. If you use a last chance agreement, it is critical that your intention is rehabilitative and you believe the employee will be able to modify his or her behavior successfully.

Don't use a "Last Chance Agreement" just to have the file "look good" in the event of a third-party review or to create the illusion of the possibility of continued employment. Last chance agreements should spell out in no uncertain terms exactly what the employee must do to remain employed and what will happen if the employee fails to do exactly what is described in the document. Typical of a last chance agreement is an employee's signature in conjunction with language that reflects the employee's agreement to its terms: "In accepting the terms of this Last Chance Agreement, you are agreeing that if you fail to live up to this agreement, you will either immediately resign your position or you will be terminated. No excuses will be accepted for not meeting the terms of this agreement." Last chance agreements also tend to contain language specifically directing the employee to consult an attorney or union representative prior to signing the agreement. Consult with your HR department before undertaking a last chance agreement.

Always know your company's policy. Learn your organization's discipline policy. Be familiar with the disciplinary steps. Find out if there are any serious offenses that are exempt from the usual progressive discipline process. Understand the specific procedures that supervisors and managers must follow under the policy.

Always follow your company's policy. Not following a progressive discipline policy can have serious legal consequences. For instance, failure to apply the policy to all employees who violate a rule can be used as evidence against the employer in a discrimination lawsuit. Immediately firing an employee without following the policy's required disciplinary steps can result in the employee suing for breach of an implied contract for continued employment.

DOCUMENT DISCIPLINARY STEPS

Documentation of discipline is essential—for both disciplinary and legal reasons. Documentation reinforces the message that a supervisor is trying to communicate in the discipline meeting. A disciplinary meeting is a stressful event for both employee and supervisor. The employee may not hear everything that is being said. Giving the employee a written summary of what is wrong and what must be changed will help prevent misunderstandings.

If discipline is challenged in a lawsuit, documentation allows the organization to show what happened during the disciplinary process. Documentation shows when the meetings took place, what was said during the meetings, and that the employee was given notice of unacceptable behavior and an opportunity to change or improve.

AVOID INFORMAL DISCIPLINE

Managers and supervisors must be careful about taking an informal approach to discipline because of concerns that every situation will not be treated consistently. If one employee only gets a friendly reminder about being late while another employee gets a written warning, there is inconsistent treatment. The employee who gets the written warning may believe this inconsistent treatment is based on an unlawful motive, such as race or sex discrimination.

Pre-Termination Review

DON'T FIRE SOMEONE ON THE SPOT

Firing an employee on the spot can get an employer into trouble. Every termination decision should be carefully reviewed for fairness, legality, and consistency with employer policy. The less care that is given to making a decision to fire someone, the greater the risk the organization will wind up in court. The checklists provided below are designed to help ensure that termination decisions are soundly made.

Suspension during investigation. Even if an employee has committed a serious offense that clearly calls for termination, such as hitting a coworker, it is better to suspend the employee first than to immediately fire him or her. The employee should be told that he or she is suspended and must leave the premises until further notice from management. An investigation of the surrounding circumstances may uncover facts that explain the employee's behavior or make termination inappropriate.

✓ CHECKLIST: POLICY/PROCEDURE DOUBLE-CHECK

What specific policy or work rule violation authorizes the termination?
Where is the policy published? How was the policy communicated?
Is the policy reasonably related to the orderly, efficient, and safe operation of the company?
Does the policy require conduct that can be reasonably expected of the employee?
How do you know that the employee knew the behavior was against policy? Do you have documentation that the employee knew of the policy?
Has the employee had an opportunity to present his or her side of the story?
Was there an investigation to determine whether the employee actually engaged in conduct that violated the policy?
Was the investigation of the conduct fair and objective? Did the investigation attempt to find out the employee's version of events?
Did the investigation find enough facts to show that the employee acted improperly?
Did the employee have an opportunity to make necessary changes in behavior?
Is termination appropriate for this infraction?
Have procedures in the company's progressive discipline policy been followed?
If the employee is covered by a union contract, have disciplinary procedures set forth in the contract been followed?

Is termination consistent with punishment imposed in other, similar situations with other, similarly situated employees?
Do you have authority to recommend termination or to make a termination decision?
Have all persons that need to review and approve the termination action agreed with the action and approved it?

✓ CHECKLIST: DOCUMENTATION AUDIT

- Make sure the investigation was complete. A complete investigation includes gathering
 and completing a written report of all the facts and written witness statements, including
 the employee's statement; preserving physical evidence and records; reviewing all
 personnel records, including disciplinary records; and comparing actions taken in
 similar situations.
- Prove that the termination was fair and followed company policies and practices. Is there documentation to prove that the events were true and that company policies and procedures were followed?
- Review the documentation. Double-check any facts cited. Make sure there are proper authorizations for all actions. Determine whether the proper documentation has been used.

✓ CHECKLIST: LEGALITY REVIEW

A "yes" answer to any of the questions below is a warning sign that the planned termination may be illegal. If "yes" or "don't know" is the answer to any of these questions, consult with your Human Resources department before proceeding with the termination:

- □ Could any of the following protected categories be a factor in the recommendation to terminate the employee?
 - Race or color
 - Religion
 - Sex, including pregnancy, childbirth, or related condition
 - Age
 - Disability
 - Genetic information
 - National origin
 - Citizenship status

• Veteran or military status
Whistleblower activity
Arrest records
• Marital status
• Caregiver status
Sexual orientation/gender identity
• State of residency
• Political affiliation
• Lawful off-duty activities, including firearm possession or ownership
Could the discharge have the appearance of discriminating on the basis of one of the above protected categories?
Has the employee been a victim of abuse or harassment? Has the employee complained of abuse or harassment?
Is there any reason to believe the employee may have a disability that has impaired his or her work performance?
Has a request by the employee for a disability or religious accommodation been refused?
Has genetic information about the employee or his or her family member been revealed?
Is the employee pregnant?
Has the employee recently engaged in any political activities?
Has the employee recently requested a military leave?
Has the employee recently returned from a military leave?
Has the employee engaged in union activities?
Has the employee recently been called as a witness or served on jury duty?
Has the employee been promised any terms or conditions of employment by anyone in a position of authority?
Is the employee about to vest in any benefit?

	Are the employee's wages being attached or garnished?			
	Has the employee recently been promoted, given a raise, or received a company commendation or award?			
	Has the employee complained about wages, hours, or other work conditions?			
	Has the employee reported company wrongdoing?			
	Did the employee refuse to do some activity because it was against the law?			
	Has the employee filed a grievance or complaint against the company?			
	Has the employee had medical treatment recently?			
	Has the employee filed a workers' compensation claim?			
	Has the employee applied for or returned from family medical leave recently?			
	Have false or malicious statements been made about the employee?			
	Has personal information about the employee been revealed?			
	Would the termination decision be any different if you knew the "facts" were to be reported in the local media? Reported on a Facebook page?			
✓ CHEC	KLIST: REDUCTIONS IN FORCE			
	Be certain there is a sound and defensible business reason for reducing the size of the work force.			
	If applicable, determine whether federal or state plant closing or mass layoff notice requirements have been satisfied (typically a responsibility of Human Resources or corporate counsel).			
	Conduct the legality review checklist, above, before selecting employees for the workforce reduction.			
	Have documentation to back up merit-based selections.			
	Make sure planned selections do not conflict with seniority rights under a union contract or company policy.			
	Ensure that the planned selections do not violate employment contracts with employees.			
✓ CHECKLIST: RESIGNATIONS				
	Determine whether the employee has provided advance notice of resignation if required by company policy.			

Find out why the employee is leaving.
If the employee has chosen to resign instead of being fired, make sure that the choice is the employee's alone and that no one has pressured the employee to resign. Also, determine whether company policy permits resignation instead of firing in the circumstances of the employee's case.
Find out whether the employee is resigning in order to escape illegal or intolerable employment practices or conditions.
Request that the resignation be in writing, that the reasons for resigning be stated, and that the employee sign the statement.
Document the reason(s) why the employee resigned.

Conducting a Termination Meeting

WHAT SHOULD THE TERMINATION MEETING ACCOMPLISH?

One of the most difficult parts of any manager's or supervisor's job is telling someone that he or she has been fired or otherwise discharged from employment. It is an unpleasant and stressful task. Careful planning is required to make sure that the termination meeting efficiently communicates to the employee the termination decision and the reason for the decision. The meeting should be conducted in a manner that maintains the dignity of the person being terminated as well as the reputation of the company as an employer that deals fairly with its people.

The termination meeting is the last opportunity a company has to decrease the likelihood that an employee will file a lawsuit challenging the termination. To decrease potential liability, the termination meeting should be conducted in a manner that:

- Maintains the dignity of the person being terminated and minimizes as much as possible the resentment the discharged person feels toward the company.
- Explains the reason for the discharge.

According to one lawyer who represents employees who have been fired, many people who sue for wrongful discharge are trying to find out the real reason they were fired or laid off. They do not feel they were "leveled with" by management and seek out legal help to force the company to explain the "real reason" behind the termination.

WHERE TO HOLD THE MEETING

If at all possible, the termination meeting should be held in person. In some situations involving remote or telecommuting employees, the termination meeting may have to be conducted by phone. In no event should an employee be terminated by email. The in-person meeting should be held privately:

- at a neutral site other than the manager's office;
- at a place with a working telephone and, preferably, at least one wall of uncovered glass;
- in a well-lit area with at least two chairs and a desk; and
- close to the exit from the office or worksite.

WHEN TO HOLD THE MEETING

Early in the day and early in the week is the best time for conducting a termination interview. People are more relaxed, more rested, and better equipped to handle stress earlier in the day. People tend to be tired and short-tempered later in the day, and this may increase the chance for an unpleasant reaction to bad news. Avoid scheduling the meeting on the last working day of the workweek or before a holiday or vacation.

SHOULD A THIRD PARTY BE THERE?

If the employee requests a witness, it is probably better to allow this so that the employee does not feel he or she is being railroaded out the door unfairly. However, explain that the witness is there only to observe the meeting, not to act as a representative for the employee's side.

A request for a union representative does not have to be granted because the purpose of the meeting is to merely inform the person of a permanent decision to discharge that has been previously made.

Management may want a third person present if trouble is expected or if an objective third person is needed. Often a representative from human resources is present to answer questions about severance, benefits, final pay, eligibility for unemployment, and the like. However, a second management representative may be seen as an attempt to "gang up" on the employee.

HAVE DOCUMENTATION AVAILABLE

The supervisor should bring documentation that supports the discharge to the termination meeting. But it is not necessary to show the documentation unless there is some misunderstanding about why the termination is occurring.

Supporting documentation might include:

- copies of relevant disciplinary policies
- performance appraisals
- memos of disciplinary meetings
- formal warnings issued during progressive discipline
- statements from witnesses gathered during the investigations
- customer complaints

WHAT TO DO DURING THE TERMINATION MEETING

The actual meeting to inform an employee that he or she is being terminated should be brief, taking about 10 minutes. The purpose is to communicate that a decision has been made to terminate the employee and the reasons behind that decision. The following steps should be kept in mind when conducting the termination meeting:

- 1. Emphasize the following points:
 - The decision is final and cannot be reversed
 - All relevant factors were reviewed.
 - There is agreement at all management levels.

- 2. Display empathy for the employee's situation but do not sympathize or try to be a friend. If the employee begins to cry, allow the expression of emotion to occur and just offer some tissue. Avoid trying to soften the bad news.
- 3. Don't hold out any hope that the decision will be changed or that there is a possibility for any kind of bargaining.
- 4. Don't "blame" the decision on upper management. Avoid making statements such as: "*They* decided to terminate your employment." Remember, you must communicate that there is agreement for the decision at all levels of management.
- 5. Don't lose control of the meeting or stray from the central issue of informing the employee of a predetermined result. Be firm and honest, but allow the employee to have his or her say. Don't interrupt or "talk over" the person if he or she maintains a businesslike tone. If the employee tries to argue with the decision, react by saying words such as: "I understand what you are saying, but the decision stands and will not be changed." If the employee becomes angry and abusive, do not respond in a similar manner. Maintain a normal tone of voice. State firmly that the meeting will not continue under such conditions.
- 6. Don't respond to a threat to file a lawsuit. That is the right of any person.
- 7. Don't discuss the situation of any other employee; this meeting concerns solely the employee.
- 8. Communicate the reasons for the termination in factual terms. Do not make value judgments about the person's character or work ethic.
- 9. End the meeting by telling the person the effective date of the termination and the manner in which to leave the premises. Outline the next steps in the termination process, such as return of company ID, keys and credit cards. At this point it may be appropriate to turn the meeting over to a human resources department representative or other company official to inform the person about final payments and benefits.
- 10. If the employee is to leave immediately, have any final checks, benefits or vacation payments prepared and inform the employee how and when to collect his or her personal belongings.
- 11. Wish the employee good luck and express confidence in his or her future. If the meeting was conducted in person, stand, extend your hand and remain standing until the employee has left the meeting site.

SAMPLE OPENING STATEMENTS

The first moments of the termination session will often dictate the tone for the rest of the meeting. It is during this period that the supervisor can establish control of the meeting. This opening statement should be planned out and rehearsed by supervisors. The statement should first inform the employee that a termination decision has been made, followed by the reason for the

termination. The tone of the statement should be non-judgmental. Words should be chosen that do not provoke a hostile reaction or invite an argument about the merits of the decision.

The following statements illustrate how a supervisor might begin a termination meeting.

We have decided to end your employment with the company. As you recall we tried several times in counseling sessions to warn you that your performance needed to improve. In the last meeting held on (date) you were specifically told that failure to improve your productivity and work quality to acceptable levels could lead to termination. Unfortunately, you were unable to achieve the performance goals set out in that meeting. That inability to meet acceptable performance goals after repeated counseling and warnings is the reason we have decided to take this action. Today is your last day of employment with the company.

I must advise you that your employment with the company is being ended effective today. We have decided to terminate your employment because of your absence and tardiness problems. You recall that we have discussed your attendance record several times in the last six months. In the written warning I gave you on (date) you were specifically informed that if you missed one more work day in a one-month period you would be terminated. Yesterday you did not show up for work and did not call to make arrangements to make up the time. Thus, I have no alternative but to follow through on the warning and terminate your employment.

References/Defamation/Privacy

WHAT IS DEFAMATION?

Defamation is a false statement — either written or spoken — about a person that harms the person's reputation. Defamation can occur when a supervisor releases inaccurate, negative information about a former employee. Critical comments made about an employee during the performance appraisal process or investigations of misconduct are also potentially defamatory. Statements made in email communications or on social networking sites can also give rise to defamation claims. Not only can a company be held liable for defamatory statements in the workplace, so can the supervisors or employees who made the statements.

WHAT ARE THE DEFENSES TO DEFAMATION?

Truth. Truth is an absolute defense to defamation claims. However, this defense will only succeed if an allegedly defamatory statement is really true. Thus, for example, a supervisor's mistaken belief that a defamatory statement about an employee is true will not satisfy the truth defense. Moreover, as discussed below, even if the statement were true, it may violate the employee's privacy rights.

Consent. Statements about an employee's performance may be protected if the employee previously consented to the disclosure. But even in the case of consent, disclosures should be limited to only those who need to know.

Qualified privilege. Managers and supervisors have a "qualified privilege" to speak openly about an issue concerning an employee with persons, such as other members of management, who have a legitimate need to know about the matter. However, the privilege will be lost if a defamatory statement is motivated by ill-will or is made to or heard by persons who do not have a need to know the information. The privilege can also be lost if the statement unnecessarily includes information that is not job-related.

Case illustrations:

- Distributing a memo to employees that attributed an employee's discharge to alcoholism, inefficiency, and unreliability was not protected by qualified privilege. The memo was distributed to employees in circumstances where a simple statement of discharge for unsatisfactory performance would have been sufficient. The employees had no business need to know the information.
- An employer's statement that an employee had been terminated for serious misconduct, including lying, was protected by qualified privilege. The statement was communicated to a state agency investigating an unemployment compensation claim. The agency was the proper party and had a business need to know the information.

WHAT IS INVASION OF PRIVACY?

Publicly disclosing private facts about an employee can result in an invasion of privacy lawsuit. Supervisors risk an invasion of privacy suit if they broadcast matters such as the details of

a performance evaluation, the reasons for disciplining or firing an employee, an employee's medical test results, or an employee's sexual orientation. Although truth is a defense to defamation claims, it is *not* a defense to an invasion of privacy claim. Here are some general tips to avoid running afoul of employee privacy issues in the workplace:

TIPS FOR AVOIDING DEFAMATION/PRIVACY CLAIMS

- Discuss disciplinary or performance issues concerning an employee only with persons who have a legitimate right to know. Make sure the discussion is in a private area and cannot be overheard. Stick to the topic at hand don't discuss unrelated information about the employee.
- Investigate carefully suspected employee performance or discipline problems before reaching any conclusions.
- Ensure that employment decisions are objective and well-founded. Do not base any decision on rumor or malicious statements.
- Caution employees who report misconduct by a coworker of the risk of personal defamation liability if they make malicious or false statements or discuss the matter with others. Whenever possible, obtain a written statement from them.
- Avoid being petty, malicious, or dishonest when talking about an employee or documenting information about the employee.
- Don't document information about an employee that has no clear business purpose. Don't collect information in the first place if it's irrelevant and unnecessary for some management function.
- Stick to the facts when documenting the reasons for an employee's discipline or termination. Don't include unnecessary information or personal comments. Don't exaggerate.
- Check existing employee records for accuracy and completeness. Remove any unnecessary or irrelevant information that is not necessary to make employment decisions.
- Keep documentation on employees strictly confidential. Lock file cabinets where employee records are kept. Password-protect or encrypt electronic files. When sending paper records, make sure they are well-sealed and marked "confidential." Use all available security protections when transmitting computerized records.
- Explain the company's reference procedures to an employee at the time of the employee's exit interview and then obtain a written consent for release of information.
- Restrict the release of information about employees without their consent. Don't tell anyone
 anything about an employee unless you absolutely must to allow them to do their job,
 including basic employee identifying information such as address, phone number, or
 Social Security number.

- Don't publicly disclose private facts about an employee. Don't broadcast the details of a performance evaluation, the reasons for disciplining or firing an employee, medical information about an employee, an employee's sexual orientation, etc.
- Ask anyone who has the right to compel you to provide information (the police, a lawyer representing someone in a lawsuit) to obtain a subpoena describing the information they want before you provide them with any information concerning an employee. Information disclosed pursuant to a valid subpoena cannot be grounds for a successful invasion of privacy lawsuit.

HOW TO EXPLAIN WHY A COWORKER WAS FIRED

If an employee asks why a coworker was fired, first tell the employee that the company treats all such personnel matters as confidential. Next, check company policy. If company policy allows any explanation, only give a very general response. For example, if the coworker was fired for theft, do not say the person was fired for stealing. Instead, say the person was terminated for failure to follow company policy and procedure. **Specific details should not be disclosed.**

In a few cases, a supervisor may believe that employees have a need to know the details. The supervisor should have a very solid reason for wanting to disclose the information. For example, disclosure may be necessary for health or safety reasons. In such cases, assuming company policy allows disclosure, the communication should be accurate and limited in scope. Discuss the facts in an objective, nonmalicious way and avoid making accusatory statements.

HOW TO HANDLE JOB REFERENCE REQUESTS

Check company policy. Always check company policy before responding to any reference check. Find out who has authority to give references. Determine what may be said in a reference. Many companies prohibit managers and supervisors from giving references under any circumstances and require that reference requests be forwarded to the Human Resources department. Companies usually limit what may be said in a reference to the dates of employment, job title last held, and what the job duties were.

Find out who you are talking to. Make sure that you are talking with someone who has a legitimate interest in knowing the information—usually someone who wants to hire your former employee. Ask for the caller's name, title, company, and phone number or other contact information. Also, ask if the caller has a written authorization from the former employee to acquire the information.

Make sure requests are in writing. Ask the caller to submit the request in writing. Even if your company allows managers and supervisors to respond to a reference check, no response should be given unless the request is in writing.

Avoid "off-the-record" comments. Don't be tricked into responding to someone who promises to keep the requested information strictly in confidence.

Be neutral. If your company has no policy on what managers and supervisors may say in a job reference, the best practice to follow is to provide only the dates of employment, the job title

last held, and a description of the job duties. Regardless of whether a person was a good or poor employee, no further information should be given.

Be accurate. If you are required to provide a reference, provide only truthful, job-related information based on proper documentation. Never provide misleading information. For example, in the case of an employee with a known dangerous propensity (*i.e.*, documented violent behavior), do not provide a favorable reference.

Take notes. When someone calls for a reference about a former employee, take notes to place in the personnel file reflecting the date, caller, nature of the inquiry, position applied for, questions asked by the caller, and the information given.

SPECIAL CONFIDENTIALITY RULES FOR MEDICAL RECORDS

Federal laws require that all employee medical information be collected on separate forms, kept in separate medical files, and treated as confidential medical records. Medical information must never be placed in an employee's personnel file. The information should be securely stored in password-protected electronic files or kept in a separate, locked cabinet apart from the location of personnel files. Access to medical records should be strictly limited to those persons who have a need for the information. Disclosure of the information is allowed only in the following circumstances:

- Supervisors and managers may be told of necessary restrictions on an employee's work or duties and necessary accommodations.
- First aid and safety personnel may be told if an employee's medical condition might require emergency treatment.
- Relevant information may be given on request to government agents investigating law compliance, workers' compensation offices, or insurance companies.

Genetic information. While federal law prohibits employers from acquiring genetic information about employees and their families, it requires employers to keep any genetic information they do have in their possession confidential, also maintaining that information on separate forms and in separate files. There are several narrow exceptions to this rule, notably disclosures made in compliance with FMLA certification provisions or similar state laws. Other exceptions exist for disclosures requested:

- by the employee or family member about whom the information pertains, upon receipt of the employee's or family member's written request;
- by occupational or other health researcher conducting research;
- in response to a court order, except that the employer may disclose only the genetic information expressly authorized by the order;
- to government officials investigating compliance with the federal law prohibiting disclosure, if the information is relevant to the investigation; or

• to a public health agency, but only with regard to information about the manifestation of a disease or disorder that concerns a contagious disease that presents an imminent hazard of death or life-threatening illness.	1 1