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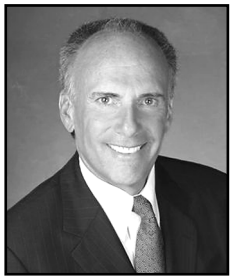
COMMENTS FROM THE EDITOR-IN-CHIEF

Allan H. Weitzman



ALLAN H. WEITZMAN is the head of the Labor and Employment Law Department in the Boca Raton office of Proskauer Rose LLP. Representing management exclusively, his practice focuses on employment litigation (discrimination, wrongful termination, etc.) and employment law counseling on a crisis and day-to-day basis. Mr. Weitzman is a recognized national speaker on employment law topics for The Society for Human Resource Management (SHRM), Federal Publications, and other groups. Mr. Weitzman has been certified by the Florida Bar as a specialist in labor and employment law.

I don't know how, but we did "it" again! I wish I could take full credit for "it." But, it's pure happenstance.

What's "it"? "It" is when the randomly submitted articles and columns complete the cycle of employment tenure: from hiring to post-termination issues and touching lots of bases in between. We have hiring issues under the ADA, handbooks, meals and lunch breaks, an FMLA update, benefits for military personnel under the new USERRA regulations, termination of executives, and, finally, warnings on post-termination references. It's almost as if this issue of *HR Advisor* could be an abridged textbook on employment law. (And, that's almost as good as the "birdie" I had on the 10th hole this morning!!)

APPLICANTS WITH A PRIOR HISTORY OF VIOLENCE

Don't be fooled by the title of Marty Denis's column, "Risky Business: Terminating the Mentally Ill with a Prior History of Violence," because it's really all about bungled hiring. Marty discusses a recent Ninth Circuit ADA case where the employer waited until three months after the employee started before it did a criminal background check to verify the accuracy of the "prior conviction" question on his employment application. The belated background check showed both a prior battery conviction and a disposition of not guilty of murder by reason of insanity. Given this report and the employee's public interaction responsibilities, the employee was terminated but later sued under the ADA for discrimination based on a perceived mental illness. If you want to know (and can't guess) what happened, read Marty's column.

FREDRIC C. LEFFLER is Senior Counsel at Proskauer Rose LLP in the firm's New York City office. His practice is devoted exclusively to labor and employment law issues in defense of employers.

THE CHALLENGE OF HANDBOOKS

OK. So, now the applicants are in the door and on day one, you give them your handbook—or should you? That question is the subject of the article by Barbara Fitzgerald-Turner and Laura Drill: "The Benefits and Dangers of Employee Handbooks: Are They Worth the Challenge?" The challenge, they write, is how to find a balance among the various competing objectives that handbooks are created to meet. Barbara and Laura answer not only this question but also delve into a discussion of handbook style, disclaimers to respond to legal concerns, and the complicated concerns that present themselves when a revised handbook is issued. After you read this article, you'll never take your handbook for granted again.

MEAL AND REST BREAKS

Let me give you 172 million reasons to read Christina Banks's article, "How to Comply With Meal and Rest Break Law and Policy." Each of those 172 million reasons had a dollar sign in front of it for Wal-Mart when a California court

decision resulted in a verdict for failure to provide meal breaks for 116,000 employees over a four-year period.

Despite this, meal and rest break compliance seems to be the forgotten step-child of FLSA compliance. But, compliance with these breaks are fraught with problems. To learn about these problems, as well as ways to minimize liability, read every word of Christina's article as if each word also had a dollar sign in front of it.

SERIOUS HEALTH CONDITIONS

It's inevitable: your employees or their spouse, parents, or children will get sick and your employees will want/need to take off from work. While all of our readers know about FMLA compliance, it may be difficult to keep up with the recent judicial developments regarding "serious health conditions," unless, of course, you have Janet Payton's article, "'Serious Health Conditions' under the FMLA." Frankly, I think that the FMLA reads more like tax code intricacies than an employment law statute. Janet's article is quite valuable in that it both demystifies the FMLA and provides a discussion of recent cases that put the FMLA into various practical contexts.

BENEFITS UNDER USERRA

While it's not as inevitable as illness, military leave issues are becoming more commonplace. That explains why, eleven years after the passage of USERRA, the Department of Labor has issued regulations interpreting its provisions. A portion of those regulations is devoted to the implications of USERRA to employee benefit plans sponsors and employee benefit plans. In "New USERRA Regulations Clarify Benefit Obligations," Roberta Chevlowe and Gia Brock focus on these implications and the notice obligations applicable to employers. There are health plan issues (while serving and upon reemployment) and pension plan issues, as well as multi-employer plan issues for both. Roberta and Gia lay it all out for you and make compliance easy.

TERMINATING EXECUTIVES

I've always believed that executive terminations create the greatest exposure for two basic reasons: (i) when there's a loss of confidence or the relationship turns sour, employers seek immediate termination even in the absence of a well-documented file or the traditional progressive disciplinary steps; and (ii) because of their high salaries, terminated executives are attractive clients to plaintiffs' attorneys. In the face of this exposure, Robert Nobile and Beth Golub have created a checklist that HR professionals should consider for executive terminations. Their column, "Terminating An Executive: Key Steps to Minimize Liability," will prove invaluable to you the next time you're faced with the potential ramifications of these highly explosive and sensitive situations.

POST-TERMINATION DEFAMATION RISKS

Jerry Panaro's column, "You're Fired, and Here's Why: Now Sue Me!" fits in perfectly with my cradle to grave employment law timeline. Jerry answers the question: now that you've decided to terminate employment, what do you tell the employee and others? Welcome to the world of defamation!

While defamation is not an employment law per se, we're seeing more and more of it as plaintiffs' attorneys lard on extraneous claims (including defamation) to enhance the settlement value of their complaints. Jerry's column will sensitize you to the tension that exists between the need to tell the employee the true reasons to defend against discrimination claims and the resulting potential for defamation suits. Knowing the various defenses to defamation, as described by Jerry, will give you a decided advantage in easing this tension.

CONCLUSION

Speaking of telling the truth, I would rather be playing a second round of golf on this beautiful Saturday afternoon than writing these Comments. And, you would probably prefer any number of leisure activities over reading this edition of *HR Advisor*. But with today's ever-changing, fast-paced legal environment, there are certain sacrifices we all have to make as HR professionals. This edition of *HR Advisor* is worth the sacrifice.

NEW USERRA REGULATIONS CLARIFY BENEFIT OBLIGATIONS

Roberta K. Chevlowe and Gia G. Brock

Eleven years after Congress passed the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA),[1] which protects the rights of employees who leave employment to undertake military service, the U.S. Department of Labor (DOL) has published final regulations interpreting the statute's provisions.

Although the regulations do not impose any new legal requirements, they do clarify various existing requirements (including the statute's antidiscrimination and reemployment protections). This article focuses on the regulations' implications for employee benefit plan sponsors and employee benefit plans. Also included is a brief discussion of the notice obligation applicable to employers, since many benefit plans also function as employers. Plan sponsors should undertake a review of their administrative rules and procedures to ensure compliance with the interpretations set forth in the regulations.

ROBERTA KAREN CHEVLOWE, Senior Counsel in the Labor and Employment Law Department of Proskauer Rose LLP, practices in the field of employee benefits law. Roberta regularly advises clients on issues arising under ERISA, COBRA, HIPAA, USERRA, and the Internal Revenue Code. She is a co-author of the COBRA Handbook and received her Juris Doctor cum laude from Brooklyn Law School.

GIA GABRIELLE BROCK is an associate in Proskauer Rose LLP's Employee Benefits and Executive Compensation Law Group in the Labor and Employment Law Department. Gia received her Juris Doctor from University of Pennsylvania Law School, where she was the Executive Managing Editor of the Journal of Labor & Employment Law.

HEALTH PLAN ISSUES

USERRA requires health plans to provide service members with certain benefits both during military service and upon reemployment. In the preamble to regulations, the DOL has clarified that cafeteria plans are considered health plans subject to USERRA and must comply with the statute's continuation and reinstatement provisions.

Continued Health Plan Coverage: Protections for Service Members While Serving

USERRA provides that a service member who leaves work to perform military service has the right to elect to continue existing employer-based health plan coverage, on a self-pay basis, for himself/herself (and eligible dependents) for a period of time up to the lesser of (a) 24 months; or (b) the period of the military service (as defined in the regulations). Generally, a health plan may not charge a service member more than 102 percent of the full premium for such coverage.

The DOL regulations provide guidance regarding who may elect continued health coverage pursuant to USERRA. In particular, the regulations clarify that a health plan is not required to allow a service member to initiate coverage at the beginning of a period of military service if he/she did not previously have such coverage. Moreover, the DOL clarified in the preamble that, since USERRA continuation coverage is only available in the context of an employment

relationship, a service member who has health coverage by virtue of his/her status as a dependent of an employee or as a retiree does not have a right to elect to continue health coverage pursuant to USERRA. Similarly, unlike COBRA, a dependent of a service member does not have an independent right to elect continued health coverage pursuant to USERRA.

The statute itself does not contain any guidance concerning the procedures for electing and paying for continuation coverage pursuant to USERRA. However, the regulations provide that plan administrators may develop reasonable requirements governing a service member's election of, and payment for, continuation coverage, provided that such requirements are consistent with the terms of the plan and USERRA's rules. The regulations further state that it may be reasonable for a plan to adopt the same election and payment rules that the plan applies to COBRA continuation coverage, provided that such rules do not conflict with any provision of USERRA. Importantly, if a plan does not adopt reasonable rules regarding the election period, the plan will be required to permit retroactive reinstatement of coverage to the date of the employee's departure from employment upon the member's election and payment of all unpaid amounts at any time during the required continuation coverage period.

The regulations also contain detailed rules concerning the circumstances under which a health plan may terminate a service member's coverage upon departure for military service due to failure to timely elect or pay for such coverage. As noted in the regulations, the action that a plan administrator may take regarding cancellation of coverage depends on whether the employee was excused from USERRA's requirement to give advance notice of military service (e.g., because it was impossible or unreasonable, or precluded by military necessity) and whether the plan has established reasonable rules for electing and paying for continuation coverage.

Health Plan Coverage Upon Reemployment

Regardless of whether a service member elects to continue health coverage while serving in the uniformed services, USERRA requires reinstatement of health plan coverage to the returning service member and his/her dependents upon the individual's reemployment. In addition, the statute generally prohibits a health plan from imposing an exclusion or waiting period on the reemployed employee and his/her dependents where one would not have been imposed if the individual's coverage had not terminated as a result of service in the uniformed services.

In the regulations, the DOL has provided detailed guidance regarding reinstatement of health coverage upon reemployment. First, in the preamble to the regulations, the DOL explained that an employer is only required to reinstate an individual's health plan coverage upon the employee's actual reemployment, and not upon the individual's application for reemployment. Second, the regulations clarify that USERRA permits, but does not require, an employer to allow a reemployed individual to delay reinstatement of health plan coverage to a date that is later than the date of reemployment. However, if a health plan allows an individual to delay reinstatement to health plan coverage, that individual may be subject to the plan's exclusion or waiting periods.

Special Rules for Certain Multiemployer Health Plans

The regulations articulate detailed rules applicable to multiemployer health plans that provide coverage through a "credit bank," "dollar bank," or "hour bank" arrangement. As described in the preamble to the regulations, these "bank" plans use "accounts" through which employees save prospective health benefit credits that may be spent later, and typically use a lag period system for accumulating credits for eligibility and coverage. The regulations provide that these types of "bank" plans must permit (but cannot require) service members to use "banked" credits during the period of military service instead of paying for continued coverage during that period. Upon the individual's depletion of the banked credits, the plan must allow the service member to continue health plan coverage on a self-pay basis for the remainder of the required continuation period. In addition, upon reemployment, the plan must reinstate the individual's coverage, but may require the individual to pay the full cost of the reinstated coverage until he/she has earned enough credits to resume coverage under the plan. Alternatively, an employee may opt not to use banked credits during his/her military service and instead pay for coverage during that period, so that he/she may use the banked credits upon reemployment. Finally, the regulations require employers or plan administrators providing these types of plans to counsel employees regarding their options.

PENSION PLAN ISSUES

As noted in the preamble to the regulations, USERRA establishes specific rights for reemployed service members in their employee pension benefit plans (including non-ERISA plans such as state, government, or church-sponsored plans). Provided that the service member returns to employment within a specified timeframe, the reemployed individual must be treated as though he/she had remained continuously employed for purposes of calculating his/her pension benefits. The reemployed service member may not be treated as having incurred a break in service for purposes of participation, vesting, or benefit accrual under the plan. The regulations clarify that the entire period of an employee's absence "due to or necessitated by" the military service, including preparation time, should be considered service with the employer for determining pension benefit entitlement.

General Rules Governing Pension Plans

The regulations make clear that the employer is liable to the plan for funding the plan's obligation to provide pension benefits attributable to the reemployed individual's period of military service. (Special rules apply in the context of multiemployer pension plans, as described in the following section.) In a defined contribution plan, upon reemployment, the employer must allocate its make-up contributions, the employee's make-up contributions (if any), and the employee's elective deferrals (if any) in the same manner and to the same extent that the employer allocates the amounts for other employees during the period of service. In a defined benefit plan, the employee's accrued benefit must be increased for the period of service once the individual is reemployed and, if applicable, once the employee has repaid any amounts previously paid to him/her from the plan and made any employee contributions that may be required under the plan.

The regulations clarify that, with respect to employer contributions to a plan to which the employee is not required or permitted to contribute, the employer generally must make the contribution attributable to the individual's period of service by the later of: (a) ninety days after the date of reemployment, or (b) the date that plan contributions are normally due for the year in which the military service was performed.

With respect to employee contributions or elective deferrals under a contributory plan, the regulations reiterate that the employee is permitted (but not required) to make up these contributions or elective deferrals, but they must be made during the period beginning with the date of reemployment and extending for a period of up to three times the length of his/her period of military service, not to exceed five years. The regulations add that an individual may only make such repayments while he/she is employed with the employer. Thus, once a reemployed employee leaves employment, he/she loses the right to make up the missed contributions or elective deferrals to the plan.

Finally, the regulations provide that employer contributions that are contingent on the employee's make-up contributions or elective deferrals must be made in accordance with the plan's requirements for matching contributions. In this regard, the regulations state that if the employee does not make up the missed contributions or elective deferrals, the employee will not be entitled to receive the employer match or accrued benefit that is dependent on the employee contribution or elective deferral.

The preamble to the regulations also states that employers and plan administrators should develop reasonable rules for the allocation of make-up contributions that are appropriate for the type and size of the particular plan.

The regulations add new guidance with respect to an employee's ability to repay certain amounts previously withdrawn from a defined benefit plan. Under the regulations, upon reemployment, the employee must be allowed (but is not required) to repay any amounts previously paid to him/her from the plan in connection with his/her service in the uniformed services. If the individual chooses to repay withdrawn amounts, the amount the individual repays must include any interest that would have accrued had the monies not been withdrawn. Although the regulations provide that, generally, the repayment period may not exceed five years, they allow an employer and employee to agree to a longer repayment period. It should be noted that the DOL stated in the preamble that it was not extending this repayment option to participants in defined contribution plans.

Special Rules for Multiemployer Pension Plans

The regulations amplify the statute's special provisions for multiemployer pension plans.

With regard to liability for the employer contributions attributable to the period of military service of a reemployed member, the statute and regulations provide that the liability is allocated as specified by the plan sponsor and, if the plan

sponsor does not address this issue, then the individual's last pre-service employer is liable for the contributions. The regulations further state that an employee is entitled to the same employer contribution regardless of whether he or she is reemployed by the pre-service employer or by a different employer contributing to the same plan, provided that the pre-service employer and post-service employer share a common means or practice of hiring employees.

The regulations also provide guidance on certain notice obligations. Under the statute, an employer that contributes to a multiemployer plan and reemploys a service member must notify the plan administrator, in writing, within 30 days of such reemployment. However, the regulations clarify that the employer's obligation to so notify the plan does not begin until the employer has knowledge that the employee was reemployed pursuant to USERRA.

NOTICE OBLIGATIONS APPLICABLE TO EMPLOYERS

Recent amendments to USERRA require employers (including employee benefit plans that function as employers) to provide employees with a notice of the rights, benefits, and obligations of employees and employers under USERRA. The text of this notice was initially published on March 10, 2005. Since the DOL has slightly revised the notice, a new version of the notice has been published in the regulations. Employers should begin using the revised notice immediately. A copy of the revised notice is available at the following address: http://www.dol.gov/vets/programs/userra/poster.htm. Employers may provide the notice by positing it where notices are customarily placed.

ACTION PLAN FOR EMPLOYERS AND EMPLOYEE BENEFIT PLANS

The DOL has stated that it does not anticipate that the regulations will require significant plan adjustments, as the regulations impose no *new* legal requirements. Nevertheless, employers and plan sponsors should take the following actions (if they have not already done so) to ensure compliance with the interpretations set forth in the regulations.

1. **Health plan sponsors should establish procedures governing a service member's election of, and payment for, continuation coverage.** These procedures should include provisions regarding when a service member's health coverage will be terminated for failure to make timely payment.
2. **Health plan sponsors should establish procedures regarding whether a returning service member can enroll in the plan if the individual does not enroll immediately upon reemployment.** On a related note, health plan sponsors should determine whether a reemployed individual will be subject to the plan's exclusion provisions if he/she does not immediately enroll in health plan coverage upon reemployment.
3. **Pension plan sponsors should develop reasonable rules for the allocation of make-up contributions.** Although the DOL refused to require plans to adopt a sequential approach, plans may wish to consider this approach.
4. **Employers should distribute to employees the revised notice of USERRA rights.** Again, a copy of the notice can be found online at http://www.dol.gov/vets/programs/userra/poster.htm.

■

NOTES

1. 38 U.S.C.A. § 4301

"SERIOUS HEALTH CONDITIONS" UNDER THE FMLA

Janet G. Payton

INTRODUCTION

One issue that has been litigated under the Family and Medical Leave Act of 1993 (FMLA or Act)[1] has involved a covered employer's obligation to provide twelve weeks of unpaid leave for employees who either have a serious health condition themselves or have a family member with such a condition. Generally, FMLA leave must be granted to an employee who needs leave to recover from his or her own serious health condition. The FMLA also requires employers to grant leave to an employee who needs to care for his or her spouse, child, or parent with a serious health condition. This article examines these statutory requirements and several of the cases that have been decided in this area.

WHAT CONSTITUTES A SERIOUS HEALTH CONDITION?

Employers that are faced with a request to grant leave for a serious health condition will need to make an effort to determine whether the employee's request actually involves a serious health condition before denying that request. Under the FMLA, the term "serious health condition" means "an illness, injury, impairment, or physical or mental condition" that involves either:

- ***inpatient care*** in a hospital, hospice, or residential medical care facility; or
- ***continuing treatment*** by a health care provider (defined as a doctor of medicine or osteopathy who is licensed by the state in which the doctor practices to practice medicine or surgery or any other person determined by the Department of Labor to be capable of providing health care services). [Emphasis added.][2]

As is evident from this definition, a serious health condition encompasses anything from a simple respiratory infection to AIDS or cancer but hinges on the provision of inpatient care or continuing medical treatment. Examples of generally recognized serious health conditions include: heart attacks, heart conditions requiring heart bypass or valve operations, most cancers, back conditions requiring extensive therapy or surgical procedures, strokes, severe respiratory conditions, spinal injuries, pneumonia, severe arthritis, injuries caused by serious accidents on or off the job, ongoing pregnancy, miscarriages, and complications or illnesses relating to pregnancy (such as severe morning sickness, the need for prenatal care, childbirth, and recovery from childbirth).

An employee seeking FMLA leave based on a serious health condition must show that he or she has that condition to be entitled to leave. In *Rhoads v. Federal Deposit Insurance Corp.*,[3] the Fourth Circuit rejected an employee's FMLA claim, concluding first that the district court had correctly required her to establish that she had a serious health condition and that she had failed to do so. In making that determination, it rebuffed her argument that such a showing was not necessary if she met the FMLA's notice and certification re-

JANET G. PAYTON is an associate editor at West, and a member of the Ohio Bar.

quirements. Second, in addressing Rhoads's claim that because her employer did not follow the FMLA's second opinion procedures, it was foreclosed from asserting that she did not have a serious health condition, the court found that the statutory language pertaining to second and third opinions is permissive and ***does not require*** an employer to seek other opinions when questioning the validity of a certification.

INPATIENT CARE

The DOL regulations define inpatient care as an "overnight stay" in a hospital, hospice, or residential medical care facility, including any period of incapacity (*e.g.,* inability to work, attend school, or perform other regular daily activities).[4] It also includes any subsequent treatment "in connection with such inpatient care."

CONTINUING TREATMENT

Any illness, injury, impairment, or physical or mental condition that results in a period of incapacity requiring absence from work, school, or other regular daily activities of more than three calendar days that involves ***continuing treatment*** by a health care provider is covered under the FMLA. In addition, an illness, injury, impairment, or physical or mental condition that involves continuing treatment by a health care provider for a chronic or long-term health condition that is incurable or so serious that, if not treated, would likely result in a period of incapacity of more than three calendar days is covered. A ***chronic serious health condition*** is one that:

- requires periodic treatments;
- continues over an extended period of time; and
- may cause episodic rather than a continuing period of incapacity.

The following are other circumstances that will constitute "continuing treatment" for purposes of the FMLA:

- when two or more visits to a health care provider, medical personnel supervised by the health care provider, or a provider of health care services, such as a physical therapist, are required for the treatment of the injury or illness
- when at least one visit to a health care provider is necessary, thereby resulting in a regimen of continuing supervised treatment to resolve the condition
- when there is any period of incapacity due to pregnancy, or for prenatal care
- when continual supervision by a health care provider of an employee or family member with a long-term chronic condition or disability is necessary, as discussed above
- when the period of incapacity is permanent or long-term due to a condition, such as Alzheimer's or a severe stroke, for which treatment may not be effective
- when the period of absence is taken in order to receive multiple treatments (*e.g.,* radiation, chemotherapy, physical therapy, or dialysis) either for restorative surgery after an injury or accident, or for a condition, such as cancer, severe arthritis, or kidney disease, that would likely result in a period of incapacity in the absence of medical intervention

INCAPACITY FOR MORE THAN THREE CONSECUTIVE DAYS

To be covered under the FMLA, a health condition must necessitate the employee's absence for more than three consecutive days. At least one circuit court has concluded that, to meet this requirement, the employee must have missed three or more full days of employment.[5] Partial days are not counted.

In *Perry v. Jaguar of Troy,*[6] the Sixth Circuit examined a case brought by a man who took a leave of absence to care for his thirteen-year-old son with learning disabilities during the summer and was not reinstated to his former position when he attempted to return from leave. The employee, Jeffrey Perry, sued under the FMLA, claiming that his former employer's actions were unlawful. The court, however, disagreed, finding that Perry's son did not have a serious health condition because he was able to engage in daily activities.

Perry's son, Victor, had been diagnosed with learning disabilities, attention deficit disorder (ADD), and attention deficit hyperactivity disorder (ADHD), and was taking medication to treat his impulse-control problems. He visited a doctor every six months to monitor his physical condition and the effect of the medication. Although Victor functioned at a third-grade level in reading and a second-grade level in written language skills, he could brush his teeth, feed and dress himself, ride the bus to and from school, attend a class for emotionally and mentally impaired students, watch video games and television, and play with neighborhood kids.

First, the employer claimed that because Victor did not see a doctor during the summer of 2001 when

Perry requested leave, he was not receiving treatment as required by the FMLA regulations. The court agreed, stating that, "[e]ven if Victor's biannual doctor visits constitute[d] treatment," Perry was unable to show that Victor was incapacitated that summer. The employer also presented evidence that Victor was able to engage in daily activities in which most children engage, but Perry was unable to demonstrate that Victor could not perform regular daily activities when compared with other children without ADD and ADHD. Although Perry claimed that Victor was incapacitated because he could not attend a regular day camp due to his need for extraordinary supervision, the court stated that the "comparative amount of supervision a child needs standing alone does not address the child's ability to engage in regular daily activities."

The reason the FMLA requires a specific period of incapacity is to exclude coverage of short-term conditions for which treatment and recovery are very brief, such as minor illnesses that last only a few days and surgical procedures that typically do not involve hospitalization and require only a brief recovery period.[7]

Voluntary or cosmetic treatments (such as most treatments for orthodontia or acne) that are not medically necessary and do not incapacitate the individual for more than three days are not included in the definition of a serious health condition.

That said, an employer should be careful about automatically assuming that some conditions are minor and, thus, not covered by the FMLA. For example, in *Caldwell v. Holland of Texas, Inc.,*[8] the court reversed summary judgment for the employer, Holland of Texas, based on its conclusion that an employee's three-year-old son who had an "acute ear infection" may actually have had a serious health condition, which thereby would have entitled her to unpaid FMLA leave.

That was the case also in *Thorson v. Gemini, Inc.*[9] There, Katherine Thorson was fired for excessive absenteeism by Gemini, a company for which she had worked for approximately eight years. At the time of Thorson's firing, Gemini had an absenteeism policy that limited acceptable absenteeism to 5 percent of an employee's scheduled work hours in a rolling twelve-month period. The limit covered all absences, except for scheduled vacations, holidays, or approved leaves of absence, regardless of cause and including absences for illness.

Thorson left work on Wednesday, February 2, complaining of diarrhea and stomach cramps and did not return to work until Monday, February 7. When Thorson returned to work, she brought a note from her doctor stating that she was not to work until that day. After only a few hours on the job Monday, Thorson had to leave again due to stomach cramps, necessitating another trip to her doctor that same day. Her doctor scheduled her to have some tests on Friday, February 11, suspecting that she had either a peptic ulcer or gallbladder disease. The test results were normal and Thorson returned to work on Monday, February 14, again with a doctor's note. She worked for the remainder of that week but Gemini fired her for excessive absenteeism on Friday, February 18. On March 9, a different doctor diagnosed Thorson with a small hiatal hernia, mild antral gastritis, and duodenitis—all stress-related conditions.

On appeal for the second time, the question of whether Thorson had a serious health condition under the FMLA was, once again, raised. After first concluding that Thorson had an "illness" or "physical condition," the court focused on whether that condition involved "continuing treatment by a health care provider." It turned to the DOL regulations that were in effect at the time relevant to Thorson's case—the interim final rule—to answer that question as follows:

> On its face, then, the interim final rule sets forth three objective requirements that must be met before Thorson can be deemed to have had a "serious health condition": she must have had a "period of incapacity requiring absence from work," that period must have exceeded three calendar days, and she must have had "continuing treatment by… a health care provider" within that period.

Noting that there was no dispute that Thorson's absence for her February 1994 illness exceeded three calendar days, the court found that she had also had continuing treatment, which, under the interim final rule, meant that she had been treated two or more times. It also concluded that although the final regulations "expound upon and rearrange" some of the language in the interim rule, they did not change the substance of the rule on this particular issue.

The court then moved on to Gemini's argument that Thorson did not have a serious health condition because her diagnosis consisted of only minor ailments. It observed that the DOL had issued inconsistent opinion letters dealing with conditions that may be

viewed merely as minor; however, it concluded that aside from the letters, Thorson received "continuing treatment" under the objective standard delineated in the regulations. It stated as follows:

> Subjectively, it may be that Thorson's condition was not "serious" in the usual sense of the word. Nevertheless, until February 11, her physician believed Thorson could have a potentially serious condition, and it was not until March 9, after Thorson had been terminated from her job at Gemini, that a diagnosis definitively ruled out her physician's initial suspicions. Thorson was sufficiently ill to see a physician two times in a period of just a few days and that is all that the plain language of both the interim and final rules requires for "continuing treatment."

With respect to Gemini's claim that Thorson's condition should not have resulted in an incapacity requiring absence from work, the court observed that Gemini did not avail itself of the FMLA provisions that were designed to prevent employee abuse of leave, *i.e.,* the FMLA certification process. It went on to say that "[h]ad it done so, it may have been able to determine that Thorson did not have a 'serious health condition' within the meaning of the FMLA." As a result, the court concluded that the district court "was correct in granting Thorson summary judgment on the issue of FMLA liability."

The courts are relying on the regulations for analyzing the three-day-absence requirement.[10]

Another inquiry to determine an employee's incapacity for purposes of establishing the existence of a serious health condition is whether he or she is unable to ***perform the functions of the job.*** This requirement is broadly defined. It does not mean in each instance that the employee must literally be so physically or mentally incapacitated that he or she is generally unable to work. ***It is intended to encompass circumstances when the employee must be physically absent from work from time to time to receive treatment even if the employee is capable of performing his or her job or is recovering from a serious health condition.***[11]

One court addressed an unusual question arising in this context. The Eighth Circuit, in *Stekloff v. St. John's Mercy Health Systems,*[12] held that "a demonstration that an employee is unable to work in his or her current job due to a serious health condition is enough to show that the employee is incapacitated, even if that job is the only one that the employee is unable to perform."

The case involved a woman who was fired after presenting her employer with a note from her doctor that she would be unable to work for two weeks. The employer claimed that because the employee, Debbie Stekloff, was working part-time at a second job after she took her leave, she did not suffer a period of incapacity of longer than three calendar days.

The court framed the initial issue as whether Stekloff's inability to work at St. John's was enough to show that she was unable to work for purposes of the FMLA and, therefore, incapacitated so as to constitute a serious health condition. In addressing this question, the court drew a distinction between the Americans with Disabilities Act's (ADA's) requirement that an individual be unable to work in a "broad range of jobs" to demonstrate that he or she is disabled and the FMLA's requirement that the individual suffer a period of incapacity of more than three days. That distinction, according to the court, lies in Congress's reason for enacting the FMLA—to address inadequate job security for employees with serious health conditions and provide stability in workplace relationships. In that light, the court concluded that an employee's ability to find work elsewhere "does nothing to mitigate the damage caused by a disruption in the working relationship already established between the employee and his or her current employer." Therefore, Stekloff's part-time position did not disrupt her "period of incapacity" for purposes of FMLA entitlement.

In addition, following the same reasoning that it did in determining whether Stekloff had suffered a period of incapacity, the court stated that the inquiry into whether an employee can perform the functions of his or her position should also focus on the ability to perform the functions in his or her current environment. Because Stekloff had provided sufficient evidence that she could not work at St. John's during the time of her leave, summary judgment for St. John's was reversed.

The requirement that the employee be unable to perform the functions of his or her position is limited to the essential functions of that particular position.[13] For instance, an employee with early stage cancer may be physically and mentally capable of performing his or her job but may be temporarily unable to perform the duties when required to receive medical treatment. An employee who has returned to work following major heart surgery, but is required to report periodically to a physician for examination may also be temporarily unable to perform

the functions of his or her position under the FMLA.

Employers who want a health care provider to review an employee's ability to perform his or her essential job functions will have the option of designating the essential job functions in a position description provided to the health care provider for this purpose.

ASSESSMENT BY HEALTH CARE PROVIDER

The importance of verification by a medical care provider cannot be emphasized enough. Generally, it is insufficient for an employee claiming to need leave for a serious health condition to just claim that the condition is serious. If a person cannot work, attend school, or perform other regular daily activities because of a health condition, that incapacity should be supported by a statement from a medical provider. That assessment, however, does not require a precise diagnosis.[14]

An employee's failure to back up his or her claim of entitlement to FMLA leave with the support of a medical professional will likely lose if the case gets to court. For example, in *Olsen v. Ohio Edison Co.,*[15] the court held that the employee must establish that he or she ***was required*** to be absent from work by producing evidence that a "health care provider made a professional assessment of his [or her] condition and determined, based on that assessment, that an extended absence from work was necessary."[16]

The Fifth Circuit, in *Price v. Marathon Cheese Corp.,*[17] concluded that the employee did not establish that she had a serious health condition nor did she show that she was incapacitated because her health care provider had released her to work a full schedule.

The employee was fired on a Monday morning for leaving work early the previous Friday, supposedly without permission, despite the fact that she had a doctor's excuse that she obtained that same Friday morning. According to the court, she had seen a doctor a few times over the previous three months or so for "conservative treatment" of carpal tunnel syndrome.

The court concluded that, although carpal tunnel syndrome, "if sufficiently severe, can be a serious health condition," it did not rise to that level in the case before it. Particularly important was the fact that the doctor returned the employee to her full work schedule at her request after only a two-week period of being placed on a modified schedule.

Similarly, a plaintiff whose pleadings were seriously deficient was unable to establish that her "shortness of breath and chest pains" constituted a serious health condition because she did not show that the condition required inpatient care or assessment by a health care provider.[18]

EXAMPLES OF SERIOUS HEALTH CONDITIONS

Pregnancy or Prenatal Care

Although complications from pregnancy may constitute a serious health condition, routine problems associated with pregnancy generally will not trigger FMLA protection. The case of *Gudenkauf v. Stauffer Communications, Inc.,*[19] is an example where the employee was not able to show that her morning sickness, back pain, headaches, and swelling attributable to her pregnancy kept her from performing the functions of her job so as to entitle her to take reduced or intermittent FMLA leave. There was evidence in the record from her own doctor that indicated that the employee's problems were not out of the ordinary.

At least one court has held that an employer may, but is not required to, request medical certification if FMLA leave is requested for severe morning sickness.[20]

Chronic Conditions

Like cases arising under the ADA, the outcome of many FMLA cases are fact-driven. Although denying leave based on a condition being listed under the regulations as not covered under the statute may be tempting, that approach is not advisable. Each situation needs to be looked at carefully based on the specific facts before the employer. This is especially true with some conditions that may prove to be chronic.

For example, the Third Circuit, in a case construing the interim regulations and bolstered by a look at the final FMLA regulations, found that an employee submitted sufficient evidence of a "serious health condition" resulting from a peptic ulcer to survive summary judgment.[21]

Kathleen Victorelli began treatment for a peptic ulcer in 1990 and continued seeing her doctor for the condition throughout the remaining four years of her employment with Shadyside Hospital. During the time of her employment, she received several warnings about excessive absences due to sickness despite the fact that she provided Shadyside with doctor's excuses for those absences. Finally, on July 29, 1994, Victorelli informed her supervisor that she could not make it to work that day because of a recurrence of her stomach condition. Although Victorelli returned to work on July 31

and August 1, she was terminated on August 1.

Victorelli sued, alleging that her termination was in violation of the FMLA. The district court granted summary judgment in favor of Shadyside after concluding that Victorelli had not presented sufficient evidence of a serious health condition. After analyzing the evidence presented under the interim regulations in effect at the time of the alleged violation, the Third Circuit vacated the district court's judgment and remanded the case for further proceedings.

First, the court concluded that Victorelli had been treated at least twice for peptic ulcer disease and, furthermore, she was subject to continuing treatment that included a course of medication. It then went on to conclude as follows:

> There is evidence that Victorelli's peptic ulcer disease appears to be a long-term or chronic condition… Dr. Adoki has also stated that, while manageable with medication and treatment, Victorelli's condition is incurable.

Also relevant to the court's determination was Shadyside's failure to obtain medical certification in the form of second or third opinions, "as is its right under FMLA regulations."

Although the court decided the case based on the interim regulations, it turned to the final regulations because the lower court had noted that the final rule specifically states that "unless complications arise" "minor ulcers" are not covered by the FMLA. It, therefore, engaged in an analysis of what distinguishes a "serious" ulcer from a "minor" one. It noted that the final rule extends coverage for chronic serious health conditions for any period of incapacity or treatment for that incapacity and stated that Victorelli's condition may satisfy this test. The court concluded as follows:

> First, Victorelli's multiple visits to Dr. Adoki for her peptic ulcer disease fit the language of [the final rule]. Second, the three-year duration of Victorelli's condition constitutes an extended period of time under [the regulations]. Third, Victorelli's periods of incapacity have been episodic rather than continuous… After comparing the interim and the final rules, we note that the standard for "continuing treatment" has remained unchanged.

Other chronic ailments generally include: diabetes, asthma, epilepsy, or depression, to name just a few.[22] Treatments for allergies or stress may also be serious health conditions if all of the conditions of the regulation are met. Treatment of substance abuse may be included as a serious health condition where a stay at an inpatient treatment facility is required. Absence because of the employee's use of the substance, without treatment, does not qualify for FMLA leave.

Minor Illnesses

Generally, minor illnesses such as the common cold or flu or routine dental or orthodontia problems are not serious health conditions under the FMLA. However, one court has held that "an assemblage of diagnoses including elevated blood pressure, hyperthyroidism, back pain, severe headaches, sinusitis, infected cyst, sore throat, swelling throat, coughing, and feelings of stress and depression," when taken together, could constitute a serious health condition, even if any one of them taken separately would not.[23]

More courts are beginning to view minor illnesses in this light. In *Miller v. AT&T Corp.*,[24] the Fourth Circuit held that as long as such an illness meets the regulatory requirements for a "serious health condition," leave taken as a result of it will be protected under the FMLA.

CERTIFICATION REQUIREMENTS FOR SERIOUS HEALTH CONDITION LEAVE

Health Care Provider Certification at Employer's Option

An employer may require, at its option, that the serious health condition of the eligible employee or of the son, daughter, spouse, or parent of the employee be certified by the relevant person's health care provider.[25] There are three occasions when medical certifications may be required for such leaves:

1. when the leave is requested;
2. when the employer has reason to question the appropriateness of the leave or its duration after its inception; and
3. when an employee requests an extension of a leave.

At the conclusion of a leave, an employer may require the employee to produce a fitness-for-duty report certifying that the employee is able to return to work.

If the employer elects to impose a certification requirement, the employee must provide to the employer a "timely" written certification containing, at a minimum, the date on which the serious health condition commenced, the probable duration of the condition, and the "appropriate medical facts" within the knowledge of the health care provider regarding the condition.[26]

The DOL has developed an optional form (Form WH-380) for use in obtaining medical certification from health care providers. The form provides entries for di-

agnosis and treatment regimen.[27] The employer is limited to the specific inquiries contained in the DOL's form, whether the form is actually used or not.

When the leave is foreseeable, the employee must provide the requested certification to the employer within the time frame requested by the employer (which must allow at least fifteen days after the employer's request), unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts.[28] Failure to comply with the certification request may result in a delay in the start of FMLA leave.[29]

An employer is entitled to insist on the adequacy of the certification, provided the information requested is reasonable. In a case that was primarily based on a race discrimination claim under Title VII, the Fifth Circuit rejected both that claim and a claim arising under the FMLA.[30] The employee had requested FMLA leave because of stress and anxiety and the employer approved that request. He remained absent from work for more than five weeks.

Several times during the employee's absence, the employer made numerous requests for medical certification as required under its policy. In response, the employee submitted a total of three letters from two psychologists who treated him; however, the employer notified the employee that the letters were inadequate and advised him to return to work immediately. Additional evidence showed that further attempts to obtain medical certification from the employee were unsuccessful and he was subsequently discharged.

On the FMLA claim, the circuit court concluded that none of the evidence presented by the employee, even evidence that he vigorously tried to have introduced, created an issue of fact as to whether the employee suffered from a serious health condition. The letters presented to the employer by the psychologists did not indicate that he was incapacitated and unable to work and an affidavit of an expert, based on an examination of the employee two years after his termination, was conclusory and vague.

The court also rejected the employee's claim that the employer violated the FMLA by failing to wait fifteen days after its written request for medical certification to terminate him. Finding that the fifteen-day requirement was not required in this case, it stated as follows:[31]

> State Farm provided Boyd a copy of its FMLA policy, which he reviewed immediately before requesting leave from work. Moreover, State Farm urged Boyd several times by phone to comply with the FMLA medical certification requirement. In response to these requests Boyd submitted a total of three doctors' notes, none of which diagnosed his absence as medically required. Thus, it is clear that before Boyd was terminated, he had been given more than adequate notice of the FMLA medical certification requirement and had made several attempts to comply with the Act.

An employer is not required to request a second certification if the employee's first health care certification states that the employee is able to work.[32]

Additional Certification Requirements Depending on Reason for Leave and Type of Leave Requested

For leave requested to care for a seriously ill spouse, son, daughter, or parent of the employee, the certification must also contain a statement that the eligible employee is needed to care for the son, daughter, spouse, or parent and an estimate of the amount of time that such employee is needed to care for the son, daughter, spouse, or parent.[33]

The certification is sufficient if it states that "the employee's presence would be beneficial or desirable for the care of the family member, which may include psychological comfort."[34] Moreover, if a reduced leave schedule or intermittent leave is requested, the certification must also include a statement of the medical necessity for the leave and the expected duration and schedule of the intermittent or reduced leave.[35] The final regulations further explain that certification for intermittent or reduced leave must also include an estimate of the probable number of and interval between such treatments, actual or estimated dates of treatment if known, and the period required for recovery, if any.[36]

For leave caused by the employee's own serious health condition, the certification must additionally include "a statement that the employee is unable to perform the functions of the position of the employee."[37] The employer may furnish the health care provider with a description of the essential functions of the employee's position.[38] If the request is for intermittent leave or leave on a reduced schedule, a statement of the "medical necessity" of the intermittent or reduced leave, and its expected duration, is also required.[39]

Finally, any requests for intermittent leave or a reduced leave schedule for "planned medical treatment" of the son, daughter, spouse, parent, or employee must also be accompanied by a certification of "the dates on which such treatment is expected to be

given and the duration of such treatment."[40]

Employer Request for a Second Opinion Certifying a Serious Health Condition

Where an employer has "reason to doubt the validity of the [employee's health care provider's] certification," the employer may require, solely at its expense, that the employee obtain the opinion of a second health care provider "designated or approved" by the employer, who shall not be employed on a "regular basis" by the employer.[41] Thus, the employer, for example, cannot require an examination by its so-called company doctor. It may not, however, request any additional information from the employee's health care provider.[42]

If opinions conflict between the employee's health care provider and the second opinion, the employer may require, again at its own expense, "that the employee obtain the opinion of a third health care provider designated or approved ***jointly*** by the employer and employee. [Emphasis added.]"[43] The third opinion is final and binding on both the employer and employee.[44] The Act is unclear as to whether the employer makes the decision of whether a conflict between opinions exists, thereby requiring a third opinion.

The employer may also require subsequent recertification on a reasonable basis, but not more often than every thirty days, unless, for instance, the employee requests an extension of leave.[45] In situations where the leave is for pregnancy or chronic or permanent/long-term conditions, the employer may ask for more frequent recertifications if the circumstances under the previous certification have changed significantly or the employer has information casting doubt on the employee's stated reason for the leave. In situations involving leave, including intermittent or reduced leave, for any other reason, recertification may be requested for those same two reasons or if the employee requests an extension of leave.

Medical Certifications for Return to Work

An employer may require that an employee submit a medical certification that the employee is able to return to work (*i.e.,* fitness-for-duty report) at the end of an FMLA leave if the leave was due to the employee's own serious health condition. This requirement must be applied to all employees who are similarly situated (*i.e.,* in the same occupation or suffering from a similar serious health condition).

Before the leave begins, the employer must notify the employee of the duty to submit to a fitness-for-duty exam and the consequences for not doing so. The employer may seek such a certification only with regard to the particular health condition that caused the need for the FMLA leave. The cost of this certification is the responsibility of the employee. No second or third fitness-for-duty physical examination may be required. With the employee's permission, the health care provider representing the employer may contact the employee's health care provider to clarify a fitness-for-duty report. However, the employer may not require any additional information from the employee.[46] Any request for clarification can only be for the serious health condition for which the leave was taken.

Where the health care provider certifies that the employee is not able to return to the same or equivalent job, but is able to return to a "light duty job," the employee may decline the employer's offer of a light duty job and remain on unpaid FMLA leave until the twelve-week entitlement is exhausted. An employer may not require an employee to accept a light duty offer if the employee is still entitled to FMLA leave.

An employer may delay restoring an employee to work until the fitness-for-duty certification is provided. Unless the employee provides either a fitness-for-duty certification or a new medical certification to extend the leave at the time the FMLA leave is concluded, the employee may be terminated for any continued time off.

In some cases, the ADA may also play a part in an employee's fitness-for-duty verification. For example, the employee in *Porter v. United States Alumoweld Co., Inc.,*[47] learned that the interplay between the requirements set forth under the ADA and those established by the FMLA worked to his disadvantage. He was fired after he failed to take a functional capacities examination to determine if his back could withstand the rigors of his job upon returning to work. In spite of his doctor's note that stated that he was able to return to work, which would have been sufficient under the FMLA, pressing his corresponding claim under the ADA allowed the court to look at that statute and determine that such a requirement was permissible.

CONCLUSION

The FMLA's definition of a "serious health condition" does not pose extraordinary difficulties for employers in a technical sense because the statute and the regulations specify the requirements in fairly clear and objective terms. However, court decisions do re-

veal that there is some nuance to the definition, especially with regard to minor and chronic illnesses. In addition, employers need to be aware of their obligations in communicating with employees on matters pertaining to leave for serious health conditions as well as obtaining certification from the employee's health care provider. The key for any covered employer is to understand the purpose of the FMLA and adhere to the requirements laid out in the regulations. ■

NOTES

1. 29 U.S.C.A. § 2601 *et seq.*
2. 29 U.S.C.A. § 2601(6), (11).
3. Rhoads v. F.D.I.C., 257 F.3d 373, 11 A.D. Cas. (BNA) 1776, 7 Wage & Hour Cas. 2d (BNA) 129, 82 Empl. Prac. Dec. (CCH) P 40973, 145 Lab. Cas. (CCH) P 34459, 21 Nat'l Disability Law Rep. P 72, 2001 WL 788973 (4th Cir. 2001).
4. 29 C.F.R. § 825.114(a)(1).
5. Russell v. North Broward Hosp., 346 F.3d 1335, 8 Wage & Hour Cas. 2d (BNA) 1857, 84 Empl. Prac. Dec. (CCH) P 41494, 149 Lab. Cas. (CCH) P 34760, 16 Fla. L. Weekly Fed. C 1187, 26 Nat'l Disability Law Rep. P 279, 2003 WL 22254676 (11th Cir. 2003).
6. Perry v. Jaguar of Troy, 353 F.3d 510, 9 Wage & Hour Cas. 2d (BNA) 350, 84 Empl. Prac. Dec. (CCH) P 41563, 149 Lab. Cas. (CCH) P 34795, 2003 FED App. 0459P, 27 Nat'l Disability Law Rep. P 113, 2003 WL 23025473 (6th Cir. 2003).
7. See Seidle v. Provident Mut. Life Ins. Co., 871 F. Supp. 238, 63 U.S.L.W. 2528, 2 Wage & Hour Cas. 2d (BNA) 913, 66 Empl. Prac. Dec. (CCH) P 43438, 129 Lab. Cas. (CCH) P 33210, 6 Nat'l Disability Law Rep. P 247, 1994 WL 725186 (E.D. Pa. 1994) (ear infection not a serious health condition under the FMLA).
8. Caldwell v. Holland of Texas, Inc., 208 F.3d 671, 5 Wage & Hour Cas. 2d (BNA) 1778, 78 Empl. Prac. Dec. (CCH) P 40010, 140 Lab. Cas. (CCH) P 34035, 2000 WL 329630 (8th Cir. 2000) 208 F.3d 671 (8th Cir. 2000).
9. Thorson v. Gemini, Inc., 205 F.3d 370, 5 Wage & Hour Cas. 2d (BNA) 1646, 78 Empl. Prac. Dec. (CCH) P 40112, 140 Lab. Cas. (CCH) P 34051, 176 A.L.R. Fed. 781, 2000 WL 236404 (8th Cir. 2000).
10. See, e.g., Carter v. Rental Uniform Service of Culpeper, Inc., 977 F. Supp. 753, 79 Fair Empl. Prac. Cas. (BNA) 1647, 4 Wage & Hour Cas. 2d (BNA) 254, 134 Lab. Cas. (CCH) P 33626, 1997 WL 586067 (W.D. Va. 1997). See also Haefling v. United Parcel Service, Inc., 169 F.3d 494, 5 Wage & Hour Cas. 2d (BNA) 193, 137 Lab. Cas. (CCH) P 33825, 1999 WL 111996 (7th Cir. 1999) (employee fired for excessive absenteeism did not have serious health condition because he was unable to show that his incapacity lasted more than three consecutive calendar days of work).
11. See, e.g., Hott v. VDO Yazaki Corp., 922 F. Supp. 1114, 70 Fair Empl. Prac. Cas. (BNA) 1008, 3 Wage & Hour Cas. 2d (BNA) 538, 68 Empl. Prac. Dec. (CCH) P 44149, 132 Lab. Cas. (CCH) P 33420, 1996 WL 163833 (W.D. Va. 1996) (employee with sinobronchitis that would likely last seven to ten days but who was able to perform the functions of her position did not have a serious health condition).
12. Stekloff v. St. John's Mercy Health Systems, 218 F.3d 858, 6 Wage & Hour Cas. 2d (BNA) 294, 2000 WL 959613 (8th Cir. 2000).
13. Beckendorf v. Schwegwann Giant Super Markets, 134 F.3d 369, 6 Wage & Hour Cas. 2d (BNA) 1376, 1997 WL 811826 (5th Cir. 1997).
14. See Hodgens v. General Dynamics Corp., 144 F.3d 151, 4 Wage & Hour Cas. 2d (BNA) 993, 73 Empl. Prac. Dec. (CCH) P 45412, 12 Nat'l Disability Law Rep. P 283, 1998 WL 248013 (1st Cir. 1998)144 F.3d 151 (1st Cir. 1998) (physician's inability to determine if plaintiff had angina not fatal to claim because plaintiff did undergo treatment for several days for atrial fibrillation requiring absence from work).
15. Olsen v. Ohio Edison Co., 979 F. Supp. 1159, 4 Wage & Hour Cas. 2d (BNA) 247, 134 Lab. Cas. (CCH) P 33616, 1997 WL 611699 (N.D. Ohio 1997)979 F. Supp. 1159 (N.D. Ohio 1997).
16. Dillon v. Carlton, 977 F. Supp. 1155, 4 Wage & Hour Cas. 2d (BNA) 1879, 1997 WL 580491 (M.D. Fla. 1997) (medical certification form for employee requesting modification of work schedule to care for son with attention deficit disorder with words "serious health condition" crossed out by health care provider sufficient to justify denial of leave request).
17. Price v. Marathon Cheese Corp., 119 F.3d 330, 24 A.D.D. 196, 7 A.D. Cas. (BNA) 138, 79 Fair Empl. Prac. Cas. (BNA) 1586, 4 Wage & Hour Cas. 2d (BNA) 1052, 71 Empl. Prac. Dec. (CCH) P 44863, 134 Lab. Cas. (CCH) P 33620, 10 Nat'l Disability Law Rep. P 227, 1997 WL 429188 (5th Cir. 1997).
18. Boyce v. New York City Mission Soc., 963 F. Supp. 290, 23 A.D.D. 887, 8 A.D. Cas. (BNA) 855, 77 Fair Empl. Prac. Cas. (BNA) 579, 4 Wage & Hour Cas. 2d (BNA) 1401, 72 Empl. Prac. Dec. (CCH) P 45177, 10 Nat'l Disability Law Rep. P 31, 1997 WL 232511 (S.D. N.Y. 1997). See also Oswalt v. Sara Lee Corp., 889 F. Supp. 253, 11 A.D.D. 361, 4 A.D. Cas. (BNA) 1081, 3 Wage & Hour Cas. 2d (BNA) 121, 131 Lab. Cas. (CCH) P 33341, 7 Nat'l Disability Law Rep. P 36, 1995 WL 374978 (N.D. Miss. 1995).
19. Gudenkauf v. Stauffer Communications, Inc., 922 F. Supp. 465, 15 A.D.D. 1217, 5 A.D. Cas. (BNA) 1739, 77 Fair Empl. Prac. Cas. (BNA) 1723, 3 Wage & Hour Cas. 2d (BNA) 410, 68 Empl. Prac. Dec. (CCH) P 44264, 132 Lab. Cas. (CCH) P 33410, 1996 WL 164695 (D. Kan. 1996), aff'd 158 F.3d 1074, 77 Fair Empl. Prac. Cas. (BNA) 1742, 74 Empl. Prac. Dec. (CCH) P 45624, 98 CJ C.A.R. 5269, 1998 WL 667993 (10th Cir. 1998).
20. Pendarvis v. Xerox Corp., 3 F. Supp. 2d 53, 82 Fair Empl. Prac. Cas. (BNA) 5, 4 Wage & Hour Cas. 2d (BNA) 1024, 1998 WL 229928 (D.D.C. 1998).
21. Victorelli v. Shadyside Hosp., 128 F.3d 184, 21 Employee Benefits Cas. (BNA) 2232, 4 Wage & Hour Cas. 2d (BNA) 321, 134 Lab. Cas. (CCH) P 33605, 11 Nat'l Disability Law Rep. P 263, 1997 WL 693035 (3d Cir. 1997).
22. McClain v. Southwest Steel Co., Inc., 940 F. Supp. 295, 6 A.D. Cas. (BNA) 1381, 3 Wage & Hour Cas. 2d (BNA) 1482, 134 Lab. Cas. (CCH) P 33617, 8 Nat'l Disability Law Rep. P 363, 1996 WL 547857 (N.D. Okla. 1996) (genuine issue of fact as to whether plaintiff's chronic nausea, diarrhea, vomiting, severe headaches, dizziness, and lightheadedness constituted a "serious health condition").
23. Price v. City of Fort Wayne, 117 F.3d 1022, 3 Wage & Hour Cas. 2d (BNA) 1729, 133 Lab. Cas. (CCH) P 33545, 1997 WL 353605 (7th Cir. 1997). See also Marchisheck v. San Mateo County, 199 F.3d 1068, 1999 Daily Journal D.A.R. 12631, 24 Employee Benefits Cas. (BNA) 1320, 5 Wage & Hour Cas. 2d (BNA) 1345, 77 Empl. Prac. Dec. (CCH) P 46209, 140 Lab. Cas. (CCH) P 34000, 1999 WL 1188978 (9th Cir. 1999) (combined conditions may constitute serious health condition, but there was no showing of such conditions in the case before the court).
24. Miller v. AT & T Corp., 250 F.3d 820, 6 Wage & Hour Cas. 2d (BNA) 1754, 80 Empl. Prac. Dec. (CCH) P 40487, 143 Lab. Cas. (CCH) P 34252, 20 Nat'l Disability Law Rep. P 182, 2001 WL 475934 (4th Cir. 2001).
25. 29 U.S.C.A. § 2603(a); 29 C.F.R. § 825.305(a).
26. 29 U.S.C.A. § 2603(b)(1)-(3); Pagan v. United States Postal Serv., 230 F.3d 1374 (Fed. Cir. 1999); Ahern v. Department of the Treasury, 230 F.3d 1373, 1999 WL 1211868 (Fed. Cir. 1999).
27. 29 C.F.R. § 825.306(a).
28. 29 C.F.R. § 825.305(a).

29. 29 C.F.R. § 825.100(d).
30. Boyd v. State Farm Ins. Companies, 158 F.3d 326, 78 Fair Empl. Prac. Cas. (BNA) 524, 4 Wage & Hour Cas. 2d (BNA) 1825, 74 Empl. Prac. Dec. (CCH) P 45604, 136 Lab. Cas. (CCH) P 33760, 50 Fed. R. Evid. Serv. 522, 1998 WL 726792 (5th Cir. 1998).
31. See also Bailey v. Southwest Gas Co., 275 F.3d 1181 (2002) (certification from doctor was inadequate to show serious health condition).
32. See, e.g., Stoops v. One Call Communications, Inc., 141 F.3d 309, 4 Wage & Hour Cas. 2d (BNA) 779, 135 Lab. Cas. (CCH) P 33666, 1998 WL 142297 (7th Cir. 1998).
33. 29 U.S.C.A. § 2603(b)(4)(A).
34. 29 C.F.R. § 825.306(b)(5)(i).
35. 29 U.S.C.A. § 2603(b)(5), (6).
36. 29 C.F.R. § 825.306(b)(3)(i)(B).
37. 29 U.S.C.A. § 2603(b)(4)(B).
38. 29 C.F.R. § 825.306(b)(4).
39. 29 U.S.C.A. § 2603(b)(6).
40. 29 U.S.C.A. § 2603(b)(5).
41. 29 U.S.C.A. § 2603(c)(1), (2); 29 C.F.R. § 825.307(a)(2).
42. 29 C.F.R. § 825.307(a).
43. 29 U.S.C.A. § 2603(d)(1).
44. 29 U.S.C.A. § 2603(d)(2).
45. 29 U.S.C.A. § 2603(e); 29 C.F.R. § 825.308.
46. Albert v. Runyon, 6 F. Supp. 2d 57, 4 Wage & Hour Cas. 2d (BNA) 1128, 12 Nat'l Disability Law Rep. P 309, 1998 WL 255331 (D. Mass. 1998).
47. Porter v. U.S. Alumoweld Co., Inc., 125 F.3d 243, 24 A.D.D. 89, 7 A.D. Cas. (BNA) 537, 4 Wage & Hour Cas. 2d (BNA) 297, 10 Nat'l Disability Law Rep. P 355, 1997 WL 567247 (4th Cir. 1997).

HOW TO COMPLY WITH MEAL AND REST BREAK LAW AND POLICY

Cristina G. Banks, Ph.D.

Why isn't compliance with meal and rest break law and company policy a non-issue? Employers know that employees who take breaks are likely to be more productive. They also know that employees need to eat a meal during long workdays. Why is it so difficult to ensure that employees *receive* their earned rest breaks and meal periods? In addition, why don't all employees *take* their earned meal and rest breaks? Apparently, answers to these questions are not simple, yet the consequences for not providing meal and rest breaks as dictated by law and policy can be highly significant. The recent California Superior Court decision by an Alameda County jury in *Savaglio v. Wal-Mart Stores, Inc.*,[1] which resulted in a $172 million verdict against Wal-Mart for failure to provide meal breaks to nearly 116,000 employees over a four year period, sent shock waves under the feet of employers who have not paid attention to this issue and especially those who know they have not delivered on their promise to employees.

Because meal and rest break compliance has not received the attention that other wage and hour lawsuits have in the last decade (e.g., overtime claims), employers have relatively little experience defending against these lawsuits, and many are scrambling for advice from their counsel to assess potential liability and to make corrections if needed. This article seeks to provide a better understanding of typical problems with meal and rest break compliance and offers a way to evaluate compliance vulnerabilities and minimize the probability of a lawsuit.

CRISTINA BANKS is a Senior Lecturer at the Haas School of Business, University of California, Berkeley, where she teaches human resource management and organizational behavior. She is also founder/owner of Lamorinda Consulting LLC, and is the former founder/owner of Terranova Consulting Group LLC. She has served as an expert in more than 40 overtime and meal/rest break cases.

RELEVANT FEDERAL AND STATE LAWS

FLSA. The Fair Labor Standards Act (FLSA)[2] administered by the US Department of Labor (DOL) does not regulate meal and rest breaks for nonexempt employees. However, DOL does provide guidance on a number of aspects of this employment practice. DOL defines a "bona fide meal period" as a period of time typically 30 minutes in length during which an employee must be completely relieved from duty for the purpose of eating regular meals.[3] The employee is not considered relieved if he/she is required to perform any duties, whether active or inactive, while eating. Unless nonexempt employees are free from work during their meal period (e.g., in the office, lunchroom, break room, or off premises), the break is not a bona fide meal period, and the time should not be deducted from the employee's total work hours. For example, office workers who eat at their desks while performing work are not relieved from duty and thus should be compensated for work-time. Also, because the FLSA requires employers to keep accurate records of hours worked and wages earned[4] an employer could face liability when time is

TABLE 1

STATE LAWS GOVERNING MEAL AND REST BREAKS

STATE†	REST BREAKS	MEAL PERIODS
California	Paid 10-minute rest period for each 4 hours worked or major fraction thereof; as practicable, in middle of each work period.	30 minutes after 5 hours, except when workday will be completed in 6 hours or less and where there is mutual employer/employee consent to waive meal period.
Colorado	Paid 10-minute rest period for each 4-hour work period or major fraction thereof; as practicable, in the middle of each work period.	30 minutes to not more than 60 minutes, after 6 hours, with subsequent meal periods required 6 hours after termination of proceeding meal period.
Connecticut	None	30 minutes after first 2 hours and before last 2 hours for employees who work 7.5 consecutive hours or more.
Delaware	None	30 minutes after first 2 hours and before the last 2 hours for employees who work 7.5 consecutive hours or more.
Illinois	Each hotel room attendant shall receive a minimum of two 15-minute paid rest breaks in each workday in which they work at least seven hours.	Each hotel room attendant shall receive one 30-minute meal period in each workday in which they work at least seven hours.
Kentucky	Paid 10-minute rest period for each 4-hour work period.	Reasonable off-duty period, ordinarily 30 minutes but shorter period permitted under special conditions, between third and fifth hour of work.
Maine	None	30 minutes after 6 consecutive hours, except in cases of emergency and except where nature of work allows employees frequent breaks during the workday.
Massachusetts	None	30 minutes if work is more than 6 hours.
Minnesota	Paid adequate rest period within each 4 consecutive hours of work, to utilize nearest convenient restroom.	Sufficient unpaid time for employees who work 8 consecutive hours or more.
Nebraska	None	30 minutes off premises, between 12 noon and 1pm or at another suitable lunch time.
Nevada	Paid 10-minute rest period for each 4 hours worked or major fraction thereof; as practicable, in middle of each work period.	30 minutes if work is for 8 continuous hours.
New Hampshire	None	30 minutes after 5 consecutive hours, unless feasible for employee to eat while working and is permitted to do so by employer.
New York	None	30 minute noonday period for employees who work shifts of more than 6 hours, 60 minutes noonday period for employees who work in factories, an additional 20 minutes between 5pm and 7pm for those employed on a shift starting before 11am and continuing after 7pm.
North Dakota	None	30 minutes, if desired, on each shift exceeding 5 hours.
Oregon	Paid 10-minute rest period for every 4-hour segment or major portion thereof in one work period; as feasible, approximately in middle of each segment of work period.	30 minutes, with relief from all duty, for each work period of 6 to 8 hours, between second and fifth hour for work period of 7 hours or less and between third and sixth hour for work period over 7 hours.
Rhode Island	None	20 minute mealtime within a 6 hour work shift, and a 30 minute mealtime within an 8 hour work shift.
Tennessee	None	30 minutes for employees scheduled to work 6 consecutive hours or more.
Washington	Paid 10-minute rest period for each 4-hour work period, scheduled as near as possible to midpoint of each work period. Employee may not be required to work more than 3 hours without a rest period.	30 minutes if work period is more than 5 consecutive hours, to be given not less than 2 hours nor more than 5 hours from beginning of shift.
West Virginia	None	20 minutes for employees who work 6 consecutive hours or more.

† There are a number of exclusions and specifications that determine applicability of these laws to employers. This table is meant to serve as a quick reference for readers and should not be interpreted as a complete description of these laws.

deducted for unpaid lunch breaks that do not meet DOL's definition of a bona fide meal period.

State Law. Most states do not have meal and rest break regulations, and in these cases, the liability is likely to emerge from allegations of company policy violations where an employer provides meal and rest breaks benefits. Liability may also emerge from violations of 29 CFR Part 516 of the FLSA regarding accurate timekeeping where employers have not accurately and consistently determined when a break should be unpaid. It behooves employers to carefully review their meal and rest break policies and evaluate how these policies are practiced to determine whether they are in compliance and if these policies need to be changed to minimize complaints or potential lawsuits.

Several states have laws that govern meal and rest breaks, and general information about these laws is summarized below. (See Table 1.) Readers can obtain additional information about these state laws at http://www.dol.gov/esa/programs/whd/state/rest/htm for rest breaks and at http://www.dol.gov/esa/programs/whd/state/meal/htm for meal periods.

California has the most extensive meal and rest break laws, so it is not surprising that the largest verdict against a major employer for violating meal period laws, *Savaglio v. Wal-Mart Stores, Inc.*,[5] occurred in that state. In addition to the Wage Orders issued by the California Industrial Welfare Commission (described in part above), under California Labor Code 226.7, "No employer shall require any employee to work during any meal or rest period…" and "[i]f an employer fails to provide an employee a meal period or rest period… the employer shall pay the employee one additional hour of pay, at the employee's regular rate of compensation for each work day that the meal or rest period is not provided." The extra hour of pay is called the "California Premium." This premium is calculated per employee, per day, and is paid to the employee in the same paycheck as his/her paid work time. At this time, it is not clear whether the California Premium is a "penalty" or "wage," but the resolution of this issue will have a significant impact on the amount of liability an employer can face.[6] Nevertheless, it is clear that poor execution of meal and rest break policies and ineffective compliance efforts could result in many millions of dollars in lawsuits in any state.

REASONS FOR NON-COMPLIANCE

The sources of the non-compliance problem may lie in several places. A brief summary of potential sources are provided below.

1. **Not understanding the requirements.** Clearly, one source is a lack of information about applicable laws and company standards regarding meal and rest breaks. Managers and supervisors who work directly with non-exempt employees are often unaware of what is required. They may not recognize the importance of their specific day-to-day responsibilities on behalf of the company. When compliance responsibilities are not spelled out for managers and supervisors in job descriptions, operations manuals, training guides, company communications, performance appraisals or other company documents, it is unlikely that managers and supervisors will understand how they create risk for the company.

2. **Understaffing.** Employers that operate with lean labor budgets in an effort to keep labor costs down, run the risk of having an insufficient number of employees to meet the daily work demand. Labor scheduling systems that are based on productivity or workload analyses have the ability to staff stores and other places of business to meet general work demand. Without knowing specifically the ratio of labor hours per unit of work (e.g., sales per labor hour), employers can find themselves understaffed due to several factors such as a bias to err on the side of too few employees rather than too many and not replacing absent employees or vacant positions. Also, without taking meal and rest break time into account when projecting required labor hours, the organization will have too few employees on staff to cover the work demand. When companies are understaffed, violations are likely to occur because (a) there are not enough personnel to relieve employees for breaks and meal periods, and (b) the workload is too great to stop work for breaks and meal periods.

3. **Management too busy to monitor meal and rest breaks.** Employers may have the perception that management has too many

day-to-day responsibilities to closely supervise and verify that meal and rest breaks are appropriately provided and taken. This perception may very well be reality. As companies thin their ranks of managers to cut costs, the remaining managers typically take on more responsibilities and supervise more employees. In addition, day-to-day fluctuations in staffing (e.g., absenteeism) and work demand (e.g., a rush in business) make it difficult for managers to appropriately staff the work throughout the work day. However, the law and company policy are insensitive to span of control issues or fluctuations in work demand, and management is still responsible for compliance regardless of the expansion of duties and direct reports.

4. **Employee self-management**. There may be several reasons why employers prefer that non-exempt employees manage themselves, but the net result of this preference may be increased liability. Self-managed employees can create liability several ways: (a) employees may take their meal and rest breaks in a manner inconsistent with regulations (e.g., outside the window of time allowed, eating while working); (b) employees may be unduly influenced by peer pressure and internal competition to not take meal and rest breaks to produce more on the job; and (c) employees who believe they can may believe improve their chances of advancement in the company may voluntarily miss their meal and rest breaks. If employers hold employees responsible for taking their meal and rest breaks as required by law, violations can occur for several other reasons: (a) employees may not have the ability to take their meal and rest breaks because they cannot find someone to relieve them from their work duties; (b) employees may not have the authority to leave the work station whenever they want; and (c) employees may have too much work to accomplish to take a break before they leave for the day. While on the surface giving employees discretion to "manage" their workday (including when and how long they take meal and rest breaks) appears desirable, it is a risky strategy. Moreover, making employees responsible for their own meal and rest breaks does not relieve management of its burden of compliance.

5. **Unsupervised field employees**. Employees who work autonomously and independently in the field (e.g., truck drivers, couriers) present unique challenges regarding meal and rest break laws and policy. Because they are largely unsupervised, it is difficult to control when and how long they take breaks. Employers can monitor this behavior by reviewing time records, but violations may already be a fact, leaving employers in the position of chasing down "violators" and attempting to change their behavior. The problem is that these employees are able to exercise discretion in the timing of their breaks to suit their individual needs and preferences. Unless there are specific controls in place to channel the timing and length of breaks, individual discretion may trump compliance efforts. Despite the difficulty of managing field employees, management still has responsibility for ensuring compliance.

6. **Corporate culture that encourages "gung ho" behavior.** Corporate culture can also contribute to violations when the culture encourages employees to "do whatever is necessary" to meet productivity goals or to deliver high levels of customer service. "Gung ho" behaviors, such as working extraordinary hours, at an accelerated pace, or at higher levels of productivity often appear in conflict with stopping work and taking a break. The stronger the message company leadership sends to employees to work in this manner, the greater the risk of violations. For example, corporate culture that values service to the customer above all else including employees' needs (e.g., taking a rest break or lunch) encourages employees to skip breaks, and if any take their breaks, these employees are perceived as disloyal and not a valued member of the organization. Social control through corporate culture strongly influences employee behavior, and it can make conformance to meal and rest break laws and policy very difficult.

A FALSE TUG-OF-WAR

Sometimes the problem of compliance with meal and rest break laws and policy is characterized as a tug-of-war between employee interests and management's efforts to comply. "I don't want to be told when I have to take a break or stop work to eat lunch," is a common complaint heard in companies where these laws and policy are poorly integrated with the organization of work and culture. The tug-of-war results when business operations are out of alignment with models of "successful" employees and employee rights.

Most fundamentally, companies want to maximize productivity and profit whenever possible, particularly when a company is under the watchful eye of Wall Street. All U. S. companies must comply with state and federal laws, and these laws directly impact a company's bottom-line (e.g., labor costs as a result of overtime requirements, paid rest breaks, coverage for meal periods). Companies often walk a thin line driving profit while communicating to employees the importance of taking full and timely meal and rest breaks. Some employees interpret corporate communication as "double messages." Employees, wanting to keep their jobs and contribute to company success, may elect to "help" the company by voluntarily missing their meal and rest breaks. So begins the "tug-of-war." It is a false tug-of-war because management without question has an obligation to comply with the law and to facilitate the taking of meal and rest breaks through its actions and words. Tolerance of a perceived tug-of-war is evidence of a company's failure to build the appropriate structures, processes, and systems to ensure compliance.

A SOLUTION

How do you get management and employees on the same side of compliance? The following is a preliminary (but not exhaustive) list of conditions that facilitate compliance:

- sufficient staffing to permit full and timely breaks
- a daily work schedule that provides for full and timely breaks
- a management team that is committed to ensuring and in fact ensures that full and timely breaks are taken
- a reliable mechanism for recording meal and rest breaks taken
- a place where meal and rest breaks can be taken away from work so that interruptions do not occur
- a reliable mechanism for detecting missed, shorted or untimely meal and rest breaks
- a high integrity process for addressing missed, shorted or untimely meal and rest breaks to minimize or eliminate their future occurrence
- a compensation and reward system that does not encourage working through meal and rest breaks

NO GUARANTEES

Having these elements in place does not guarantee that a company will not have meal and rest break violations or a lower risk of lawsuits. What may make the difference between a company that successfully complies with the law and one that could be in compliance but isn't, is the company's commitment to utilizing these elements fully and with integrity to minimize the occurrence of violations and to swiftly remedy situations that cause them to occur. Establishing a culture of compliance is key.

EVALUATING YOUR RISK

How can you evaluate your risk of a meal and rest break lawsuit? Or, if a lawsuit has already been filed against you, how can you evaluate your strengths and weaknesses at trial? Here are some places to look.

1. **How your company makes money.** How a company makes a profit can create conditions that may encourage non-compliance. In general, if a company's business model imposes significant constraints on how and when people work, there is less flexibility for scheduling breaks and ensuring that employees take them. For example, if customer service is primary to a business, the presence (absence) of customers can dictate when employees can take breaks. Similarly, if the business is driven by rigid timelines or deadlines, there are potential constraints on if and when employees can take breaks. Additionally, self-directed work that is performed under intense pressure to make productivity goals or to complete work by end of day creates a situation where stopping work for meal and rest breaks is undesirable. These examples illustrate how the business itself can invite situations in

which compliance with meal and rest break law is difficult without explicit and effective controls in place to ensure meal and rest breaks are protected.

2. **How your company is structured to ensure compliance with policies and the law.** Several elements of organizational structure are important for compliance:

   a. a clear and consistently enforced meal and rest break policy;

   b. an accurate timekeeping system to verify that meal and rest breaks were taken and when they were missed;

   c. job descriptions for managers that state clearly and unambiguously that management is responsible for ensuring that meal and rest breaks are taken;

   d. a labor budgeting and scheduling system that is designed to adequately cover and adjust to changing work demand;

   e. a selection and training system that results in the delivery of competent employees who are capable of meeting performance expectations;

   f. a responsive employee feedback and grievance system that identifies and remediates in a timely fashion instances of noncompliance; and

   g. a promotion system that takes into account compliance with meal and rest break law.

3. **How your company culture supports compliance with policies and the law.** If the culture reinforces self-sacrifice to the point of skipping meal and rest breaks and working off the clock to further company success, employees will be disinclined to ask for and take breaks. Conversely, a culture that clearly reinforces compliance with meal and rest break policy and the law through both word and deed will go a long way toward encouraging employees to take their full and timely meal and rest breaks or reporting to management when they were not taken. That culture is developed through the company's stated values, leader and manager behavior, and rewards and recognition for meal and rest break compliance.

4. **How your company staffs the work demand.** The labor scheduling system can directly impact the occurrence of understaffing in an organization. Understaffing can be reduced by implementing a productivity-based scheduling system, one that directly ties staffing to projected workloads with an established minimum staffing level to avoid insufficient staff to cover meal and rest breaks. Labor scheduling systems that are based strictly on a percentage of sales, for example, without anchoring that percentage on an understanding of minimum staffing needs, may not provide adequate staffing to cover meal and rest breaks.

5. **How your company measures productivity and overall success.** Performance measurement is critical to company success; performance targets and expectations of achievement should be set at a level that is both motivating and achievable without violating the law. Careful studies of productivity should be carried out to determine appropriate performance targets, and a feedback process should be built into the performance measurement system to allow adjustments in targets given historical trends. Uninformed goal-setting, rigid adherence to preset goals and targets, and the absence of a feedback process regarding the effectiveness of goals and targets are likely to invite "gung ho" behavior which could lead to insensitivity toward meal and rest break compliance. More important, a definition of company success that does not include compliance with all laws is an invitation for violations.

6. **How your company compensates and rewards management and nonexempt employees.** A major signal to management regarding what the company values comes through the compensation and reward system. If non-compliance is tracked by a performance measurement system and this information is taken into account when promotion and bonus decisions are made, management has a disincentive to violate meal and rest break law. If compliance is tracked and this information is taken into account

when promotion and bonus decisions are made, management has an incentive to comply with meal and rest break law. Either way, compliance must be a factor in a company's compensation and reward system to highlight its importance relative to other managerial behaviors and thus, drive behavior toward compliance.

7. **How your company identifies and addresses noncompliance.** To identify violations, a company needs a reliable system to detect shorted, late, or missed meal and rest breaks. To avoid the appearance of indifference to the violations, the employer needs to find out the nature and extent of the problem when violations occur. If a meal or rest break was not provided, the occurrence should be investigated by a disinterested or independent party (e.g., internal audit department, outside expert) to reveal the cause of the missed, late, or shorted break. If, through an investigation, a pattern emerges that suggests a common cause, such as staffing, poor adherence to policy, a lack of training in the policy, a rogue manager, a rogue employee, or poor job design, swift remedial action should be taken. Deciding to terminate monitoring of meal and rest breaks or to eliminate identification and investigation of violations is an invitation to more violations. More important, it is a willful act to conceal a problem.

8. **How your company deals with bad news.** There are two roads to travel when a significant problem emerges. One road leads to concealment of the problem and "spin"; the other road leads to acknowledgement of issues and correction. If it can be shown that a company knew it had a serious problem with violations and executives/management chose to conceal it, a lawsuit will be considerably more costly to the company than would be otherwise because of the possibility of punitive damages. However, if a company knew it had a problem and took effective steps to correct the problem, then the outcome of a lawsuit will be more favorable.

CONCLUSION

Until the laws change or companies soften their policies regarding meal and rest breaks, liability will be a reality for companies that don't pay attention to this issue. There are ways to make employee interests compatible with state law and company policy, but it will take a critical review of how a company operates and the structures, processes, and systems in place to reveal how to achieve greater compatibility. A path forward is provided here. ■

NOTES

1. Savaglio v. Wal-Mart Stores, Inc., 2004 WL 2034092 (Cal. Super. Ct. Trial Div. 2004).
2. 29 U.S.C.A. §§ 201 et seq.
3. 29 CFR 785.19.
4. 29 CFR Part 516.
5. Savaglio v. Wal-Mart Stores, Inc., 2004 WL 2034092 (Cal. Super. Ct. Trial Div. 2004).
6. If the California Premium is considered a wage, the liability can go back four years and could involve waiting time penalties.

THE BENEFITS AND DANGERS OF EMPLOYEE HANDBOOKS: ARE THEY WORTH THE CHALLENGE?

Barbara Fitzgerald-Turner, SPHR, and Laura Drill, J.D.

Although its significance is often underappreciated, the development of an employee handbook is one of the most challenging assignments that an organization can face. Why? Because employee handbooks are created to meet a wide range of objectives—some of which are conflicting. These objectives include:

- An employee handbook, if well-written and properly utilized, should provide a level of legal protection to an organization by establishing the employee-employer relationship and effectively communicating the employer's policies to help defend against various types of litigation, including wrongful termination, discrimination, and harassment claims. Also it displays a company's commitment to comply with government-mandated regulations. To support this objective, and because handbooks have been used as evidence in court cases against an employer, there may be a tendency by attorneys and employers to fill the handbook with legal disclaimers and extensive policy language that may read as "legalese" to an average employee.
- A handbook should be an easy reference tool that enables employees to obtain quick, accurate answers to policy questions versus "trial by error" or gaining misinformation via the "grapevine." This is especially true for new employees because the employee handbook is often the first formal information they receive regarding the organization's policies and expectations. A handbook gives a firm's management team the opportunity to educate employees about the company and to identify what policies are most critical to the firm's operation and success. To achieve this objective, a handbook needs to be written in "plain English" so that it is easily understandable and clearly communicates the firm's expectations for employees' behavior and performance, as well the consequences for not meeting those expectations.

BARBARA FITZGERALD-TURNER, SPHR, is Vice President of Human Resource (HR) Consulting for the Elite Group. She has worked with national and international companies at various stages in their lifecycles and has earned a Masters' degree in HR from George Washington University, as well as lifetime certification as a Senior Professional in Human Resources (SPHR) from the Human Resource Certification Institute. Barbara has published numerous articles, and is a frequent industry speaker.

LAURA DRILL, Esq., is a Senior Human Resource Consultant with the Elite Group, and has extensive experience in employee relations, employment law, management coaching, performance management, and workforce planning. Laura, who earned her law degree from Widener University School of Law, is a member of the Pennsylvania Bar and participates annually in the Employment Law Institute sponsored by the Pennsylvania Bar Institute.

Ms. Fitzgerald-Turner and Ms. Drill can be reached at 1.888.581.2049 or bfturner@elitegrp.com or ldrill@elitegrp.com.

- An effective handbook ought to provide managers with a tool for ensuring consistent treatment of employees across the organization by describing company policies and practices for addressing employee issues. This is important to avoid legal liability, since employees who feel they have been treated in a manner inconsistent with a firm's policies are much more likely to seek legal counsel. It is also critical since nothing undermines morale and productivity more than employees perceiving that the "rules" may vary depending on who your manager may be.

- A handbook must be a "living document" prepared in a format that can be easily updated to reflect the constant changes in labor and employment laws and in a firm's policies, procedures, employee benefits, etc. An outdated handbook that no longer represents the practices of a company can increase a company's risk of liability for employment-related litigation. Therefore, an employer must take seriously the commitment to review and update their handbook on a regular basis. A "once and done" philosophy will only subject the company to increased legal risk.

- Firms often use their employee handbooks to reinforce their mission, values and/or vision. It is essential that these statements be consistent with the handbook's policies and the everyday practices of the firm. If there is conflict, cognitive dissonance will occur among employees as they attempt to reconcile being part of a firm that "says one thing, but does another."

So how does an organization create a balance among all of these objectives?

WHERE TO BEGIN

Once a company has decided to make the commitment to develop a handbook (or revise an existing document), it is critical to ensure that it effectively meets the each firm's specific needs and goals, understanding that "one size does not fit all." In fact, the handbook should reflect the company's unique culture and values and include policies that will direct the firm and its employees in meeting its goals and satisfying its clients' expectations. A manufacturing firm, for example, would likely focus on safety practices and processes that support product quality in its handbook, while a software company would emphasize *Electronic Communications* as well as *Non-Compete/Non-Solicit/Confidentiality* policies.

Although a handbook includes procedures and policies of an organization, it should not read like a set of rules, but rather as a roadmap or a set of guidelines for how employees and the management of the firm work together. For example, a *Problem Resolution Policy* could include language such as, *"The Company encourages an open and frank atmosphere in which any problem, complaint, suggestion, or question receives a timely response from the Company. If you disagree with Company rules, policies, or practices, you can state your concerns through the problem resolution procedure."* Such a policy statement provides a guide to employees for seeking a solution for a problem, while communicating the company's commitment to an open-door policy.

The handbook is also an excellent vehicle with which to communicate the company's employee relations philosophy. This can be accomplished in the first few pages via a *Letter from the President*. It is important that the philosophy presented be supported by the policies in the handbook rather than conflict with them. If, for example, the company is committed to a team concept and/or informality, the *Letter* could include statements about the expectation of cooperation and team support, and the president should sign the letter using her/his first name. In the policies, the emphasis would be on a less rigid dress policy and less formal lines of authority and titles. Authoritarian-type language and rules would then be avoided in the policy descriptions.

The information contained within the handbook must also be consistent with the reality of the company, or the credibility of the document will be compromised. For instance, if a company states in a *Performance Appraisal* policy that managers will conduct regular performance reviews with employees, and these assessments do not occur, employees will be frustrated that the firm is not living up to its commitment and promise. (This type of inconsistency may also create legal liability for the firm if it terminates an employee for performance-related issues and did not provide that employee with formal performance feedback.)

HANDBOOK STYLE

Employee handbooks should be written in a positive, clear, direct, and non-technical style, using

"plain English" and not "legalese" that could make the handbook difficult to understand and interpret. In short, a handbook balances what the company does for the benefit of each employee and what the employee is expected to do for the company. It does not need to include every detail of company practice but should instead focus on clearly stating company philosophies, expectations, and policies that employees need to know to understand their working conditions, benefits and compensation, as well as their rights and responsibilities as employees.

While ideally a handbook would not be more than 20-40 pages in length, the complexity of the modern workplace often makes that difficult. It should be presented in an easy-to-read format with lots of white space and liberal use of boldface type and "bullets" to communicate the most critical information. In addition, the policies should be organized in a clear and logical manner to allow for ease of use by both employees and managers. Further, consideration must be given to the educational level of the majority of the workforce to ensure that the handbook is written at a level to be understood by all employees. Consideration should also be given to producing a separate version of the handbook in another language for members of the workforce whose primary language is not English.

LEGAL CONCERNS REGARDING EMPLOYEE HANDBOOKS

An employee handbook is often the key document describing the relationship between the employee and the employer. Therefore, if a company includes a policy in its handbook, it must be prepared to act consistently with the expectations created and follow through with the consequences of the standards established. Many court cases decided against the company have centered on incidents where companies have written policies that they did not consistently follow or enforce and which led to discrimination claims. Judges and juries are harder on these companies because they have made commitments to employees that they have not honored on an uniform basis.

Although an employee handbook should not read like a law book, there is language that should be avoided, as well as legal disclaimers that should be included so as to not create unexpected contractual obligations for the company or alter the employment-at-will relationship between the employee and the employer. Disclaimers that are often recommended include, but are not limited to:

- The handbook does not alter the "at-will" nature of employees' work relationship with the company.
- The handbook does not create a contract, expressed or implied.
- The handbook should not be considered all-inclusive, but rather a set of guidelines for governing and interpreting the relationship between the company and its employees.
- The information regarding benefit plans is only an overview; it is important to always consult the detailed plan documents before making decisions regarding benefits. The official plan documents shall serve as the final and authoritative word, and all statements of coverage are subject to the plans' terms and conditions.
- The handbook supersedes any previous handbook, written policies, or oral representations/statements made by managers of the company and can only be changed in writing by the president of the company or his/her designee.
- The handbook and any policies or benefits described in it can be changed by the company unilaterally at any time without prior notice.
- Regardless of the date of hire, employees are subject to any amendments, deletions or changes in the handbook. (However, there are some decisions where the courts found that the earlier handbooks created contractual obligations, and that to overcome contractual rights, the employer must give these employees some sort of additional "consideration" to make the changes of the new handbook apply to them. This can occur when the original handbook did not contain legal disclaimers and therefore created contractual obligations between employers and employees. For instance, in *Doyle v. Holy Cross Hospital,*[1] the court found that an employer could not unilaterally change a policy that created contractual obligations by subsequent additions of disclaimer language to a revised handbook. The employer would be required to provide sufficient consideration and obtain the affected employees' consent to make

the revisions enforceable. Conversely, in *Hogue v. Cecil I. Walker Machine Co.,*[2] the court found that an employer can modify or eliminate policies that create contractual rights, as long as the employees are given notice. Legal counsel should be consulted to determine the law in each jurisdiction.)

These legal disclaimers, to be effective, must be clearly stated and prominently displayed. Some courts go even further to require that the disclaimers be highlighted or underlined and in a conspicuous place, such as on the first page of the handbook.[3] Many employers object to having this type of legal language as the first information that an employee reads when opening an employee handbook because they feel that it creates a negative tone and diminishes the "Welcome" language to follow. However, the legal consequences of an improper placement of the disclaimers or the softening of the disclaimer language to make it "sound better" must be seriously considered.

Also, language that erodes the at-will relationship by contradicting the legal disclaimers should be avoided. For example, avoid terms such as "cause" or "just cause" when identifying reasons for termination of employment. For instance, in *United States ex rel Yesudian v. Howard Univ.*,[4] the court found that a handbook created an implied contract by stating that employees would only be discharged for "cause" even though the handbook also contained a disclaimer. Similarly, extensive and rigid disciplinary procedures should not be created, but instead the handbook should provide for a general progressive disciplinary procedure, which allows for employer discretion and flexibility. In *Dillion v. Champion Jogbra, Inc.*,[5] the court allowed a wrongful termination claim from a terminated employee, finding that the handbook sent mixed messages to the employee about her status. In this case, the handbook contained an elaborate discipline and discharge procedure in contrast to the disclaimer that employees could be terminated "at-will."

Terms such as "normally" or "generally" should be used rather than "always" when making commitments regarding performance reviews' timing. Further, instead of "permanent" employee, use the term "regular," and use the term "introductory period," instead of "probationary period."

To document that employees have received, read, and understand the handbook, each employee should sign an *Acknowledgment of Receipt of Employee Handbook,* which is then placed in their personnel files. It is recommended that the legal disclaimers included in the handbook be restated on this acknowledgment form to emphasize the company's position and provide further legal protection. Also, to reinforce its significance, the employee handbook should be labeled "Company Confidential," and if "hard" versus electronic copies of the handbook are distributed, each employee should be assigned a numbered copy that must be returned to the company upon termination of employment.

Finally, experts recommend having an attorney review the final draft of a handbook before releasing it to employees to ensure it is in compliance with the current local, state, and federal laws, as well as case law at any jurisdictional level.

INTRODUCING A NEW OR REVISED HANDBOOK

Prior to general distribution, it is recommended that a "representative sample" group of employees and managers review the final draft of the handbook. This review will help ensure that the document is "user friendly" and identify areas of potential confusion or employee relations concerns. Depending on the structure of the organization, representatives of different departments and at different levels can and should be solicited for their input. These are the people who represent the "customers" for the handbook.

Too often, handbooks are distributed and "put on the shelf" for occasional employee reference. Therefore, a new (or significantly revised) handbook should be launched with a formal company-wide presentation. Not only does this provide management with an opportunity to emphasize essential points, but it also underlines the importance of the handbook as a vital source of information. In larger companies, it may be useful to hold question-and-answer sessions on a departmental basis. A handbook "launch" is an important and welcome forum for the top executive or business owner and the human resource professional to lead.

With the technology that exists today, it has become far easier for firms to distribute their employee handbooks. Posting a handbook in electronic format on the company's intranet or via a Web portal, allows employees and managers access to the firm's policies 24/7. This is particularly valuable for organizations with employees in widespread geographic locations or who work different shifts. This same technology has also dramatically increased the

ease and timeliness with which updates can be made to a handbook. Instead of having to distribute entirely new handbooks or individual pages containing changes, the company can notify employees by e-mail that a change has been made.

However, with this new technology also comes additional legal risks—in particular, how to create the necessary documentation to prove that an employee has received the electronic copy of the handbook or revised policy. Because the law regarding the electronic distribution of communication materials to employees is still developing, legal experts recommend that employers take the necessary precautions to ensure there is sufficient access to these policies. First, the employer should ensure that all employees have notice of and access to the new handbook or the revisions. (It is recommended that detailed instructions be provided to employees on how to access the electronic copy.) The employer should also notify all employees by e-mail of the content and effect of a new or revised handbook or policy and create a electronic tracking system to monitor receipt of each e-mail and any links or attachments.

In addition, the employer should consider a meeting with all employees to inform them of the new handbook or policy revisions and use a sign-in sheet to document attendance. (In *Mannix v. County of Monroe*,[6] the court found that the county gave sufficient notice to its employees about revised employment policies by posting the revision on the internal database, sending an e-mail notice to all employees and holding employee meetings on the revisions. Also in *Campbell v. General Dynamics Government Systems Corp.*,[7] the court found that e-mail notification of a revised policy was insufficient because the e-mail failed to accurately describe the effect of the policy and no tracking system was created to ensure receipt by employees.) Due to the "newness" of this area of the law, it is still recommended that the *Acknowledgment of Receipt of Employee Handbook* or *Policy Revision,* which contains notice of all legal disclaimers, remain in paper form to be printed out, signed by the employee, and maintained in each employee's personnel file.

Further, employers should have several "hard" copies of the handbook (placed in loose-leaf notebooks to facilitate update) available in each department of the company, as well as in the human resources department, with the understanding that employees may access the hard copy at any time.

CONCLUSION

A comprehensive handbook, properly implemented, offers employees an understanding of the company for which they work. handbooks do not replace the very real need for face-to-face contact with their managers, but they can and do provide a valuable resource for employees and complement the manager-employee relationship. They also serve the important purpose of establishing guidelines for the working relationship between an employer and its employees.

While no employee handbook will ever meet all of the needs of an organization, through careful consideration of the key information employees need in order to be effective in an organization; through balancing legalese with "plain English"; through staying consistent with the firm's declared mission/values/vision; and through using technology to distribute and update the handbook, it can become a critical part of a company's employee communications strategy. Not an easy task, but the development of an effective employee handbook is certainly worth the challenge.

■

NOTES:

1. Doyle v. Holy Cross Hosp., 186 Ill. 2d 104, 237 Ill. Dec. 100, 708 N.E.2d 1140, 15 I.E.R. Cas. (BNA) 164, 137 Lab. Cas. (CCH) P 58564, 1999 WL 77557 (1999).
2. Hogue v. Cecil I. Walker Machinery Co., 189 W. Va. 348, 431 S.E.2d 687, 8 I.E.R. Cas. (BNA) 1037, 1993 WL 199254 (1993).
3. See Nicosia v. Wakefern Food Corp., 136 N.J. 401, 643 A.2d 554, 9 I.E.R. Cas. (BNA) 1338, 130 Lab. Cas. (CCH) P 57870, 1994 WL 314051 (1994)
4. U.S. ex rel. Yesudian v. Howard University, 332 U.S. App. D.C. 56, 153 F.3d 731, 128 Ed. Law Rep. 1030, 14 I.E.R. Cas. (BNA) 545, 136 Lab. Cas. (CCH) P 10232, 1998 WL 549457 (D.C. Cir. 1998).
5. Dillon v. Champion Jogbra, Inc., 175 Vt. 1, 819 A.2d 703, 2002 WL 31875528 (2002).
6. Mannix v. County of Monroe, 348 F.3d 526, 20 I.E.R. Cas. (BNA) 945, 149 Lab. Cas. (CCH) P 59799, 2003 FED App. 0390P, 2003 WL 22470142 (6th Cir. 2003).
7. Campbell v. General Dynamics Government Systems Corp., 407 F.3d 546, 16 A.D. Cas. (BNA) 1361, 151 Lab. Cas. (CCH) P 60002, 30 Nat'l Disability Law Rep. P 135, 2005 WL 1208136 (1st Cir. 2005).

TERMINATION OF EMPLOYMENT

RISKY BUSINESS: TERMINATING THE MENTALLY ILL WITH A PRIOR HISTORY OF VIOLENCE

Marty Denis

Employers are occasionally faced with employment situations where they discover that their employees have a prior history of violence. Or perhaps the employer discovers that their employee has a prior history of mental health problems. If that prior history of violence and mental health problems are equated to a potential risk of harm to customers or employees in the workplace, is an employer free to terminate the employee?

Well, of course, nothing may be free in this world. And, given a recent decision from the Court of Appeals for the Ninth Circuit in *Josephs v. Pacific Bell*, employers may want to think twice or even four times about how they address such issues.[1]

AN EMPLOYEE'S PRIOR HISTORY OF MENTAL HEALTH PROBLEMS AND ACCUSATIONS OF ATTEMPTED MURDER

Josephs was hired for a service technician job with PacBell in 1997. At PacBell, service technicians performed unsupervised, in-home telephone installations or repairs. Josephs had been employed for ten years in a similar position with Cox Communications. Josephs checked "NO" in answer to PacBell's employment application question, "Have you ever been convicted of, or are you awaiting trial for, a felony or misdemeanor?"

After Josephs had been working for three months, PacBell did a background check and obtained Josephs's criminal history. PacBell determined that Josephs had been arrested in 1982 for attempted murder. PacBell also learned that he had been found not guilty by reason of insanity and that Josephs had been convicted in 1985 for a 1982 misdemeanor battery on a police officer.

PacBell suspended Josephs pending further investigation. It confirmed the charge of attempted murder, the finding of not guilty by reason of insanity, and the 1985 misdemeanor conviction. PacBell also learned that Josephs had been committed to and had spent two and one-half years in a California state mental hospital between 1982 and 1985. PacBell also learned that he had then spent six months in a board-and-care mental health facility, was released from parole on July 30, 1986, and had changed his name following his release.

During the three months before his suspension, Josephs apparently adequately performed his job. At least that is what his immediate supervisor testified to.

DISCHARGING THE EMPLOYEE

Following his suspension, PacBell refused to reinstate Josephs. PacBell notified Josephs on April 23, 1998, that he was discharged "due to fraudulent entries on your application, in that you attempted to withhold information concerning your past" and that "this was a willful attempt, and a direct violation of [PacBell's] Code of Conduct, which is not tolerated by long-term employees as well as newly hired ones." In response, Josephs filed an EEOC charge of discrimination alleging handicap discrimination. Ultimately, he filed a lawsuit too.

MARTY DENIS is a partner with the Chicago firm of Barlow, Kobata & Denis. A former trial attorney with the EEOC's Philadelphia Litigation Center, he represents management in employment discrimination and labor matters.

Josephs claimed that PacBell regarded him as suffering from a mental illness that might result in future acts of violence, and that he was discriminatorily discharged in violation of the American with Disabilities Act.

WHERE IS THE "BEEF"?

Where was Josephs's "beef" you say? He had been arrested for attempted murder and found not guilty by reason of insanity. Does not an employer have a duty—indeed, a critical obligation—to protect its customers from dangerous persons? Just read in the newspapers about current and former employees "going postal."

How much, you ask, must an employer do to prevent mayhem in the workplace or to its customers? After all, if, as Josephs's own record showed, he had attempted to kill another person, how can such a person be qualified for a service technician job interacting with the public?

Indeed, that is exactly what PacBell argued at trial. PacBell's in-house lawyer, Karen Haubrich, testified at trial that she believed that "somebody who has attempted to kill another individual should not be in a service technician position." Haubrich testified that Josephs was properly terminated because he failed to reveal the conviction or his name change on his employment application. According to Haubrich's testimony, Josephs's lack of honesty in his application also required his discharge.

On cross-examination, Haubrich admitted looking up and discussing with various PacBell employees news coverage of Josephs's 1985 release from the state mental hospital. This material included newspaper reports, introduced at trial, that Josephs had been under psychiatric care and counseling at the hospital and had been a "mentally disordered offender."

A $500,000 JURY AWARD

As framed by Josephs and PacBell in closing arguments, the determinative issue before the jury was whether PacBell refused to reinstate Josephs because it regarded him as having a mental illness that might result in future acts of violence or because of the violent acts he had previously committed.

The jury concluded that PacBell's termination of Josephs was nondiscriminatory. However, the jury determined that PacBell refused to reinstate Josephs because it regarded him as mentally disabled in violation of the ADA. The jury awarded Josephs compensatory damages totally $500,000.

PacBell appealed. PacBell argued that a claim for discriminatory refusal to reinstate is not a viable claim. The Ninth Circuit joined the First, Third, Fourth, Tenth, and Eleventh Circuits and expressly recognized that a discriminatory failure to reinstate was as a separately actionable claim and could violate the Americans with Disabilities Act.

THE EMPLOYEE WAS REGARDED AS DISABLED

PacBell also argued that Josephs did not have a condition covered by the ADA, that a major life activity was not involved, and that, in any event, Josephs was not qualified for the position of service technician.

In a two-to-one decision, the Ninth Circuit affirmed the $500,000 jury verdict. As the majority for the court of appeals pointed out, under the ADA an employee is considered disabled if he is regarded by his employer as having a physical or mental impairment that substantially limits one or more major life activities. An individual falls within that definition if his employer "mistakenly believes that a person has an… impairment that substantially limits one or more major life activities."

As for the employee's claim that PacBell regarded him as suffering from a mental illness that might result in future acts of violence, according to the court of appeals, the jury was entitled to consider more than Josephs's criminal record and court documents. As the appellate court pointed out, the jury heard evidence that PacBell employees considered Josephs unemployable because he had spent time in a "mental ward" and might "go off" on a customer. The jury also heard evidence that PacBell reviewed newspaper reports and discussed during the grievance proceedings statements which detailed his mental instability before his stay in the mental hospital. For the majority of the court of appeals, the jury had ample evidence to support its finding that PacBell regarded Josephs as having a mental impairment covered by the ADA.

EVIDENCE THAT THE EMPLOYEE WAS SUBSTANTIALLY LIMITED IN A BROAD CLASS OF JOBS

The jury, as the appellate court also noted, found that PacBell regarded Josephs's mental disorder as substantially limiting his ability to work in a broad range of jobs.

The appellate court pointed out that the jury heard evidence that PacBell considered Josephs unfit for any job with the company. One employee testified that his supervisor told him that the company wanted to "eliminate the possibility" of employing someone such as Josephs. When the union

representative proposed that Josephs be offered a position that did not involve unsupervised access to the homes of customers, PacBell rejected that suggestion because "people can still walk by." This evidence, for the appellate court, amply supported the jury's finding that PacBell viewed Josephs as having a mental disability that "substantially limited" him in the "major life activity" of working.

THE EMPLOYEE WAS QUALIFIED DESPITE HIS SO-CALLED VIOLENT BACKGROUND

As for PacBell's arguments that Josephs's past violent acts made him unqualified for the position, the appellate court noted that the jury heard testimony that Josephs was performing well on the job and that his supervisor considered him a potential asset to the company. Josephs's own testimony detailed his past successful employment as a service technician, and the jury heard other evidence of Josephs's ten years of experience performing a similar job with another company. While PacBell's counsel testified that it was her "belief" that someone who attempted to kill another person should not be in a service technician position, PacBell introduced no evidence of a written company policy prohibiting the employment of persons who had committed violent acts. In fact, the jury heard evidence that PacBell had reinstated one service technician who had a felony domestic violence conviction. Finally, in making its determination that Josephs was qualified, the jury was instructed that an employer may take into account a past history of violence in making employment-related hiring decisions. As the court noted, the evidence did not compel a conclusion that, in the eyes of PacBell, Josephs was not qualified for the service technician position because of his past violent acts.

A CRAZY DECISION FROM THE NINTH CIRCUIT?

Ah, you say, this is an aberration. This is just another "crazy" decision from the Ninth Circuit—that liberal bastion of pro-plaintiff, employee rights. Perhaps that may be true.

However, a $500,000 jury award can have a mighty instructive and chilling effect. While each of these employee/employer situations need to be carefully weighed and protecting customers and co-employees from violent employees are important considerations, the *Josephs* decision cautions against being presumptuous about employees with a prior "mental ward" or other psychological history background. Perhaps PacBell should have made a more fact-based showing that Josephs had a propensity for violence.

Another possible learning lesson is to stay away from stereotypes. Don't talk about them, don't write about them, and, hopefully, don't think about them out loud. Such comments can be twisted around and used as evidence of a biased stereotyping against the mentally handicapped.

Finally, recent efforts have surfaced in some states to give individuals with prior criminal records, even felonies, the right to vote. Part of this effort may be politics and reflect an effort to extend the franchise. This extend-the-right-to-vote effort may ultimately also impact on the rights of minorities in the workplace who comprise a higher percentage of the individuals convicted of felonies. To the extent our society is changing how it views individuals with prior convictions, those changing views will likely impact how employers will be expected to hire and treat employees with criminal backgrounds.

The bottom line is that acting on presumptions and stereotypes in the workplace can create the factual predicate for risky and potentially costly litigation. Certainly, do not call anyone "crazy" or an "idiot." Those words, depending on their context and the tone of voice, might arguably be viewed as an employer's stereotypical views of the mentally ill. ■

NOTES:

1. Josephs v. Pacific Bell, 432 F.3d 1006, 2005 Daily Journal D.A.R. 14847, 17 A.D. Cas. (BNA) 678, 31 Nat'l Disability Law Rep. P 183, 2005 WL 3527127 (9th Cir. 2005).

THE HR TROUBLESHOOTER

YOU'RE FIRED, AND HERE'S WHY: NOW SUE ME!

Gerard P. Panaro

Employers face a trilemma whenever they fire someone:

1. If you don't tell the employee why s/he's being fired, you give some but not all of the reasons, or you give a false reason, you risk being sued for unlawful discrimination and losing your case because your explanation (or lack of one) is found to be a "pretext" for discrimination.

2. If you do give the employee the reason(s) for his or her dismissal, you risk being sued for defamation.

3. If you give a prospective employer a bad reference on a terminated employee, you risk being sued for "retaliation", also under the anti-discrimination statutes.[1]

GERARD P. PANARO is Of Counsel with the law firm of Howe & Hutton, Ltd., in Washington, D.C. , where he specializes in employment law. He is the author of Employment Law Manual, published by West.

All is not lost, however, for there are some narrow paths out of the dense thicket that this trilemma creates for all employers. Even though there appear to be very few states with laws that compel an employer to give an employee the reasons for his or her dismissal, and there is no federal law requiring the employer to do so, the practical reality is that if the employer is to avoid being sued for discrimination or is to provide itself with the strongest defense and chance of defeating any claim, then it must tell the employee why s/he is being let go, it must give the employee *all* the reasons for the decision, and it must be totally honest, even at the risk of hurting the employee's feelings. You can be (and should be) kind, sensitive, diplomatic, sympathetic, and compassionate, but you have to be honest.

Even though fired employees routinely allege, threaten, or even sometimes sue for defamation in connection with their dismissal, the fact of the matter is that a suit for discrimination is far more likely, and therefore the employer should worry more about that and possibly losing that suit than being sued for defamation.[2] Defamation is hard to prove—the plaintiff has to prove that the statement was false and truth is an absolute defense to a claim of defamation—and there are several defenses to a suit for defamation. In the employment context, perhaps the most common one is that the employer was *privileged*—had a legal right—to disclose to others (i.e., the fired employee's colleagues; a prospective employer) the truthful reason(s) why it terminated the employee. As just noted, truth is also a defense. If a statement is true, it doesn't matter how much it damages the reputation of its subject: you can't be held liable for defamation.

Besides, suing for defamation presents a dilemma for the plaintiff as well: in attempting to prove that a statement was false, s/he actually ends up giving more publicity to it, and opens his or her entire reputation up to examination, questioning, and attack by the defense, in its effort to prove that its statement(s) was/were true.

What is the solution? This article makes the following recommendations:

- Always give terminated employees all of the reasons why they are being terminated.
- Guarantee the factual predicate and truthfulness of your reasons by a fair and thorough investigation: this point cannot be emphasized strongly enough.[3]
- If at all possible, limit your disclosure of the reasons to the employee alone; if that is not possible, limit disclosure of the reasons only to those people with a legitimate interest in knowing it.
- There is no necessity and not as compelling a reason to give *others* a full explanation of why someone was let go as there may be to give the dismissed employee him- or herself; therefore, when communicating to others the reasons for the dismissal, you may (and generally should be) be less specific, more generic, and more diplomatic (but again, don't lie).
- If you are seriously concerned about being sued for defamation, then attempt to negotiate in advance a settlement with the terminated employee, or at least a statement or public explanation for his/her departure that you all can agree on.

WHY IT IS IMPORTANT TO TELL THE TRUTH AS A DEFENSE AGAINST UNLAWFUL DISCRIMINATION

To understand why it is so important to give an employee all the reasons for his or her dismissal and to give only truthful reasons, you have to understand how a discrimination suit unfolds in court and how you get to the final result. The burden of proving unlawful discrimination is always on the plaintiff. But getting there requires the parties to engage in a "three step dance":

1. First, the plaintiff makes out a "prima facie" case: I was a member of a protected category; you took adverse action against me; you did so because of my _____ (fill in the blank with one or more protected categories: race, sex, age, disability, religion, etc.).

2. Second, the employer gets the chance to rebut or disprove the plaintiff's prima facie case by offering a legitimate, non-discriminatory reason for its action: Yes, I terminated you, but not because of your race, sex, age, etc.; I terminated you for poor performance, for tardiness, for insubordination, etc. (The reason can be anything under the sun, so long as it is not unlawful: e.g., based on race, sex, religion, etc.; in breach of contract; in retaliation for having exercised a statutory right.)

3. The third and final step of the "dance" belongs to the plaintiff. S/he gets the chance to come back and prove that the explanation offered by the employer was not the "real" reason for the dismissal: the "real" reason was unlawful discrimination; the employer's explanation is nothing more than a "pretext" for discrimination.

In other words, to win, the plaintiff must call—and prove—the employer a liar. And this is why it is so important for employers to give terminated employees the real, honest, true reasons for their dismissals, and *all* the reasons; because if they don't, they make it easier for a judge or jury to believe that they *are* liars: they did discriminate. And therefore they lose.

Let's see how this works in a real case. In *Zisumbo v. McCleodUSA Telecommunications Services, Inc.*,[4] the plaintiff sued for pregnancy discrimination (and defamation). The district court ruled in favor of the employer, but the court of appeals reversed, finding that the plaintiff had offered enough evidence on the issue of pretext to survive a motion for summary judgment. The court of appeals based its decision on the false and inconsistent reasons the company gave for terminating the employee: It told her she was being terminated for poor performance; it told the EEOC she was terminated pursuant to an office reorganization; and then it told the courts that she had been terminated for *both* reasons—poor performance and office reorganization.

The plaintiff was hired as an account executive, then promoted to senior account executive. Her direct supervisor disapproved of her becoming pregnant. When the plaintiff told her supervisor she was pregnant, his attitude toward and treatment of her changed considerably. Her performance evaluation was positive, but noted she needed to improve her paperwork. Later, she was issued a written warning itemizing her performance problems and putting her on a performance plan for arguing with her peers and management, failing to employ a certain method

of selling, and coming to work late. The plaintiff eventually resigned.

The analysis of a pregnancy discrimination claim (and this is true of all discrimination claims, whether brought under federal law or state law) follows a three-step process, the Tenth Circuit explained: "Under this framework, [1] the aggrieved employee must first establish a prima facie case of prohibited employment action. [Cit. om.]… [2] If the employee makes a prima facie showing, the burden shifts to the… employer to state a legitimate, nondiscriminatory reason for its adverse employment action. [3] If the employer meets this burden, then summary judgment is warranted [i.e., the employer wins] unless the employee can show there is a genuine issue of material fact as to whether the proffered reasons are pretextual."

In this case, the lower court concluded that the company had stated a legitimate nondiscriminatory explanation for its decision to demote the plaintiff: it needed to reorganize its sales personnel by reducing the number of senior account executives and a male employee was chosen to retain the sole remaining senior account executive position because he had sales figures far superior to the plaintiff's.

On appeal, however, the Tenth Circuit concluded that the plaintiff had presented sufficient evidence of pretext to overcome the company's stated explanation. The court explained how a plaintiff proves pretext: "A plaintiff can show pretext by revealing such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence. [Cit. om.]" In this case, the plaintiff's argument for pretext focused on evidence that the company's stated reason for demoting her was false. (The Tenth Circuit quoted another case which noted that proving that an employer's stated reason for the adverse employment action is false is one of three ways employees typically make a showing of pretext.)

The court explained the consequences of such a showing: "[A] plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated. [Cit. om.] The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination... [Cit. om.]"

What evidence did the plaintiff offer of the company's false reason for her demotion that persuaded the Tenth Circuit? She argued that the company's stated reason was false based on its abandonment and repudiation of the reason for the demotion it gave to the EEOC. As the plaintiff put it in her brief: "Defendant's 'corporate reorganization' explanation was so substantially divergent from the 'personal performance' reasons alleged earlier, that it appeared Defendant was attempting to discard a flawed defense in favor of another having better prospects."

In accepting this argument, the Tenth Circuit observed that "One of the primary roles of the factfinder is to assess credibility in deciding how to view the evidence… If the factfinder concludes that *one of* the employer's reasons is disingenuous, it is reasonable for it to consider this in assessing the credibility of the employer's *other* proffered reasons. [Emphasis added.]" In other words, what the court said is this: If you've (the employer) told me (the jury) one single lie, I (the jury) can conclude that everything you've (the employer) told me is a lie.

The company's comeback to this argument was that its different explanations for the plaintiff's demotion did not show pretext; they showed that both reasons were correct, both reasons were legitimate, and neither reason was a pretext for discrimination. "A major problem with this argument," the Tenth Circuit replied, "is that it represents a dramatic reversal of the position advanced by McLeod before the district court. In its reply memorandum in support of summary judgment, McLeod asserted [the plaintiff's] allegations regarding the pretextual nature of McLeod's statements to the EEOC were 'immaterial because her reassignment was *based on corporate readjustments of its sales teams* and not on [her] performance.' [Emphasis in original.]" In other words, the appellate court concluded, the company "specifically disclaimed its previous assertion to the EEOC that the demotion was based on [the plaintiff's] poor performance in 'back-end' sales duties." It "seems disingenuous" for the company to argue on appeal, the Tenth Circuit opinion observed, that its statement to the EEOC was correct and legitimate.

Incredibly, according to a footnote in the court's opinion, the company argued that "its change in position with regard to [the

plaintiff's] demotion *was occasioned by a change in counsel* and the difficulty in tracking down those individuals at McLeod that had made the demotion decision. [Emphasis added.]" In other words, we got a new lawyer, so we got a new explanation of why we demoted the plaintiff!

The Tenth Circuit added other reasons why it concluded that the plaintiff had offered enough evidence to suggest that the company's stated reason for demoting her might have been a pretext for discrimination. It noted that the only evidence the company offered in support of its claim that the plaintiff was demoted for poor performance was her performance review. Although that review did note that the plaintiff needed to improve her paperwork, "Nevertheless," the court observed, "a jury could conclude [the plaintiff's] problems with paperwork were not that serious in light of the otherwise high scores received by [her] in the evaluation. [Footnote om.]" Continuing, the court said:

> Furthermore, McLeod did not even rely on the performance review in support of its statements to the EEOC concerning [the plaintiff's] problems with "back-end" sales. Instead, McLeod relied on its assertions that [the plaintiff] had failed to adequately care for customers during the "back-end" sales process, specifically identifying customers Linford Glass and SafeHome Security. As noted above, however, both Linford Glass and SafeHome Security submitted letters to the EEOC stating that they were satisfied with [the plaintiff's] performance and that the technical problems they had with McLeod could not be blamed on [her].

All of the above led to the Tenth Circuit's ultimate conclusion: "Given that (1) McLeod did not even argue below that its statement to the EEOC was consistent with, and an alternate reason for, [the plaintiff's] demotion, and that (2) there is a material issue of fact as to the accuracy and veracity of McLeod's statements to the EEOC, this court concludes the district court erred in granting summary judgment in favor of McLeod on the question of disparate treatment."

To make even clearer and stronger the lesson of a case like *Zisumbo*, let's assume, for the sake of discussion, that both of the company's reasons for demoting the plaintiff were absolutely true: she had performance problems, plus the company had to reorganize, and of the two senior account executives, she was chosen for demotion because her sales figures were so much worse than her male colleague's. Now let's further suppose that McCleod, being a sensitive and compassionate employer, and being even more so in light of the plaintiff's pregnancy, did not want to hurt the plaintiff's feelings by telling her it was demoting her because of her poor performance. So, it doesn't give her that reason: it just tells her she's being demoted because of a reorganization.

When the plaintiff sues for pregnancy discrimination anyway, and when, in the course of litigation, the employer is finally compelled to come forward with its additional, real reason for termination, it still has the same problem evident in the actual case. It still looks like a liar and undermines its own defense, because the obvious rejoinder to coming forward with this additional explanation so late in the game is: If that were the real reason for her termination (poor performance), why didn't you tell her so up front in the beginning? If you lied to the plaintiff when you told her you were demoting her due to a reorganization, how can we (the jury) believe you now? How can we trust you? How can we be sure you aren't lying to us now, to avoid being found liable for pregnancy discrimination?

DEALING WITH THE DEFAMATION PROBLEM

In some states, state law compels an employer to give an employee the reasons for his or her termination. Minnesota and Missouri are two examples of such states. Minnesota statute 181.933 allows an employee who has been involuntarily terminated to request from the employer the reasons for the termination. In such a case, however, the statute prohibits the employee from suing the employer for defamation.[5] Not only does Missouri have a similar statute,[6] but Missouri's law makes the employer liable for punitive damages if it fails to comply, and has no express immunity for defamation. Missouri's "dismissal letter" statute, however, applies only to employers of seven or more employees, and the employee must have worked there at least 90 days. But it applies to voluntary, as well as involuntary, separation. The dismissed employee has up to one year in which to request the dismissal letter.

In those states which have a law compelling the employer to give a dismissed employee the reason(s) for his or her discharge, the employer has no choice but to comply. But even when disclosure of the reasons for dismissal is not mandated by state law (and this appears to be the rule in most states), it is still wise for the employer to tell the employee why s/he is being dismissed, for the

reasons illustrated by the *Zisumbo* case (and myriads of others, if this article were to become a book, and the author had a year or so to work on it), discussed above.

How, then, does an employer provide full, honest and truthful disclosure to an employee of the reasons for his or her dismissal, especially when those reasons are personally repugnant to the employee (incompetence, insubordination, theft, dishonesty, fraud, violence, drug abuse, etc.), without losing a suit for defamation? Here are some suggestions:

1. The number one way to tell the truth and avoid liability for defamation at the same time is to *do a sufficiently thorough investigation so as to establish a strong foundation for proving the truth of the reasons given.*
2. The second thing to do is to limit disclosure of the reasons only to those with a need to know them and conform what you say to the audience to whom you are speaking and to the strength of their legitimate interest in the information.
3. A third procedure to follow is to consider the audience to whom you are speaking and provide only enough information to satisfy that obligation.
4. Fourth, be consistent, stick to your story, and don't change or contradict explanations once given.
5. Fifth, of course, *always tell the truth!*

Remember, the main source you have to worry about in terms of being sued for defamation is the employee him- or herself: A prospective employer, a co-worker, a customer, a law enforcement, or other governmental agency isn't going to sue you for defamation (although any of these could sue you for something different—deliberate, affirmative *misrepresentation or lying*).

There are at least five potential audiences to whom an employer could be speaking:

1. government agency
2. law enforcement
3. prospective employers
4. fellow workers
5. customers

Suppose you are being questioned by an agent of the FBI, CIA, Department of Defense, Homeland Security, or some similar government agency, who is doing a background check on your former employee for a highly sensitive position that has national security implications? With such an inquirer, the employer will probably want to be (and should be) totally forthcoming and withhold nothing.

Suppose you are responding to interrogatories from the unemployment office or the EEOC. Here, too, the employer should be totally forthcoming: information given to such law enforcement agencies is absolutely privileged, even if given out of malice.

A third audience might be a prospective employer. There are least three considerations here. First, a majority of the states—perhaps close to 40—have enacted "job reference immunity" statutes, which purport to immunize one giving a reference about a former employee. However, most of these statutes merely codify existing law about defamation, require that the one giving the reference act in good faith, and carve out exceptions to their protection. Nonetheless, such statutes do provide some protection. Second, a prospective employer's legally legitimate interest in information about a former employee that is relevant to the job is high (for example, an employer looking to hire in-house counsel has a legitimate interest in knowing if the candidate was fired because s/he couldn't pass the bar exam or was disciplined by the bar association for unethical behavior), and having a full explanation of the circumstances of the candidate's dismissal from his or her previous position could be critical. Third, there have been a couple of cases in which a former employer has been held liable for *misrepresenting* the circumstances of a former employee's dismissal, when the misrepresentation was material to a subsequent injury. To illustrate, a principal who has fired a teacher for molesting little girls tells a prospective employer that the teacher gets along wonderfully with young children. Upon this recommendation, a second school hires the teacher, he molests children there, and one of the parents sues. The referring principal could be held liable. All of the foregoing suggest that one can and should be honest and forthcoming with a prospective employer in discussing a former employee.

A fourth audience will be a former employee's coworkers. Here, the company has a legitimate interest in telling colleagues why someone was fired. Perhaps the two most common interests are to preserve morale, so that others do not fear they will suddenly be fired for mysterious, secret reasons; and, to preserve order and discipline and set an example: people who break the rules, who don't perform, who don't follow orders will not be working here.[7] However, with this audience, the em-

ployer does not necessarily have to provide detailed explanations. For example, it might be enough to say so-and-so was let go for violating work rules, or so-and-so was let go because his or her performance didn't meet our needs.

Finally, it may be necessary to offer a reason or explanation as to why someone was dismissed to customers, vendors, suppliers, and/or customers, especially if the former employee serviced those accounts. This group probably is entitled to the least information, although individual circumstances may dictate otherwise. In fact, arguably and very generally, this group may not be entitled to any explanation at all.

In a recent case from Minnesota, *Fjelsta v. Zogg Dermatology PLC*,[8] the employer was successful in defeating the plaintiff's defamation claim. As with the previous case, the plaintiff's defamation count arose in the context of a lawsuit alleging discrimination on the basis of sex and pregnancy under both federal and Minnesota law.

In support of her defamation claim, the plaintiff alleged as follows:

- One of the owners of the doctor's office she worked at held a meeting with the remaining staff after the plaintiff had been told to leave and stated that she had been terminated.
- The practice told the staff that she had been terminated for endangering the safety of patients.
- The practice also told a patient that the plaintiff had been terminated for endangering patients.
- An employee said that although she could not remember exactly what was said, one of the owners of the practice told the staff that the plaintiff would not be working at the office as long as she refused to do her job "and something about endangering patients."

None of this evidence proved defamation, the court ruled in granting summary judgment to the employer. Under Minnesota law, to be defamatory, a statement must be "communicated to a third party, [be] false, and tend to harm the plaintiff's reputation in the community. [Cit. om.]" The plaintiff must set out the defamatory matter "verbatim." "At a minimum," the court elaborated, "the plaintiff must allege who made the allegedly libelous statements, to whom they were made, and where. [Cits. om.]"

The plaintiff's evidence in this case fails to meet these tests, the court decided: the first witness said that the practice told the staff only that the plaintiff had been terminated, without giving any reason; the second employee-witness acknowledged that she couldn't recall the owner's exact words; a "vague recollection" is insufficient to support a defamation claim. The court therefore ruled in favor of the medical office employer.

Likewise, the employer in *Wheeler v. CSK Auto, Inc.*,[9] was successful in defeating the plaintiff's defamation count, based on a statement that a human resources manager made to one of the company's district managers, who in turn repeated it to the plaintiff's sister, who also worked for the company. The plaintiff said the HR manager said that she was fired for violating company policy and for having a coworker work on her car.

To prove defamation, the court said, the plaintiff "must show that the communication complained of was published, false, and unprivileged. [Cit. om.] Truth and privilege are both defenses to a defamation claim. [Cits. om.]" Under California law, "a communication made by an employee to another employee is subject to a qualified privilege if it is made, without malice, to a person interested in the communication." But, the privilege can be lost if the plaintiff specifically alleges malice (acting with knowledge of falsity or reckless disregard for whether the statement is true or false).

In this case, the court said, the employer proved the statement was true. "In addition," the court went on, "because the communication was between two CSK employees who had an interest in the circumstances of [the plaintiff's] termination, the communication also falls within a qualified privilege. Moreover, [the plaintiff] cannot defeat the qualified privilege because she did not specifically allege malice in her complaint and failed to allege it in opposition."

THE ISSUE OF "COMPULSORY SELF-DEFAMATION"

The theory of "compulsory self-defamation" raises a further hurdle and complication for employers caught in the dilemma of what to say and to whom when an employee is terminated. This theory—largely rejected and discredited by other courts—holds that an employer can be held liable for defamation if the employee is forced to "defame himself" and if the employer could reasonably foresee that. To illustrate: the employer fires an employee for sexual

harassment of co-workers (which the employee alleges is false). The fired employee goes on a job interview, is asked by the interviewer, "Why did you leave your last job?", and answers: "I was fired for sexual harassment." The employee has been forced to defame himself.

Although a Minnesota court recognized the claim in a case last year, *Lavela v. S.B. Foot Tanning Co.*,[10] it nonetheless ruled for the employer against the employee's defamation claim. The plaintiff based his defamation claim on the termination letter the company gave him, which stated, as quoted in the court's opinion: "Based on your continuing disability and the medical documentation you have provided us, it seems very unlikely that you will be able to return to your employment with S.B. Foot Tanning Company." The plaintiff said that this statement was defamatory and that he was forced to repeat it to prospective employers when asked why he was no longer employed by Foot Tanning Co.

Citing the "doctrine of compelled self-publication,"[11] the court said it "should be cautiously applied so as not to significantly expand the basis for a claim of defamation." The court found that it did not apply in this case: "In the instant matter," the court explained, "there is no neutral third party, like the nursing review board, obligated to reveal the allegedly false statement if asked. Thus… this plaintiff was not compelled to reveal defendant's allegedly false statements to his prospective employers. Further… the plaintiff in this matter could have avoided publication of the statement or the resulting damages simply by providing a recent authorization to work from his doctor or offering to undergo a physical examination. Thus, the Court finds that plaintiff was not compelled to publish defendant's allegedly defamatory statement to prospective employers, and summary judgment in favor of defendant is appropriate."

But the court added another reason why the plaintiff's defamation claim could not succeed: the "statement does not have a defamatory meaning that might injure plaintiff's reputation." "On its face, defendant's statement, which plaintiff then repeated to potential employers, indicated only that defendant did not consider plaintiff physically fit to return to work in the capacity in which he had been hired. Such a statement, has no judgmental undertone, may or may not, depending on the type of work and how much time has elapsed, have any relevance to a potential employer, and is easily rebutted by offering either a doctor's note to the contrary or offering to undergo testing before starting the new employment. Thus, defendant's statement 'could not possibly have a defamatory meaning' and summary judgment in favor of defendant is appropriate."

SUMMARY AND CONCLUSION

Telling an employee why s/he is being fired can be dangerous from the point of view of risking a defamation suit, but it is necessary from the point of view of preventing, or at least establishing a defense against, suits for unlawful discrimination, retaliation, and/or "wrongful discharge." To best position themselves, employers should take the following steps:

- Establish the factual predicate of the reasons for discharge by doing an adequate investigation under the circumstances.
- Tell the employee all the reasons s/he is being let go, but only if they are the real (truthful) reasons.
- Be more circumspect when sharing reasons for dismissal with other audiences, notably co-workers, customers, clients and vendors.
- There is an absolute privilege for statements made in the context of law enforcement, administrative proceedings, arbitrations and/or litigation.

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NOTES:

1. The employer's dilemma of either telling the truth and risking being sued for defamation, or saying nothing and risking being sued for unlawful discrimination arises in contexts other than dismissal: It can occur when an employee claims a performance appraisal has defamed him or her; when a former employee claims that the employer's truthful reference defamed him or her and prevented him or her from getting a job (including claims of "compulsory self-defamation"); or when a person claims that the company's disclosure of information about him or her to fellow workers defamed him or her. But due to length and space restrictions, this article will concentrate on defamation in the context of dismissal only, even though its recommendations and lessons can be applied to the other situations as well.
2. Hard statistics are not readily available or several years old. The author's brief Internet research disclosed, for example, that as of 1998 or so, more than 150,000 discrimination suits had been filed; other sources indicate that there are fewer defamation claims.
3. Note what the court says in Lavela v. S.B. Foot Tanning Co., 2005 WL 1430302 (D.Minn., 2005) (not reported), discussed below:

   "Generally, an employer who has taken investigative steps, including interviewing the affected employee in an attempt to ascertain the accuracy of the statements, can demonstrate probable cause for having made the disputed statement. [Cit. om.]"

   In the *Lavela* case, the company received and considered evidence from the plaintiff that he was fit to return to work and requested additional records and an examination before confirming his termination. Even if, in hindsight, the court said, it might appear that the employer's determination and resulting statement were false, it

clearly had reasonable cause to make the determination and statement it did.

4. Zisumbo v. McCleodUSA Telecommunications Services, Inc., 154 Fed. Appx. 715, 2005 WL 3120640 (10th Cir. 2005).
5. **181.933 Notice of termination.**
   Subdivision 1. **Notice required.** An employee who has been involuntarily terminated may, within 15 working days following such termination, request in writing that the employer inform the employee of the reason for the termination. Within ten working days following receipt of such request, an employer shall inform the terminated employee in writing of the truthful reason for the termination.
   Subd. 2. **Defamation action prohibited.** No communication of the statement furnished by the employer to the employee under subdivision 1 may be made the subject of any action for libel, slander, or defamation by the employee against the employer. (Minnesota Statutes 2005)
6. **Letter of dismissal, when—failure to issue, damages—punitive damages, limitations.**
   290.140. 1. Whenever any employee of any corporation doing business in this state and which employs seven or more employees, who shall have been in the service of said corporation for a period of at least ninety days, shall be discharged or voluntarily quit the service of such corporation and who thereafter within a reasonable period of time, but not later than one year following the date the employee was discharged or voluntarily quit, requests in writing by certified mail to the superintendent, manager or registered agent of said corporation, with specific reference to the statute, it shall be the duty of the superintendent or manager of said corporation to issue to such employee, within forty-five days after the receipt of such request, a letter, duly signed by such superintendent or manager, setting forth the nature and character of service rendered by such employee to such corporation and the duration thereof, and truly stating for what cause, if any, such employee was discharged or voluntarily quit such service.
   2. Any corporation which violates the provisions of subsection 1 of this section shall be liable for compensatory but not punitive damages but in the event that the evidence establishes that the employer did not issue the requested letter, said employer may be liable for nominal and punitive damages; but no award of punitive damages under this section shall be based upon the content of any such letter. *Missouri Revised Statutes*, Chapter 290 (Wages, Hours and Dismissal Rights), Section 290.140 (August 28, 2005)
7. Note what the court says in Lavela v. S.B. Foot Tanning Co., 2005 WL 1430302 (D.Minn., 2005) (not reported), discussed below:

   Because employers have an interest in ensuring that employees know why they are treated in a particular manner and employees have a corresponding interest in understanding the reason for their termination, explanatory statements such as that made by defendant to plaintiff are made upon a proper occasion and for a proper purpose.
8. Fjelsta v. Zogg Dermatology PLC, 2006 WL 475283 (D. Minn. 2006).
9. Wheeler v. CSK Auto, Inc., 2005 WL 1925860 (E.D. Cal. 2005).
10. Lavela v. S.B. Foot Tanning Co., 2005 WL 1430302 (D.Minn., 2005).
11. "Generally, where a defendant communicates a statement to a plaintiff, who then communicates it to a third party, there is no publication. [Cit. om.] The publication element can be met, however, if the plaintiff is compelled to publish the defamatory statement to a third person and if it was foreseeable to the defendant that the plaintiff would be so compelled. [Cit. om.; internal quotation marks om.]" The theory "hold[s] the originator of the defamatory statement liable for damages caused by the statement where the originator knows, or should know, of circumstances whereby the defamed person has no reasonable means of avoiding publication of the statement or avoiding the resulting damages. [Cit. om.]"

THE POLICY CORNER

TERMINATING AN EXECUTIVE: KEY STEPS TO MINIMIZE LIABILITY

Robert J. Nobile, Esq., and Beth T. Golub, Esq.

All terminations are serious and can lead to litigation, but the termination of a senior officer or executive often has more significant ramifications. The importance of these decisions is heightened amidst the epidemic of corporate corruption, self-dealing, and deception by senior executives that is prominent in the zeitgeist of this decade. Additionally, executives generally have more significant ties to the organization than lower-level employees, and their termination will be felt more deeply both within the organization and often outside the organization as well.

For these reasons, HR professionals must take care to structure the employment relationship with executives correctly at the outset, and, at the other end, if the relationship comes to an end, ensure that the termination is carried out in a manner that minimizes both the risk and potential liability of litigation. To accomplish both of these goals, it is important to be aware of the myriad issues, concerns and discrete decisions to be made before an organization terminates one of its executive employees.

What follows is a delineation of issues to "check-off" an HR professional's list of considerations in the termination process of an executive. Many of these issues are not unique to the termination of an executive, but for obvious reasons, they take on heightened significance when they involve a high-level employee.

I. TERMINATION CHECKLIST

1. Statutory Concerns

One of the first issues an employer must consider prior to terminating an executive is whether the executive's termination could give rise to a claim of employment discrimination. Often, executives tend to be older and the "age issue" is frequently raised by plaintiffs' attorneys as a possible basis for challenging the termination. Gender and race are also frequent concerns, because many organizations have a dearth of women and minorities in their senior ranks; as a result, the protected class status of the individual being terminated should be considered and the reasons for the termination decision reviewed with employment counsel beforehand, so that strategies can be employed in advance to counter allegations that the basis for the termination was related to the executive's protected class status.

Whistleblower issues under Sarbanes-Oxley ("SOX")[1] and other laws may also surface prior to or at the time of termination. As a result, care should be taken

ROBERT J. NOBILE is a Partner with the New York City office of Seyfarth Shaw, where he specializes in employment law. He is also a member of the graduate faculty of St. Joseph's College in New York. He is the author of Guide to Employee Handbooks, Human Resources Guide, the Guide to HR Policies and Procedures Manuals, and Essential Facts: Employment, all published by West.

BETH T. GOLUB is a Partner at the Chicago office of Seyfarth Shaw. Her practice is devoted to labor and employment law issues in defense of management, in both litigation matters and in day-to-day advice and counseling. Both Mr. Nobile and Ms. Golub are members of Seyfarth Shaw's Workplace Counseling and Compliance Solutions Practice Group.

when reviewing the basis for termination to ensure that these issues cannot be alleged by the executive as being the "real reason" for his/her termination. In this regard, remember that in the face of a SOX whistleblower claim, it will be the employer's burden to demonstrate by clear and convincing evidence that the termination would have occurred anyway, notwithstanding the SOX-related issue.

2. Review the Employment Agreement

The next question to ask is whether the executive to be terminated has a valid written employment agreement with the organization. If so, the company must abide by its obligations under the terms of the agreement or, if possible, amend the terms by negotiating a new agreement with the executive during the termination process. Failure to comply with the terms of an employment agreement can result in litigation, the cost of which (in attorneys' fees, results of litigation, adverse publicity, and the like) can far exceed the costs of compliance. Below is list of provisions that are typically addressed in an employment agreement that should be reviewed prior to effectuating a termination.

- **Right to terminate the agreement and/or the executive's employment.** Often, executive employment agreements have "for cause" termination provisions. These must be reviewed carefully to ascertain whether cause exists. In many cases, executives are asked to leave because the board or senior management committee has "lost confidence" in the executive's leadership ability—a reason that normally does not rise to the level of cause and, thus, invariably leads to a situation where the company must negotiate the termination to "package out" the executive. (Of course, if the executive is employed at will, "cause" is not needed; but the statutory concerns noted above still apply.)
- **"Notice" provisions—** Does the agreement require notice to the executive prior to terminating his/her employment and/or the agreement? If so, ensure that these provisions are carefully followed.
- **Severance or benefits due to the executive upon termination,** either immediately or at specified times in the future—How much is the executive due, especially when the termination is without cause, and what requirements are in place that must be satisfied before these benefits are payable (*e.g.*, is a waiver and release agreement required)?
- **Bonus obligations—**Has the executive vested entirely or is he/she entitled to a pro rata share of a bonus payment for the prior or current performance years?
- **Deferred compensation entitlements—**What happens upon termination to the executive's stock options, restricted stock, and rights under other long term incentive plans in which he/she may be a participant?
- **Other "perks"** that the company may be obligated to provide (*e.g.*, company car, club memberships, etc.). How will these issues be handled?
- **Mitigation obligations—** Does the executive have a duty under the agreement to diligently seek other employment as a condition precedent to receiving ongoing severance payments or other benefits, and do the executive's benefits cease upon his/her finding new employment, or are they offset by earnings in a new position? These issues need to be considered.

3. Dealing With Confidentiality Issues and Restrictive Covenants

The following is a list of issues that may or may not be addressed in the employment agreement or in other documents, such as the company handbook or policy statements or separate, stand-alone agreements. These should be considered and reviewed as well to ensure that both the company and the executive meet all obligations.

- **Confidentiality provisions—**Most employers have confidentiality provisions incorporated into executive employment agreements, and/or in separate confidentiality statements or policies. A good practice to follow is to confirm these provisions in writing at the time of termination. This is frequently done by incorporating a paragraph into the separation agreement, reiterating the executive's obligations in this regard. (If no separation agreement is being entered into, for example, where the executive is being terminated for cause, it may be wise to send a letter to the executive reiterating his/her

duty to maintain confidentiality of trade secrets and other proprietary information.)

- **Restrictive covenants—** There are various forms of restrictive covenants that employers often place into the employment agreements for their executives, and which may be incorporated into other agreements as well, such as in stock option agreements, incentive compensation plans and the like. These include "non-compete" clauses, which prohibit the executive from working for competitors for a stated time period after termination; "non-solicitation" of customer provisions; and provisions which prohibit the executive from soliciting employees to leave the employ of the company, both for stated time periods, as well. Employers should ensure that whatever covenants they wish to enforce should be incorporated into the separation agreement by reference or included in the agreement itself. (Again, if no separate agreement is being entered into, a separate letter should be considered in this regard, to reiterate the executive's obligations.)

- **Non-disparagement—**Including a provision in the separation agreement that prohibits the executive from making disparaging remarks about the company, board members, employees, and regarding its products and services is important and can spare the company future embarrassment (*e.g.*, where the company has paid the executive a handsome severance package only to find out he/she is badmouthing the company or certain individuals).

- **Resignation from board/committees—**Care should be taken to ensure that the departing executive resigns from any key positions he/she may hold, such as a seat on the board or on special committees, or if he/she refuses to resign, is removed accordingly.

4. Determine What Termination Package Will Be Offered

The executive's employment agreement may provide for certain payments; however, the company may want to offer additional payments (*e.g.*, to secure a restrictive covenant or to "buy peace" with the departing executive, especially if there is a concern about the executive's knowledge of certain sensitive issues that the organization may not want aired publicly). The following is a list of possible components that may be included in a termination package:

- severance payments
- employee benefits, such as paid COBRA at company expense
- bonus payments (on a prorated basis for the current fiscal year).
- outplacement services (If so, which provider, what specific type of outplacement, and for how long?)
- accelerated vesting of stock or other incentive compensation (provided the respective plans permit and necessary approvals are obtained, *e.g.*, board, shareholders)

5. Rights Under Compensation and Benefit Plans

These are rights that the executive may have in addition to those specified in the employment agreement. In this connection, relevant benefit plans should be checked to ensure that all entitlements are provided:

- vested pension/401(k) benefits
- restricted stock, the right to exercise vested stock options
- other vested deferred compensation
- accrued unused vacation

6. Tax Issues

- Internal Revenue Code Section 409A considerations—Must certain payments be "deferred or delayed" to avoid tax penalties?[2]
- Will the type or amount of payments made to the executive trigger excise tax obligations?[3]

7. Post-termination Status

Will the executive have a continuing or ongoing relationship with the company after his/her effective termination date (*e.g.*, as a consultant; ongoing duty to be "on-call"; duty to cooperate in litigation; and the like)? A continuing relationship may benefit either the company, the executive, or both, and should be assessed in light of the particular facts and circumstances surrounding the termination. The company may benefit by having the services and responsibilities of the former executive fulfilled while looking for a replacement; the former executive many benefit by having some income and being able to represent to potential employers the fact that he/she is not "unemployed." Caution should be exercised here, however, to ensure that the executive's

presence is not disruptive to the work environment.

8. Return of Company Property

It is important in any termination to secure the prompt, if not immediate, return of company property. The urgency is particularly important if the termination is involuntary and, therefore, likely rife with disagreements and hard feelings on both sides (the company and the executive). Company property is not limited to the accoutrements of modern work life (*e.g.,* computers, company-issued cell phones, and BlackBerrys); it also includes documents that employees have created during the course of their employment. Executives may perceive many documents they create and collect during their employment to be personal items, but if those documents were created in the course of and in furtherance of the employee's job responsibilities, the company has a legitimate claim to ownership of them. The need to collect and retain all of these documents is particularly heightened in a highly competitive industry, where the confidentiality of trademark or proprietary information, trade secrets, or even customer lists is paramount. These documents often include:

- files (*e.g.*, personnel information about other employees, company financial data, the executive's personal files on his/her employees, company marketing materials, client and customer lists)
- memoranda
- computers
- building and area access keys
- access cards

9. Indemnification

Company obligations that inure to the benefit of a former executive often do not end simply because the employment relationship does. For example, the company may be involved in litigation at the time of the termination or litigation may arise afterward. If the executive is named in any lawsuit, the company may be obligated to indemnify the executive for the costs of litigation and any judgment or settlement that results from it. These obligations are derived from two sources: (i) contractual obligations (*e.g.,* in employment agreement or corporate by-laws); or (ii) applicable state law statutory indemnification obligations.

10. Resolution of Disputes

Is there or should there be a mechanism for the efficacious resolution of any post-termination issues that may arise in the future? Those mechanisms may include mandatory mediation or arbitration. If there is to be a mechanism for the resolution of any disputes the mechanism and any corresponding fee/cost arrangements must be delineated in a written agreement (*i.e.,* as part of a general release/separation agreement, by its own stand-alone agreement, or as part of the original employment agreement). Sometimes executives enter into a mandatory mediation or arbitration agreement at the start of their employment. Companies have had varying success in enforcing these agreements. Additionally, it is important to note that the Equal Employment Opportunity Commission is not bound by any mandatory arbitration agreement the executive enters into with the company, and it may file a lawsuit under any of the laws it enforces (Title VII, the Age Discrimination in Employment Act, the Americans with Disabilities Act, Equal Pay Act) on the executive's behalf, seeking all the monetary awards the employee could have, as well as non-monetary relief (*e.g.*, injunction, mandatory training, declaratory judgments).[4]

II. PRACTICAL AND LOGISTICAL CONSIDERATIONS FOR THE TERMINATION

In addition to the multitude of legal considerations that should be on every HR professional's "check-list," there are practical considerations that must be analyzed when terminating an executive employee. Because of the role the executive plays in the foundation and structure of the company, the termination of an executive is felt much more profoundly both internally within the company, and externally in the community. To minimize the actual disruption to company operations, as well as the potential disruption resulting from fears of shareholders, employees, or investors at the loss of a key executive, the termination process itself must be carefully choreographed and executed. What follows is an overview of the key decisions that must be made and incorporated into the termination process.

1. Termination Notice and General Termination Issues

As noted at the outset of this column, the company must determine whether any formal notice to the executive is required prior to termination. This could include formal notice about any performance deficiencies *before* a company is allowed to terminate. The place to find these obligations is typically in any employment agreement or handbook. If there are notice requirements, they obviously will affect the timing of the

termination—any termination not preceded by mandatory notice provisions may be voided by a court or result in liability for breach of contract. It also must be determined if a board or committee vote/approval is required to proceed with a termination. Again, this will affect the timing of the termination as well as the number of people that may know about it before it is communicated to the executive. This factor will also implicate issues of confidentiality and discretion.

Next, the question of who will deliver the news regarding the termination must be answered. There is no correct answer; it will depend on who the executive is and the relationships and circumstances of the termination. Clearly, however, it must be a person of significant authority within the organization.

Another important consideration will be whether the executive will be given the opportunity to resign in lieu of being discharged. For obvious reasons, this option is generally appealing for the executive. It can also be advantageous for the company. Indeed, it may improve the public's perception of the company, and this perception may assist in finding a replacement for the executive. If the executive has engaged in significant misconduct, however, the company should take the affirmative action of terminating the employee, and not allowing resignation, to send a message of non-tolerance to other employees and the public.

Will the executive be asked to leave immediately or will he/she be permitted to remain for a certain period of time? Again, this will be largely dependent on the circumstances that led to the termination and the needs of the company—specifically the need to have the executive's responsibilities carried in the search for a replacement. Of course, if there is a concern that the executive may harm the organization (*e.g.*, by stealing confidential information/files, destroying data, recruiting away other key employees), depending on the amount of risk, the executive should be asked to leave the company premises immediately upon receiving notice of the termination.

How will the executive's personal "effects" be handled (*i.e.*, his/her personal belongings in office, photos, etc.)? Will the executive be permitted to return to pack up his/her property, or will it be packed and mailed to the executive? (Note: in this regard, if property will be packed by company representatives, two people should handle this assignment—one to pack the items and one in management or HR to "inventory" the items being packed. This also ensures that there is a witness to what is being packed and shipped, so that the executive can not later claim successfully that some item of great value has been lost or stolen.)

2. The Termination Meeting

The termination meeting itself should be planned carefully. It should be brief and to the point and should communicate the following points and little else:

- Notify the executive that termination will occur, that the decision is final, has been reviewed with appropriate authorities within the organization (*e.g.,* board, management committee, etc.), so that he/she knows that it is final and not open to negotiation.
- Specify why the termination is occurring, but again, be brief and to the point. This means give the business reason, not long-winded justifications and explanations. Possible business reasons could be (i) "loss of confidence;" (ii) inability of the executive to satisfy stated goals and objectives, etc.; (iii) inappropriate conduct or conduct unbecoming an officer/executive of the company; (iv) poor judgment and poor decision-making skills (with a few examples). If the termination is "for cause" under an employment agreement, care should be given to explain that the business reason or reasons are ones that satisfy the "for cause" provision.
- If applicable, mention that the company will allow the executive to resign in lieu of termination (if this is the company's decision).
- Provide the executive with a separation agreement, perhaps also with a summary of the terms of the severance/benefit package being offered.
- Communicate to the executive how the company intends to notify the public (*e.g.*, shareholders/SEC, etc.), and what will be the stated reason(s) for the termination.
- Inform the executive not to notify or contact other employees until the employees have been notified by the company of the termination.
- If the executive is over 40 years of age, and the Older Workers' Benefit Protection Act ("OWBPA") applies because he/she is being asked to sign a waiver or release of claims under the Age Discrimination in Employment

Act, inform the executive that he/she will have up to 21 days to consider the terms of the release he/she is being asked to sign and will have seven days to revoke it. This information must be communicated to the executive in writing.[5]

- Advise the executive regarding the return of company property—*i.e.*, what is in his/her possession and when he/she should return it. (Note: An inventory of what company property is in the employee's possession should be made before this termination meeting if possible.)
- Communicate the specifics regarding his/her exit —*e.g.*, that he/she should leave immediately and that the company will have his/her belongings packed and shipped to him/her. (Note: The specifics concerning the plan for the executive's actual exit may change depending how argumentative or hostile the executive becomes during the termination meeting.)
- If outplacement is being provided, inform the executive of this, and of how contact should be made with the outplacement firm. Options for outplacement services include: (i) providing the executive with the outplacement firm's name/contact information; (ii) advising the executive that the outplacement firm will be calling him/her within the next two days; and (iii) having the outplacement representative onsite and available to the executive immediately after the termination meeting.
- Carefully select the date of the termination meeting. Make sure the executive is scheduled to be in the office that day, and that there is no critical event occurring that day (*e.g.*, executive's anniversary date of employment, birthday, critical meeting with customers/clients, etc.).
- Conduct the meeting at an appropriate location. Avoid public places such as bars/restaurants, and avoid places where it will be difficult for the person delivering the termination decision to leave the meeting.

3. Public Notification of Termination/Exit Statements

- The termination of executives is often accompanied by a press release. To that end, the company must consider both the timing of the release and what will be stated publicly. Furthermore, if there is to be a public, external announcement, it must be coordinated with any internal communication. The company must consider both the timing and the content of what will be communicated to staff. Consistency with what is publicly stated is important. Relatedly, if no board vote was required before the termination, obviously the board and senior management must be advised promptly and consistently.
- Other public statements and disclosures that must be made include public filings made with the Securities and Exchange Commission. In connection with the termination of employment of an executive of a publicly-held company, the company will need to determine whether it will be necessary to file a Current Report on Form 8-K to report the entry into a material definitive agreement (Form 8-K, Item 1.01) with respect to any severance or other arrangement with the executive, termination of a material definitive agreement (Item 1.02), departure of a director or principal officer (Item 5.02), and/or appointment of a principal officer (also Item 5.02) with respect to any successor to the terminated executive. It also will be necessary to determine whether the terms of any arrangement with the executive would need to be disclosed under Item 402 of Regulation S-K (Executive Compensation) in the company's proxy statement and in its Annual Report on Form 10-K (generally through incorporation by reference to the proxy statement).[6]

III. CONCLUSION

As demonstrated above, there are a myriad of issues that must be considered and reviewed before an executive is terminated, many of which are fairly complex. In this connection, these terminations should be analyzed and planned carefully with appropriate consultation with counsel to minimize the organization's exposure to legal liability to the maximum possible extent.

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NOTES:

1. The Sarbanes-Oxley Act of 2002 ("SOX") contains significant protections for corporate whistleblowers. Unlike most whistleblower laws, the SOX's whistleblower protection

provisions are not limited to providing a legal remedy for wrongfully discharged employees. In addition, the law contains other provisions directly relevant to whistleblower protection. First, the law requires that all publicly traded corporations create internal and independent "audit committees," one of the functions of which must be to establish procedures for employees to file internal whistleblower complaints, and procedures to protect the confidentiality of employees who file allegations with the audit committee. Second, the SOX contains reporting requirements for certain attorneys. Third, the SOX criminalized retaliation against whistleblowers who provide "truthful information" to a "law enforcement officer" about the "commission or possible commission of any Federal offense." This provision is not limited to publicly traded corporations; it covers other employers as well. Fourth, the SOX provides for criminal penalties for any violation of the SOX, including the whistleblower-related provisions.

2. Section 409A was added to the Internal Revenue Code by the American Jobs Creation Act of 2004, effective January 1, 2005. A violation of Section 409A may result in immediate taxation of deferred amounts, as well as a 20% penalty tax on the employee. In general, amounts earned and vested before January 1, 2005 are "grandfathered," provided that there is no material modification of the terms of the deferral on or after October 3, 2004. Section 409A imposes significant restrictions on deferred compensation, including a general prohibition against the acceleration of payments, and the requirement that any change in the method of payment result in a further deferral of not less than 5 years. Thus, any provision in a termination agreement that affects deferred compensation must be carefully vetted. A separate restriction applicable only to publicly traded companies (including a subsidiary of a publicly-traded domestic or foreign parent) requires that deferred compensation payable on account of the termination of a "key employee" officer (generally one of the top paid 50 officers) must be delayed for at least 6 months after termination.
3. There are several Internal Revenue Code provisions that can trigger an excise tax. One is Section 409A, relating to deferred compensation, discussed in footnote 3. This is particularly relevant in terminating high-level executives from publicly held corporations. Section 280G imposes an excise tax on certain high-level employees who receive "excess parachute payments" in connection with a change in control of the employer. The determination of what constitutes a parachute payment is complex and may not be obvious. Thus, this issue should be reviewed with benefits or tax counsel.
4. E.E.O.C. v. Waffle House, Inc., 534 U.S. 279, 122 S. Ct. 754, 151 L. Ed. 2d 755, 02 C.D.O.S. 369, 2002 Daily Journal D.A.R. 485, 12 A.D. Cas. (BNA) 1001, 81 Empl. Prac. Dec. (CCH) P 40850, 15 Fla. L. Weekly Fed. S 63, 22 Nat'l Disability Law Rep. P 129, 2002 WL 46763 (2002) (holding that arbitration agreement did not bar EEOC from pursuing victim-specific judicial relief on behalf of employee).
5. There are other requirements of OWBPA; HR professionals should consult with employment counsel to ensure that the company's release agreements conform with OWBPA's requirements.
6. It should be noted that the SEC has proposed amendments to Form 8-K and Item 402, which could impact the requirements to make disclosures and the contents thereof.