

**THE NATIONAL EMPLOYMENT LAW INSTITUTE  
PRESENTS THE TWENTY-EIGHT ANNUAL**

**EMPLOYMENT DISCRIMINATION LAW UPDATE**

**Washington, D.C.  
August 5-6, 2004**

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**CONDUCTING EFFECTIVE “IN-HOUSE” INVESTIGATIONS**

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## **INTRODUCTION**

The corporate landscape is continually evolving, but in the wake of the Enron scandals, the passage of the Sarbanes-Oxley Act and, most recently, the certification of about 1.6 million current and former employees of Wal-Mart Stores, Inc., the largest class action certification in this country's history, this evolutionary trend is pushing forward at a breakneck pace. What this trend reveals, however, may be even more disturbing: a growing lack of corporate responsibility and accountability. Many companies, and their boards of directors, do not appear to be adequately self-policing by performing necessary self-critical analyses of their business practices and policies. Of course, as the Wal-Mart case highlights, accurate financial reporting and auditing is just one part of the due diligence equation; companies also need to be concerned about other areas of compliance, including employment law compliance.

The disclosures of alleged wrongdoing by Enron, Wal-Mart and others, and the impact these disclosures have cumulatively had on the national economy, place in sharp focus the importance of companies, and their boards of directors, knowing the "compliance health" of their company. Companies need to assess their compliance health by having an objective third party conduct a critical review of their business activities to determine whether their business practices and policies comply with various legal and regulatory requirements. By having an in-house evaluation performed by an objective third-party, a company can avoid the appearance of impropriety and avoid the charge of engaging in an investigation that is outcome driven. During this self-critical analysis, not only should companies determine if they are in compliance with the SEC financial and accounting reporting requirements, but also with legal and regulatory requirements administered by employment-related governmental agencies such as the EEOC, Wage and Hour Division of the DOL, OFCCP, NLRB, and OSHA.

Additionally, companies need to have in place mechanisms which address various types of situations which require in-house investigations. Protocols should be in place for such things as sexual harassment complaints and complaints by former, whistleblowing employees alleging illegal activities on the part of the company. Experience has shown that extensive documentation of these in-house investigations may be needed later to show that the company has engaged in a prompt, effective investigation when faced with an in-house problem, and that if the problem was verified, the company undertook prompt remedial action. Recent Supreme Court case law, such as the Ellerth and Faragher cases in the sexual harassment area, which have most recently and significantly been extended to cover constructive discharge claims, put a premium on such preventative and corrective procedures being implemented by the employer. In any event, regulatory compliance problems in the employment sector, as in any other sector, are much better addressed when companies voluntarily handle these issues themselves before government involvement or oversight.

This outline discusses various regulatory risks companies face with regard to their employment practices and how various government agencies undertake their compliance investigations of employers. By way of background, the following employment areas are examined: employment discrimination (under Title VII, the Equal Pay Act, ADEA, and ADA), wage and hour compliance, affirmative action compliance, labor law compliance in the union context, and safety and health compliance. Thereafter, this outlines focuses on issues companies face when fashioning self-critical analyses and in-house investigations.

## **I. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (“EEOC”)**

### **1. Enforcement Responsibilities and Overview**

The EEOC is responsible for the enforcement of Title VII of the Civil Rights Act of 1964 (“Title VII”) (discrimination on the basis of race, color, religion, sex, national origin), the Equal Pay Act (“EPA”) (wage discrimination on the basis of sex), the Age Discrimination in Employment Act (“ADEA”), and the Americans with Disabilities Act (“ADA”) (discrimination on the basis of non-job-related disability).

The EEOC is empowered to investigate charges of discrimination and attempt to eliminate unlawful discrimination through conciliation or litigation. If the Commission finds reasonable cause to believe that a charge of discrimination is true, and is unable to obtain a conciliation agreement, it is empowered to bring a civil action against the employer.<sup>1/</sup> If the Commission dismisses the charge, or fails to obtain a conciliation agreement or file a civil action within 180 days after the charge is filed, the Commission is required to issue a “right to sue” letter to the charging party, who may bring a civil action within 90 days after issuance of the “right to sue” letter. 42 U.S.C. § 2000e-5(f)(1).

### **2. Relevant statutory provisions:**

- a. Title VII. 42 U.S.C. § 2000e through § 2000e-17; 42 U.S.C. § 1981a.
- b. ADEA. 29 U.S.C. §§ 626, 216-217, 255-56, 259-60.
- c. EPA. 29 U.S.C. §§ 216-217, 255-56, 259-60.
- d. ADA. 42 U.S.C. § 12101 through § 12117, 12201-12213.

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<sup>1/</sup> If the employer is a governmental agency, the Commission is not empowered to bring a civil action, but must refer the case to the United States Attorney General, who may bring a civil action. 42 U.S.C. § 2000e-5(f)(1).

3. **Relevant regulations:** 29 C.F.R. § 1601, et seq. See also EEOC Compl. Man. (BNA).

**A. Processing of Individual Title VII and ADA Charges by the EEOC<sup>2/</sup>**

1. Charges may be filed by or on behalf of any aggrieved person, or by a Commissioner of the EEOC. The charge must be in writing and verified. 42 U.S.C. § 2000e-5(b); 29 C.F.R. § 1601.9.

a. To determine whether charge was filed in a timely manner, the employer must apply complicated rules for timeliness.

(1) If in a state without a deferral state agency, a charge must be filed within 180 days of the alleged violation.

(2) If in a state with a deferral agency, a charge must be filed with the EEOC within 300 days of the alleged violation, but the state must have had a 60-day opportunity to exercise exclusive jurisdiction over the charges except if the state waives jurisdiction or terminates its proceedings in less than 60 days. See Mohasco Corp. v. Silver, 447 U.S. 807 (1980).

In practice, therefore, a charge filed more than 240 days after the alleged violation may be untimely, unless the state deferral agency terminates its processing of the charge before the 300 day period expires.

(3) According to EEOC procedural regulations, if in a state with a deferral agency, an aggrieved employee may not file a claim under Title VII with the EEOC until 60 days after filing a charge of discrimination with the state or local agency. This

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<sup>2/</sup> Title I of the ADA incorporates the administrative procedures of Title VII of the Civil Rights Act of 1964. 42 U.S.C. §12117, 29 C.F.R. §1601.5

provides the state or local agency a reasonable time to remedy the challenged practice<sup>3/</sup>. See 42 U.S.C. § 2000e-5(c)-(d). A charge may be filed within 300 days of the alleged violation if the charge is “apparently untimely under the applicable state or local statute of limitations.” 29 C.F.R. § 1601.13(a)(3).

(4) The EEOC filing requirements are not jurisdictional, and may be subject to “equitable tolling.” Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982). Equitable tolling is available to a claimant only where he/she was actively misled by the employer or was misinformed by the EEOC or the state fair employment agency. See generally, Irwin v. Department of Veterans Affairs, 498 U.S. 89 (1990); Miller v. Beneficial Management Corp., 977 F.2d 834 (3d Cir. 1992); Hart v. S.T. Baker Chemical Co., 598 F.2d 829 (3d Cir. 1979); Dillman v. Combustion Eng’g, 784 F.2d 57 (2d Cir. 1986).

(5) A recent United States Supreme Court decision, National Railroad Passenger Corporation v. Morgan, 122 S. Ct. 2061 (2002), adds clarity to the doctrine of continuing violations, under which an employee may file a charge of discrimination outside the normal statute of limitations in certain circumstances. Under the Morgan formulation, only those discrete acts of alleged discrimination, with respect to which the employee first filed the discrimination charge with the appropriate state agency, occurring within 300 days of the date that the employee filed his charge with the EEOC are actionable under Title VII. That being said, an employee can recover on a hostile work environment theory for acts occurring more than 300 days before the charge was filed with the EEOC, as long as the acts were part of same hostile work environment and at least one act occurred within the 300-day period.

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<sup>3/</sup> Title VII does not require an aggrieved party to wait until the state or local agency remedies the complaint, it only requires the aggrieved party to wait 60 days after filing a charge with a state or local agency before proceeding before the EEOC.

**2. Notification.**

Within 10 days after filing of the charge, EEOC must notify the employer (or other respondent) of the “date, place and circumstances of the alleged unlawful employment practice.” 42 U.S.C. § 2000e-5(b). In practice, the EEOC sends EEOC Form 131-A, “Notice of Charge of Discrimination with Copy of Charge” to the employer. No action by the employer is required at this time.

Unless the charge is assigned to the systemic unit (see discussion at pages 12-13, infra), EEOC will notify the charging party and the respondent of the scheduled date for a fact-finding conference. Generally, the notice to the employer will include a request for information.

The EEOC has the right to issue subpoenas in order to have access to relevant evidence. Subpoenas may be enforced by the district courts. 42 U.S.C. § 2000e-9; 29 U.S.C. § 161(2). See also EEOC Rules and Guidelines, 29 C.F.R. § 1601.16.

**3. Employer’s Response.**

The employer should view the administrative process as the potential initiation of litigation that may continue in a suit in federal court. In that regard, the employer should insure that the charge is handled by specifically designated individuals who are trained and experienced with the EEOC’s procedures. The designated individual should consult counsel when appropriate to assist in evaluating the case and developing a defense strategy.

**4. Position Statement**

After receiving the EEOC’s information request, the employer should prepare a formal statement of its position responding to allegations in the charge which are sufficiently clear to allow for a meaningful response. Where the charge is vague and the employer response

would involve speculation or conjecture, the position statement should state that no response will be forthcoming until specific facts regarding the allegation are offered.

a. The position statement should raise applicable legal defenses such as lack of jurisdiction, statute of limitations, and judicial authority, where applicable, approving the practice in question. The position statement should set forth the employer's factual defense and include documentary evidence in support of the employer's position.

b. In preparing to defend against the charge and formulating the position statement and response to the request for information, counsel for the employer should:

(1) Interview supervisors, co-workers and all other individuals who may have knowledge of the facts and review applicable company policies;

(2) Collect data regarding treatment of other similarly situated employees;

(3) Collect statistical data such as utilization data by EEO-1 category, availability data, hiring, promotional and termination data as appropriate, and performance data such as comparable sales figures in a case involving termination of a salesperson;

(4) Ascertain whether the alleged discrimination resulted from an isolated incident or from an established employment practice or policy;

(5) Evaluate the likelihood of the charging party prevailing on the merits on all or part of the charge, the potential monetary impact, and the likelihood of litigation on an individual or class basis; and

(6) If the internal investigation reveals possible discrimination consider:

(a) the advisability of a “no-fault” settlement, including reinstatement (or rescission of discipline) and/or back pay; and

(b) the advisability of changing employment policies or practices which have been alleged to be discriminatory.

c. The EEOC generally requests information according to “off-the shelf” document requests. In responding to the EEOC’s information request, the employer should initially collect information responding fully to the EEOC’s request, and then review the information requested for relevancy. The employer should generally not provide documents or information irrelevant to the charge.

In a typical case involving a race-based discrimination, for example, the EEOC will request information regarding race, sex, rates of pay, hiring, promotions, and terminations throughout the company for a five year period. The employer should request that the EEOC narrow its request to more relevant information. Alternatively, the employer may object to a broad request as not being relevant to the charge, and provide only appropriate information.

In a termination case the issue is usually disparate treatment of individuals similarly situated. In such a case it usually serves no useful purpose to compare employees terminated for unrelated offenses. Thus, if in our example the employee was terminated for absenteeism, in responding to the EEOC’s request for information, comparative information should be limited to other employees terminated for absenteeism, and not, for example, insubordination or poor performance.

One reason to so limit the response is that the EEOC may allow the charging party to have access to his/her own EEOC file and broad based information may

provide impetus to sue and/or seek class relief. See EEOC v. Associated Dry Goods Corp., 449 U.S. 590 (1981).

This general guideline may not apply in every case. The EEOC may view overly narrow responses to document requests as an attempt to prevent the EEOC from gaining access to harmful information. In order to allay this concern, the employer should provide all relevant information that is requested by the EEOC where that information supports the employer's position.

If the employer concludes that the charge has merit or that a settlement would be advisable, contact may be initiated with the EEOC before the fact-finding conference.

#### **5. Fact-Finding Conference**

- a. Charging party, representative of respondent, EEOC agent and counsel for parties meet at EEOC offices to discuss charge.
- b. EEOC can request (and compel by subpoena, 42 U.S.C. § 2000e-9; 29 U.S.C. § 161(1); 29 C.F.R. § 1601.16(a)) attendance of specified persons.
- c. EEOC will inquire into positions of parties, and will attempt to “settle” the charge, with emphasis on a settlement offer from the employer.
- d. The conference, which is conducted by an Equal Opportunity Specialist (EOS), is an informal proceeding consisting of the questioning of both parties by the EOS. Cross examination of witnesses is generally not permitted.
- e. Although notes are taken during the conference, no transcript is made.
- f. Witnesses presented should be prepared as though they are to be witnesses in a legal proceeding.

g. Although attorneys are generally not permitted to examine or cross-examine witnesses, the attorney or other employer representatives can help focus the issues and present the EOS with relevant lines of questioning.

h. The employer should present itself as cooperative, open and reasonable, but should be firm regarding the lack of merit in the charge and the appropriateness of its settlement position.

i. If no settlement is reached at the fact-finding conference, the EEOC will refer the matter to its continuing investigations unit.

j. When appropriate, the employer should submit additional information and/or a supplemental position statement to address the issues raised during the conference.

6. As a rule, the employer should attempt to limit the scope of the investigation as narrowly as possible, focusing upon the specific facts and alleged injury suffered by the charging party. In doing so, the employer should generally attempt to limit both the geographic and temporal scope of the EEOC's investigation by respectfully objecting to the provision of information which is not relevant to the charge. In establishing areas of inquiry, however, the employer should be prepared to provide witnesses, documents and comparative information which are relevant. Because the scope of the EEOC's investigation determines the permissible scope of a Title VII suit based on the charge, it is imperative that the investigation not be turned into a "fishing expedition" by the EEOC. Though constricting the scope of the investigation, the employer should present itself as open and cooperative. All witnesses requested for interviews should be interviewed and prepared in advance. The employer should

insist that a representative or its counsel be present for interviews by EEOC investigators, particularly if conducted on the employer's premises during working hours.

7. In the absence of a settlement, the EEOC will ultimately make a determination as to whether there is reasonable cause to believe the charges are true. If reasonable cause is found, the company should request reconsideration of the EEOC's determination, raising the legal defenses, outlining any factual errors contained in the determination upon which the finding is predicated, and highlighting factual evidence favorable to the employer's position that was not properly considered in the determination. 29 C.F.R. § 1601.21. If the EEOC finds reasonable cause, it will attempt to conciliate the charge by convincing the parties to sign a formal settlement containing the agreement of the parties as to the remedy of the charge. If no conciliation agreement is reached, the EEOC will consider the "litigation worthiness" of the charge and either initiate litigation in federal district court or issue a "right-to-sue" letter allowing the individual to bring suit in federal district court.

**B. Processing of Commission Generated Systemic Charges.**

1. The Commission treats cases identified as involving "systemic discrimination" where the "patterns of employment discrimination are the most severe, and where maintenance of a successful 'systemic case' will have a significant positive impact on the employment opportunities available to minorities and women." EEOC Compl. Man. § 16.1.

2. A systemic charge is generally filed by a Commissioner and triggered by the filing of an individual charge which, by its nature or content, raises issues which are subject to class treatment.

3. A Commissioner's Charge generally will be far more skeletal and conclusory than those filed by individual charging parties. On the respondent's right to minimal

notice of the date, place and circumstances, see EEOC v. Dean Witter Co., 643 F.2d 1334 (9th Cir. 1980).

4. EEOC has developed standards for selecting systemic respondents.

Meeting any one of the standards is sufficient for the Commission to institute a systemic proceeding. These standards include:

- a. continuation of policies which result in low utilization of available minorities and/or women;
- b. employment of a substantially smaller proportion of minorities and/or women than other employers in the same labor market who employ persons with the same general level of skills;
- c. employment of a substantially smaller proportion of minorities and/or women in higher paid job categories than in lower paid categories;
- d. maintenance of specific recruitment, hiring, job assignment, promotion or discharge policies and practices that have an adverse impact on minorities and/or women, including those listed in the Commission guidelines on sex, religious, and national origin discrimination, 29 C.F.R. § 1605-07;
- e. employers whose employment practices have the effect of restricting or excluding available minorities or women, and who are likely to be used as a model for other employers due to the number of their employees, their competitive position in the industry, or their impact on the local economy; and
- f. employers with large turnover or expanding employment opportunities whose practices may not provide available minorities and women with fair access to job opportunities. EEOC Compl. Man. § 16.2.

5. A fact-finding conference generally will not be held, but EEOC may conduct an on-site review.

6. The EEOC must determine “litigation worthiness” of each case before the “Pre-Determination Interview.”

7. Conciliation will probably be more difficult, because the EEOC will seek broad relief.

**C. Relief under Title VII.**

1. Section 706(f)(2) of Title VII authorizes the EEOC to seek preliminary injunctions or temporary restraining orders whenever “the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of the Act.” 42 U.S.C. § 2000e-5(f)(2).

2. Courts generally require showing of “irreparable injury” as a precondition to the granting of preliminary relief. Injunctive relief is rarely sought or granted during the administrative process.

3. If a plaintiff brings and wins a civil action against an employer, a court may grant any equitable relief it deems appropriate, including, but not limited to, reinstatement and back pay. 42 U.S.C. § 2000e-5(g)(1). The plaintiff also is entitled to a jury trial and may receive compensatory and punitive damages. 42 U.S.C. § 1981a (“The Civil Rights Act of 1991). The Civil Rights Act of 1991 limits the total amount of compensatory and punitive damages that may be awarded as follows:

a. For employers with between 15 and 100 employees in each of 20 or more calendar weeks in the current or preceding calendar year, compensatory and punitive damages are limited to \$50,000.

b. For employers with between 101 and 200 employees in each of 20 or more calendar weeks in the current or preceding calendar year, the limit is \$100,000.

c. For employers with between 201 and 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, the limit is \$200,000.

d. For employers with more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, the limit is \$300,000.

**D. EEOC Enforcement of the Age Discrimination in Employment Act (“ADEA”) and the Equal Pay Act (“EPA”)**

Charges under these two acts are handled by a separate investigative unit which has responsibility for both age and equal pay claims. In most states the charge must be filed within 300 days of the discriminatory act.<sup>4/</sup>

**1. ADEA**

The authority for governmental enforcement of the ADA rests with the EEOC.

a. The determination whether to investigate a charge is often related to whether it can be successfully resolved.

b. A charge may not be investigated if the complainant cannot initially provide factual support.

c. The ADEA requires persons allegedly aggrieved to file a charge (with the EEOC) within similar time limits as a Title VII charge, 29 U.S.C. § 626(d). However, the Eleventh Circuit has held that the EEOC may proceed with an investigation under the ADEA even though the underlying charge of discrimination was untimely filed with the agency. EEOC

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<sup>4/</sup> In deferral states, an ADEA claimant does not have to file with the state agency before filing a charge with the EEOC. Moreover, the charge may be processed simultaneously by both state and federal agencies. Gabrielle v. Barrett, Haentjens & Co., 663 F. Supp. 1187 (M.D. Pa. 1986).

v. Tire Kingdom, Inc., 80 F.3d 449 (11th Cir. 1996). The court reasoned that the ADEA gives the EEOC broad power to investigate and nothing in the ADEA requires a charge of discrimination to be filed as a prerequisite to any such investigation. Id.

d. According to the ADEA, before the EEOC may file suit, it must first attempt to achieve compliance with the ADEA “through informal methods of conciliation, conference and persuasion.” 29 U.S.C. § 626(b). This provision is a strict requirement, though not jurisdictional, necessitating “exhaustive, affirmative action.” Brennan v. Ace Hardware Corp., 495 F.2d 368, 374 (8th Cir. 1974).

e. In ADEA suits, an employee must file a charge with the EEOC prior to bringing a civil action. However, the employee does not need to obtain a Right to Sue letter in order to bring a civil action, so long as he/she waits 60 days after the charge is filed. 29 U.S.C. § 626(d). The employee must file a complaint on or before the 90th day after the EEOC has completed its proceedings. 29 U.S.C. § 626(e).

f. Pursuant to 29 U.S.C. § 626(b), where a charge of discrimination is brought under the ADEA, certain FLSA procedures are employed, including:

(1) Requirement that all parties plaintiff to an action, including a class action, consent in writing to their inclusion in the action, 29 U.S.C. § 216(b); and

(2) Liquidated damages are available for “willful” violations, 29 U.S.C. § 216(b).

## 2. EPA

a. An employee is not required to file a charge with the EEOC as a prerequisite to bringing a civil action under the EPA.

b. Investigations of alleged EPA violations will minimally include interviews with representatives of the respondent, past and present employees and applicants, and outside persons, including union officials, community leaders and employment agency representatives. EEOC Compl. Man. § 23.2. In addition, witnesses identified by the complainant are also interviewed. EEOC Compl. Man. § 23.4. The respondent's attorney will only be allowed to be present during interviews of the respondent or any management employee whose job is not the subject of the investigation. EEOC Compl. Man. § 23.6(c).

c. The EEOC has determined that fact-finding conferences are inappropriate for complaints filed only under the EPA. EEOC Compl. Man. § 14.9(c)(5).

d. If the investigation fails to substantiate a violation of the EPA, the investigator will so advise the parties by letter.

e. If a violation of the EPA is substantiated by the investigation, the employer is notified of the EEOC's position and of the remedy sought by the agency.

f. The statute of limitations for bringing a civil action under the EPA is two years for non-willful violations, and three years for willful violations. 29 U.S.C. § 255(a); 29 C.F.R. § 1620.33(b).

**E. Settlement Agreements.**

1. Settlement agreements involving age discrimination must comply with the requirements of the Older Workers' Benefit Protection Act ("OWBPA"). 29 U.S.C. § 626(f).

2. In order for a settlement agreement in non-age cases to be binding on the EEOC, it will generally have to comply with the EEOC's form "Negotiated Settlement Agreement" with modifications and additions. Some additional agreements that go beyond the language of the EEOC's form agreement may have to be two party "side-bar" agreements

outside of the auspices of the EEOC, rather than tripartite agreements among the parties and the EEOC.

a. In an individual charge, the EEOC will probably agree to the acceptance of almost any monetary settlement acceptable to the parties. EEOC Compl. Man. §§ 15.5-15.8.

b. It is often easier to negotiate a “no-fault” settlement before, rather than after, a full EEOC investigation. However, it is often wise to delay such negotiations until after the employer submits its position statement.

c. EEOC should dismiss a charge if the charging party refuses to accept a reasonable settlement providing full relief. 29 C.F.R. §1601.18(d); EEOC Compliance Manual § 4.4(e). In ADEA and EPA cases, a demand for liquidated damages in the face of otherwise complete relief should result in dismissal of the charge.

d. If the charging party is an applicant or ex-employee, you may wish to seek his/her covenant not to reapply for employment.

e. Employer can settle privately with the charging party, without approval by the EEOC. However, because EEOC may still use the charge as a basis for suit, it is preferable to utilize EEOC processes in reaching settlement.

(1) Agreement should contain a complete release and covenant not to sue and a statement that the respondent is not admitting a violation of law. Where appropriate, a non-disclosure provision should be made part of the settlement.

(2) Agreement should require the charging party to withdraw the charge, and/or request dismissal of all pending charges.

## **II. DEPARTMENT OF LABOR - WAGE AND HOUR DIVISION (“Wage & Hour”)**

### **A. Enforcement Responsibilities and Overview**

The Wage and Hour Division of the Department of Labor enforces and administers the Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 201 et seq. Generally, the FLSA sets a minimum wage to be paid to all covered employees and requires additional compensation for hours worked in excess of the set minimum. The FLSA also contains various provisions regarding child labor, record keeping, and discriminations between men and women with respect to wages. Failure to comply with the FLSA’s requirements can result in extensive administrative investigations and awards of double damages to aggrieved employees.

#### **1. Scope of FLSA Coverage**

The FLSA’s minimum wage, overtime, child labor and equal pay provisions apply to all employees engaged in commerce or in the production of goods for commerce, or employed in an enterprise engaged in commerce or in the production of goods for commerce. 29 U.S.C. §§ 206(a), 207(a). Unless an employee is expressly exempt, these standards cannot be waived either expressly or impliedly. In light of the potential exposure to substantial liability, employers should pay close attention to determining whether a particular individual is an employee.

### **B. Wage and Hour Investigations**

The basis for an investigation by Wage and Hour is not restricted and may include complaints by employees, unions, competitors, or a Wage and Hour spot check of the industry. A Wage and Hour investigation is not a prerequisite to judicial enforcement by an employee.

1. The Wage and Hour Division may investigate and gather data regarding the wages, hours and other conditions and practices of employment in any industry subject to the

FLSA. 29 U.S.C. § 211. These include reviewing records, gathering data, and questioning employees. The Wage and Hour Investigator may inspect any records he or she deems necessary or appropriate. This power is enforceable by subpoena duces tecum<sup>5/</sup> without “probable cause” beyond assertions of relevancy and statutory authorization. Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186 (1946).

**C. Opening Conference**

1. Upon the initiation of an investigation, the Wage and Hour Investigator will meet with the employer and/or the employer’s attorney at an opening conference. The nature and scope of the investigation will be discussed and records to be reviewed, such as records of government contracts and records showing interstate commerce, will be identified. Further, a request will be made for work space and a for an employer representative to assist with questions concerning the employer’s records.

2. Private interviews with some of the employees may be requested with a view toward confirming records, ascertaining duties for purposes of determining the applicability of exemptions, and possibly discovering any age or sex discrimination or unlawful employment of minors.

**D. Closing Conference**

1. At the conclusion of the investigation, a closing conference will be held at which the employer and or the employer’s attorney will be apprised of the findings of the investigation and the relief sought.

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<sup>5/</sup> It is not necessary for the Wage and Hour Division to apply to a federal magistrate for a warrant in order to conduct an investigation. The subpoena only directs the employer to produce records and does not authorize the officer to inspect documents on the premises. Donovan v. Lone Steer, Inc., 464 U.S. 408 (1984).

a. Relief generally consists of a commitment to correct any violations and payment of back wages as computed by the Wage and Hour Investigator.

b. If the employer pays the back wages and future compliance with the FLSA has been achieved, the matter will be closed.

c. If compliance has not been achieved, or if the employer's past history makes the employer's promises of compliance unreliable, the matter will be referred for judicial enforcement. 29 U.S.C. § 216(e).

**E. Confirmation**

1. If no violation is found during the investigation, the employer may want to confirm that fact in writing to the Wage and Hour Division, stating the situation in detail. The reasons for this include:

a. A written record may be useful if an employee later sues or the government reinvestigates.

b. The government probably will not put in writing its reasons for finding no violation absent a request.

**III. OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS ("OFCCP")**

**A. Enforcement Responsibilities and Overview.**

The OFCCP is responsible for the enforcement of Executive Order 11246, the Vocational Rehabilitation Act of 1973 (the "Rehabilitation Act") and the Vietnam Era Veterans' Readjustment Assistance Act of 1974 ("VEVRAA"), the Implementing Regulations, and the OFCCP Compliance Manual and Directives System. Collectively, these acts impose nondiscrimination and affirmative action obligations on federal contractors and subcontractors

with respect to their employment of women, minorities, individuals with disabilities and certain veterans.

Specifically, section 202(1) of Executive Order 11246 provides that during the performance of a covered federal contract the contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin. 41 C.F.R. 60-1.4. Executive Order 11246 contains general equal employment provisions as well as affirmative action<sup>6/</sup> obligations. As discussed below, federal contractors and subcontractors with contracts exceeding \$10,000 are covered by Executive Order 11246, but only those with 50 or more employees and contracts exceeding \$50,000 are subject to the affirmative action obligations of the Order.

**B. Coverage under Executive Order 11246**

Coverage under Executive Order 11246 is broad. A business need only hold government contracts or subcontracts in excess of \$10,000.00 with a contracting agency of the federal government.<sup>7</sup>

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<sup>6/</sup> An affirmative action program is defined as Aa set of specific and result-oriented procedures to which a contractor commits itself to apply every good faith effort. . . . An acceptable affirmative action program must include an analysis of areas within which the contractor is deficient in the utilization of minority groups and women, and further, goals and timetables to which the contractor=s good faith efforts must be directed to correct deficiencies and, thus, to achieve prompt and full utilization of minorities and women, at all levels and in all segments of its work force where deficiencies exist.≡ 41 C.F.R. 60-2.10.

<sup>7</sup> A contracting agency is limited to a department, agency, establishment, or instrumentality in the executive branch of the government. 41 C.F.R. § 60-1.3.

1. Government Contract

Government contract means any agreement or modification thereof between any contracting agency and any person for the furnishing of supplies or services or for the use of real or personal property, including lease arrangements. 41 C.F.R. § 60-1.3. “Services” includes but is not limited to the following: utility, construction, transportation, research, insurance and fund depository. 41 C. F. R. § 60-250.2.

a. The OFCCP and the courts have interpreted this definition broadly. Almost any business contracting with the government subject to the contracting agency threshold is subject to coverage. See OFCCP v. St. Regis Corp., 78-OFCCP-1 (Mar. 2, 1994) (holding coverage includes purchases from the government); OFCCP v. Ozark Airlines, 80-OFCCP-24 (June 13, 1986) (holding coverage includes sales of supplies or services to the government).

b. Further, an express contractual relationship with the government is not necessary. Such a relationship can be implied. The Fifth Circuit has held that utility companies providing power to government installations were covered by Executive Order 11246. United States v. Mississippi Power & Light Co., 553 F.2d 480 (5th Cir. 1977); United States v. New Orleans Public Service, Inc., 553 F.2d 459 (5th Cir. 1977).

c. The OFCCP takes the position that it retains jurisdiction over contractors for enforcement purposes, for a reasonable period of time, even after work under a government contract has been completed. OFCCP v. Preiester Construction Co., OFCCP Order No. Leg 83-3/sec (Oct. 26, 1983); OFCCP v. Loffland Bothers Co., OFCCP Order No. LEG 85-1/SEC (Jan. 10, 1985).

2. Contractors that hold government contracts for less than \$10,000.00 are still covered if the aggregate total value of government contracts exceeds \$10,000.00 in any

twelve month period. 41 C.F.R. § 60-1.5(a)(1). VEVRAA also has a \$10,000.00 threshold.

However, the Rehabilitation Act only requires that a contractor hold a government contract with a contracting agency for \$2,500.00 or more.

3. Subcontractors<sup>8</sup> are also required to engage in affirmative action. A subcontract is defined as any agreement or arrangement between a contractor and any person (in which the parties do not stand in the relationship of an employer and an employee): (1) for the furnishing of supplies or services or for the use of real or personal property, including lease arrangements, which, in whole or in part, is necessary to the performance of any one or more contracts; or (2) under which any portion of the contractor's obligation under any one or more contracts is performed, undertaken or assumed. 41 C.F.R. §§ 60-1.3, 60-250.2, 60-741.2.

4. The implications of being classified as a government contractor are expansive.<sup>9/</sup> All of the facilities of a covered contractor must comply with affirmative action requirements. However, the Director may exempt any of a prime contractor's or subcontractor's facilities from requirements of the equal opportunity clause which he finds to be in all respects separate and distinct from the activities of the prime contractor or subcontractor, provided that he

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<sup>8</sup> The OFCCP does not limit coverage solely to those subcontractors directly engaged in business with a prime government contractor. OFCCP v. Loffland Brothers Co., OFCCP Order No. LEG 85-1/SEC (Jan. 10, 1985). However, there must be some evidence that the goods or services provided by a subcontractor are necessary to the performance of a government contract. Id.

<sup>9/</sup> As noted above, not all contractors that are subject to Abasic coverage≅ must establish written affirmative action compliance programs. Only contractors holding a government contract for \$50,000.00 or more and having 50 or more employees must develop an affirmative action plan for each of their establishments. 40 C.F.R. §§ 60-2.1, 60-250.5, 60-741.5. To reach the \$50,000.00 threshold, multiple contracts are not aggregated. The Secretary of Labor has held that each physically separate facility of a contractor is prima facie an Aestablishment≅ under this regulation. OFCCP v. Coldwell Bankers Co., No. 78-OFCCP-12 (Aug. 14, 1987). However, in appropriate circumstances, several facilities may be grouped and treated as one establishment.

also finds that such an exemption will not interfere with or impede the effectuation of the order. 41 C.F.R. § 60-1.5(b)(2).

In practice such exemptions are rarely found. See United States Department of Labor v. Interco, Inc., No. 86-OFC-2 (Mar. 10, 1987) (holding that division of company that held no government contracts was still required to maintain formal, written affirmative action plan). Therefore, all facilities of a covered contractor must comply with the affirmative action requirements even though a particular facility may not be involved in any work on government contracts. However, autonomous parent or subsidiary corporations of covered contractors are usually treated as separate and distinct entities for purposes of the affirmative action laws unless they can be considered a “single entity.” See OFCCP v. Coldwell Bankers Co., No. 78-OFCCP-12 (Aug. 14, 1987). There are five factors used to consider whether two companies are a single entity: (1) common ownership; (2) common directors and/or officers; (3) de facto exercise of control; (4) unity of personnel policies emanating from a common source; and (5) dependency of operations. See Decision B-170536, 52 Comp. Gen. LEXIS 57 (Sept. 21, 1972).

Successor business enterprises may also be liable for the acts of their predecessor. The OFCCP has adopted a case-by-case analysis for determining whether a successor is liable for the discriminatory acts of its predecessor. See EEOC v. MacMillan Bloedel Containers, Inc., 503 F.2d 1086 (6th Cir. 1974).

### **C. Contract Language Requirements**

Contractors that meet the threshold requirements for “basic coverage” under Executive Order 11246, the Rehabilitation Act and VEVRAA must include in all nonexempt contracts and subcontracts certain language prescribed by the implementing regulations.

Typically, contractors satisfy this obligation by incorporating by reference the equal opportunity

and affirmative action clauses referenced in 41 C.F.R. §§ 60-1.4, 60-250.4, and 60-741.5, noting that, should the applicable coverage thresholds apply, the contractor has an obligation to prepare affirmative action plans consistent with 41 C.F.R. Parts 60-1, 60-2, 60-250 and 60-741. The contractor is also required to certify that it annually submits the Federal Contractor Veterans' Employment Report VETS-100 and the Standard Form 100, Employer Information Report EEO-1. In sum, incorporating these clauses obligates the contractor to the following:

1. The contractor agrees not to discriminate against any employee or applicant on the basis of race, color, religion, national origin, sex, handicaps, disabled veterans and veterans of the Vietnam Era;
2. The contractor agrees to take affirmative action to ensure that employees are treated without regard to these factors;
3. The contractor agrees to post notices setting forth the provisions of the equal opportunity clause; to state in all employment advertisements that the employer is an equal opportunity employer; to notify each labor union of the contractor's commitments under the Executive Order; to comply with all provisions of the Executive Order and the implementing regulation, and to furnish required information and reports;
4. The contractor agrees that the contract may be canceled, terminated or suspended and that the contractor may be declared ineligible for further government contracts if it fails to comply with the clause; and
5. The contractor agrees that it will take such action as is directed by the Secretary of Labor with respect to subcontracts to assure compliance with the equal opportunity clause and ensure that none of its facilities are segregated on the basis of race, color, religion, or national origin. 41 C.F.R. §§ 60-1.4, 60-1.8.

**D. Affirmative Action Plans**

1. An affirmative action plan is defined as “a written program . . . in which a contractor annually details the steps it will take and has already taken, to ensure equal employment opportunity. Aff. Action Compl. Man. § 1B.

a. First-time contractors must prepare an affirmative action plan within 120 days of the commencement of a government contract or subcontract and thereafter update the plan annually. 41 C.F.R. § 60-1.40(c).

b. Pre-award clearance by the OFCCP is also necessary for any prime contractor or first-tier subcontractor with a federal contract of \$1 million or more. The OFCCP has 30 days to complete the pre-award review and certify that the contractor is permitted to have a government contract.

2. Affirmative action plans may be subject to disclosure and discoverability.

a. The Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, provides for the disclosure of agency records to any person who files a request reasonably describing those records in accordance with the agency’s rules. 5 U.S.C. § 552(a)(3). Pursuant to FOIA requests<sup>10</sup>, third parties have been successful in obtaining affirmative action plans submitted by contractors despite an assumption of confidentiality.

(1) The OFCCP and the EEOC have entered into a memorandum of understanding in which the agencies have agreed to share reports and supporting documents with one another. Therefore, practically speaking, a contractor should

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<sup>10</sup> In addition, the NLRB has also held that a union representing a contractor’s employees is entitled to obtain information from the contractor’s plan because the information was presumptively relevant to the collective bargaining agency status of the union. Westinghouse Electric Corp., 239 NLRB 106 (1978).

draft its affirmative action plan conscious of the fact that it may be disclosed to minority and women's groups, unions, and the public at large.

(2) In Chrysler Corp. v. Brown, 441 U.S. 281 (1979), the Supreme Court concluded that an agency's decision to disclose information contained in an affirmative action plan is subject to review under the Administrative Procedure Act, 5 U.S.C. § 706, et seq., for abuse of agency discretion.

(3) In CNA Fin. Corp. v. Donovan, 830 F.2d 1132 (D.C. Cir. 1987), the United States Court of Appeals for the D.C. Circuit upheld the decision of the OFCCP to disclose certain aspects of the employer's affirmative action plan, including statistics on the composition of its workforce, the goals it developed for equal opportunity, and its applicant flow and promotion information.

b. There are specific methods contractors should use to prevent the disclosure of affirmative action plans and supporting documentation. The Department of Labor has implemented specific regulations to address the application of FOIA to documents submitted to the various agencies of the Department of Labor, including the OFCCP. These regulations, contained at 29 C.F.R. §§ 70.1-70.54, provide that information designated as "confidential commercial information" will not be disclosed until the agency gives the contractor notice and opportunity to object to disclosure. 29 C.F.R. § 70.26. To prevent disclosure of the plan the contractor will need to demonstrate that the plan contains confidential commercial information,<sup>11/</sup> which has not been disclosed to the public, and could reasonably be expected to

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<sup>11/</sup> Confidential commercial information is defined as Records provided to the government by a submitter that arguably contain material exempt from release . . . because disclosure could reasonably be expected to cause substantial competitive harm.≡ 29 C.F.R. § 70.2(h). In the affirmative action context, supporting documentation for a contractor=s

cause substantial competitive harm. Accordingly, contractors should be careful to guard the confidentiality of the plan and its supporting documents by always treating the documents as confidential and disclosing it in such a manner as to protect the confidentiality of the sensitive information.

Specifically, because Executive Order 11246<sup>12/</sup> does not require disclosure of the plan upon request to employees and applicants, employers who chose to provide such individuals with the plan should limit disclosure to the narrative section of the plan and, to the extent possible, keep the narrative section free of statistical and sensitive data. Further, when they are required to submit documents to OFCCP, contractors should always designate the materials as “confidential consumer information.” Finally, during on-site reviews, contractors should take the same precautions to protect confidential information because such information obtained by a compliance officer is also subject to a FOIA request.

**E. The Compliance Review Process**

1. A compliance review is a comprehensive analysis and evaluation by the OFCCP of a contractor’s compliance with the nondiscrimination and affirmative action obligations imposed by federal law. 41 C.F.R. § 60-1.20(a). There are essentially three reasons for compliance reviews.

**a. OFCCP’s Equal Employment Data System Selection (EEDS)**

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plan could easily meet this definition because such documents contain a workforce analysis, utilization analysis, salary information and identification of problem areas that could provide a competitor with significant information regarding the contractor’s goals and strategies for the upcoming year.

<sup>12/</sup> The Rehabilitation Act and VEVRAA do require disclosure upon request of an employee or applicant but do not contain the sensitive information required for 11246 plans.

EEDS is an automated data system that provides area and field offices with equal employment opportunity characteristics for non-construction contractors in the relevant geographic area. EEDS tracks the record of a given facility over time and compares it to other facilities in the same industry and same locality based on EEO-1 data. Based on this comparison certain facilities are flagged for priority in compliance review scheduling. Contractors reviewed within the last two years as well as contractors no longer having federal contracts are eliminated from the list of flagged contractors. The OFCCP Area office then sets priorities for compliance reviews based on the nature of the industry, the contractor's recent hiring activity, the size of the federal contract, and the compliance history of the particular contractor. Within this large group of flagged contractors, the OFCCP has discretion as to which contractors it reviews. Further, Assistant Regional Administrators may also select up to 15% of non-construction compliance reviews from sources other than EEDS listings. OFCCP Order No. ADM 92-3/SEL.

**b. Pre-award review**

Pre-award clearance by the OFCCP is necessary for any prime contractor anticipating a contract award of \$1 million or more and for any first-tier subcontractor with a subcontract of \$1 million or more. 41 C.F.R. § 60-1.20(d). Pre-award clearance must be given within thirty days of request by a contracting federal agency. A contractor will not be subject to an on-site review if there has been a finding of compliance within the last two years and the contractor has not deviated substantially from its existing affirmative action plan. Aff. Action Compl. Man. § 3A00(b).

**c. Complaint of discrimination under any one of the three acts**

Complaints must be filed in 180 days. The OFCCP will refer complaints alleging individual discrimination to the EEOC under a memorandum of understanding between the

agencies. The OFCCP will retain jurisdiction and investigate complaints alleging systemic forms of discrimination and complaints alleging discrimination on the basis of protected veteran status.

2. The OFCCP has, generally, two methods of performing compliance reviews: (1) the desk audit; and (2) on-site reviews. It is possible that both methods may be employed in determining employer compliance.

a. **Desk Audit**

Most compliance reviews start with a desk audit. A desk audit is a review of the contractor's affirmative action plan and supporting documents by a compliance officer away from the work site. A desk audit is not always required and often, a desk audit is not performed during pre-award reviews.

(1) The first step of a desk audit is a written request by the OFCCP for information from the contractor. The letter informs the contractor that it has been selected for a compliance review and that it must send the requested information within 30 days. Included in the letter is an itemized checklist of the information to be supplied by the contractor.

(a) Upon receipt of this letter, a contractor should review all of its operations to see if any facility or corporate entity of the contractor has any government contracts. The contractor should also check to see if it meets the threshold limits for the development of an affirmative action plan. If it does not it should advise the OFCCP. The OFCCP has the burden of proving coverage. Until that burden is met the contractor has no obligations to the OFCCP.

(b) The OFCCP may offer to supply the contractor with technical assistance. Accepting the technical assistance will not preclude the OFCCP from

finding deficiencies or seeking remedies for any discrimination uncovered by the agency while providing technical assistance. A contractor should consider carefully whether to accept this offer of technical assistance.

(c) The contractor should perform its own internal desk audit first, before submitting its plan and supporting documentation to make certain it is in compliance with the regulations and the Compliance Manual. Contractors should also review their insurance policies to determine if they carry all risk coverage or specific coverage for discrimination claims. The contractor should designate, in writing, an attorney or other representative as its contact person and should set forth the extent of the representative's authority. The OFCCP is required to deal only with the designated person. OFCCP Order No. FCCM 84-1/CH 6.

(d) The contractor should submit the information requested within 30 days. Extensions are rarely granted and a failure to submit data will result in the issuance of a notice to show cause why enforcement proceedings should not be brought against the contractor.

(2) When the OFCCP receives the requested information, the agency will determine if the contractor has made "reasonable efforts" to develop an acceptable affirmative action plan. If the agency finds that the contractor has not made reasonable efforts, then it will issue a notice to show cause. If the compliance officer finds reasonable efforts, then the plan will be examined for acceptability.

(a) The OFCCP examines the contractor's workforce analysis for compliance with technical requirements, the workforce for areas in which minorities and/or women are concentrated or under represented, the contractor's job groups, availability

analysis and establishment of goals. Under representations and unexplained concentrations are likely to be investigated further during the on-site phase of the compliance review.

(b) The OFCCP will also examine the contractor's personnel practices, including hiring, promotion, and termination to determine whether adverse impact on females or minorities exists, thereby giving rise to a potential affected class claim.

(3) The OFCCP concludes the desk audit by completing a Standard Compliance Review Report. This report summarizes the various analyses, findings, and conclusions reached by the compliance officer. It also forms the basis for the subsequent on-site review.

#### **b. On-Site Reviews**

On-Site reviews are normally required under the following circumstances: (1) when the contractor has not been reviewed in the last 24 months; (2) when there are possible deficiencies in the affirmative action plan not resolved during the desk audit; (3) when there are questions concerning the contractor's good faith efforts to meet affirmative action plan goals; (4) when there is possible non-compliance with a conciliation agreement or other commitment; (5) when statistical analysis indicates the possible existence of an affected class problem, (6) when the compliance review resulted from a discrimination complaint; or (7) when there are other significant compliance questions. Aff. Action Compl. Man. § 3.

The on-site review process typically takes two to four days, but complex reviews can take weeks. The compliance officer may request more information before coming onsite. A contractor should have counsel present during an on-site review and should engage in its own on-site review before the compliance officer conducts the OFCCP on-site review.

There are five components to an on-site review:

(1) First, there is a business conference between the compliance officer and the chief executive officer or the chief management official for the facility.

(a) The compliance officer will describe the procedures to be followed during the review and will obtain the contractor's explanation of potential deficiencies or apparent problem areas.

(b) The compliance officer will attempt to determine the management person's familiarity with and attitude toward equal opportunity law.

(c) The compliance officer may also meet with the EEO officer for the facility to gather further information and to determine how to obtain needed information.

(2) Also conducted during the on-site review is document review. Document review is extensive and generally includes, recruitment activity records, personnel activity materials, promotion, transfer and termination procedures, collective bargaining agreements, job descriptions, training records, job applications, copies of any tests administered and the results, personnel files, and payroll records.

(3) The compliance officer will probably take a physical tour of the facility, looking for concentrations of protected group members in certain jobs, paying particular attention to those less desirable jobs.

(4) The compliance officer will then conduct interviews with employees and management. Generally, the OFCCP will interview employees in private. Managers and supervisors are exceptions. Managers and supervisors may have counsel present.

(5) Finally, the compliance officer will hold an exit conference with the chief executive officer or the chief management official at the facility. The compliance officer will outline the results of the compliance review and identify questions that require further analysis off-site. The compliance officer will inform the contractor whether problems have been uncovered so that the contractor can attempt to resolve them. The compliance officer will then complete an on-site narrative report setting forth the scope of the review and his or her findings.

**F. Resolution of Non-Compliance**

The OFCCP is required to use reasonable efforts to attempt to secure compliance through conciliation and persuasion when a violation is found. 41 C.F.R. §§ 60-1.20, 60-250.26(g)(2), 60-741.62.

**1. Informal Resolution**

Most violations are resolved informally. The two most common methods of informal resolution are:

**a. Closure Letter**

A closure letter used in situations where minor, or no, violations have been found. The use of the closure letter to resolve minor technical violations of Executive Order 11246, the Rehabilitation Act and VEVRAA, which traditionally was used for a finding of no violations only, has superseded the use of Letters of Commitment. OFCCP Directive No. 226 (August 5, 1998). The closure letter describes each violation, if any, and the requisite corrective action to be taken to remedy the violation. If the violation requires a change to the contractor's AAP, the contractor will be required to incorporate the requisite changes into future AAPs.

**b. Conciliation Agreements**

Under a conciliation agreement, a contractor promises to undertake the remedial action necessary to correct violations found during the OFCCP compliance review. 41 C.F.R. § 60-1.33.

(1) Conciliation agreements are used for material violations of Executive Order 11246, the Rehabilitation Act, or VEVRAA, or when a show cause notice has been issued. 41 C.F.R. § 60-1.33(a); Aff. Action Compl. Man. §§ 8F-8F00. Material violations include:

(a) When a compliance review or complaint investigations reveals that a contractor has discriminated under any of the applicable laws;

(b) A contractor failed to submit an AAP, or the AAP that was submitted did not reflect a reasonable effort;

(c) A contractor failed to demonstrate a good faith effort in implementing its affirmative action obligations, or failed to document its implementation;

(d) A contractor failed to comply with a letter of commitment. Aff. Action Compl. Man. § 8F00.

(2) There are three parts to a conciliation agreement:

(a) General Provisions, including a mandatory enforcement clause and a non-admissions clause;

(b) Specific Provisions, including a description of the violation(s) and remedy;

(c) Reporting requirements, which detail the period to be covered by the reports, their contents, and the submission date. Aff. Action Compl. Man. § 8F01.

(3) Conciliation agreements terminate after the minimum time necessary for contractors to correct the violations has passed. Aff. Action Compl. Man. § 8F02.

(4) Violation of the terms of the conciliation agreement results in the issuance of a Fifteen Day Notice, which details the violations and the evidence thereof. The contractor has fifteen days to respond. 41 C.F.R. § 60-1.34(a)(1). If a fifteen day delay would result in “irreparable injury”<sup>13/</sup> to the employment rights of affected employees, a fifteen day notice is not issued. Aff. Action Compl. Man. § 8H02(b). Failure to comply within the fifteen days could result in the initiation of immediate enforcement proceedings. 41 C.F.R. § 60-1.34(a)(3).

## **2. Enforcement Proceedings**

The OFCCP uses enforcement proceedings when informal resolution efforts are not successful or when it is not required to try to resolve the matter informally. Enforcement proceedings begin when a compliance review reveal a violation of any of the applicable laws; the contractor refuses to submit an AAP; the contractor refuses to allow an onsite compliance review; or a contractor refuses to provide access to necessary information. 41 C.F.R. § 60-1.26; Aff. Action Compl. Man. § 8I00.

### **a. Show Cause Notice**

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<sup>13/</sup> Irreparable injury occurs when a violation of a conciliation agreement is in progress or expected and cannot be readily corrected. Examples include severe harassment or retaliation and giving a job to someone else after agreeing to offer it to a victim of discrimination. Aff. Action Compl. Man. § 8H02(a)(1)-(2).

A show cause notice gives the contractor thirty days to demonstrate why enforcement proceedings should not be brought against the contractor. 41 C.F.R. § 60-1.28. Generally, before an enforcement proceeding can be initiated, a show cause notice must be issued. However, the OFCCP may proceed directly to enforcement proceedings in certain circumstances, including:

- (1) A supply and service contractor refuses to submit a requested AAP and support data;
- (2) A contractor refuses to provide access to its premises for an onsite review;
- (3) A contractor refuses to provide access to necessary information; or
- (4) An enforcement recommendation is being referred to the Department of Justice. 41 C.F.R. § 60-1.26(a)(2); Aff. Action Compl. Man. 8D02(a)(1).

A show cause notice can be issued at any point. Once a show cause notice has been issued, a contractor must demonstrate that it is exempt from the OFCCP's requirements, the OFCCP's allegations are incorrect, resolve the violation informally, i.e. a conciliation agreement, or face enforcement proceedings.

**b. Administrative Enforcement**

Under the administrative enforcement regulations, controversies are initially resolved by an administrative law judge ("ALJ"). An administrative complaint is filed

and an evidentiary hearing<sup>14/</sup> is conducted using quasi-trial procedures. 41 C.F.R. §§ 60-30.5-60-30.24; Aff. Action Compl. Man. § 8K00(a)-(c). The ALJ then issues a recommended decision to the Secretary of Labor or the Assistant Secretary of Employment Standards, depending on the type of violation. 41 C.F.R. §§ 60-30.27, 60-30.35. The secretary or the assistant secretary can then adopt, modify, or reverse the ALJ's Recommended Decision and issues the final order. 41 C.F.R. §§ 60-30.30, 60-30.37. Contractors can request judicial review of the final order in federal district court. Aff. Action Compl. Man. 8K00(f).

**c. Judicial Enforcement**

The OFCCP is also authorized to refer a matter to the Department of Justice to enforce Executive Order 11246, the Rehabilitation Act, or VEVRAA. 41 C.F.R. §§ 60-1.26(a)(2), 60-250.28(b), 60-741.65(a)(2). The OFCCP may request judicial enforcement at any stage even if conciliation efforts have not been made. 41 C.F.R. § 60-1.26(a)(2); Aff. Action Compl. Man. § 8K01(b). Generally, judicial enforcement is used only where sanctions for noncompliance would be impractical or ineffective.

**G. Sanctions for Non-Compliance**

**a. Withholding Payments**

Progress payments can be withheld from a contractor who violates any of the applicable laws.<sup>15/</sup> Progress payments are compensation that is payable to the contractor under the terms of the contract. Payments may only be withheld with approval from the OFCCP's director.

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<sup>14/</sup> Under certain circumstances the OFCCP can use an expedited hearing procedure where there is no opportunity for extended discovery. 41 C.F.R. §§ 60-30.31-60-30.37.

<sup>15/</sup> Under the Rehabilitation Act and VEVRAA, a contractor must be given the opportunity for a hearing before progress payments may be withheld. 41 C.F.R. §§ 250.29(a)(2), 60-741.66(d).

**b. Contract Cancellation**

A contract or a subcontract can be canceled or terminated for failure to comply with any of the applicable laws.<sup>16/</sup>

**c. Debarment**

Executive Order 11246, the Rehabilitation Act and VEVRAA authorize the “debarment” of government contractors for failure to comply with the requirements of any of these laws. 41 C.F.R. §§ 250.28(e), 60-741.66(c). Debarment means a contractor is prohibited from receiving future government contracts. No order of debarment can be issued without giving the contractor an opportunity for a hearing. 41 C.F.R. §§ 250.29(a)(2), 60-741.66(d). Once a contractor has been disbarred, the period of disqualification from government business is unspecified.

**IV. NATIONAL LABOR RELATIONS BOARD (“NLRB” or “Board”)**

**A. Enforcement Responsibilities and Overview**

The NLRB is responsible for the enforcement of the National Labor Relations Act (“NLRA”), 29 U.S.C. § 141, et seq. Under the NLRA, the General Counsel has complete control over the investigation and prosecution of unfair labor cases. Conduct deemed to constitute unfair labor practices is set forth in Section 8 of the NLRA. 29 U.S.C. § 158. However, the General Counsel does not have the power to investigate possible violations of the NLRA without a charge being filed. The Board’s role is entirely of a judicial nature.

**B. The Investigation Process**

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<sup>16/</sup> Under the Rehabilitation Act and VEVRAA, a contractor must be given the opportunity for a hearing before a contract can be canceled. 41 C.F.R. §§ 250.29(a)(2), 60-741.66(d).

1. Upon receipt of a signed, sworn charge<sup>17/</sup> alleging a violation of the NLRA by a regional office of the Board, the charge is docketed, given a number and assigned to a Board agent for investigation. 29 C.F.R. §§ 101.2, 101.4. The charge should be filed in the regional office covering the territory where the allegedly unlawful act occurred. 29 C.F.R. § 102.10.

2. The charging party is responsible for the timely service of a copy of the charge on the charged party. 29 C.F.R. § 102.14. Any employer, labor organization, or their agents may be charged with an unfair labor practice. If the regional director's notice of the charge is timely served, the charging party's failure to serve the charge will not preclude the directors from acting on the charge. 29 C.F.R. § 102.14(b).

3. The Regional Director will, as a matter of courtesy, send an acknowledgment of the filing naming the field examiner or attorney to whom the charge has been assigned to the parties. 29 C.F.R. § 102.14; NLRB Casehandling Manual §§ 10040.1-10040.2. Circumstances may also require that notice of the filing of the charge be sent to other parties having an interest in the case. These parties are also asked to submit their version of the facts surrounding the charge. 29 C.F.R. § 101.4. Such parties might include:

a. A labor organization alleged to be dominated or assisted in a Section 8(a)(2) charge;

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<sup>17/</sup> All charges or cases against employers, which are brought under section 8(a) of the NLRA are termed CA cases. There are five types of charges brought against unions. Specifically, violations of sections 8(b)(1), (2), (3), (5) or (6) are termed CB cases, violations of 8(b)(4)(A), (B) or (C) are CC cases, violations of 8(b)(4)(D) are CD cases, violations of 8(b)(7) are CP cases, violations of 8(g) are CG cases, and violations of 8(e) are CE cases.

- b. An employer involved in a secondary boycott or jurisdictional dispute case;
- c. In a Section 8(b)(2) case, an employer allegedly being pressured to violate section 8(a)(3) by the charged union; and
- d. Any party to a collective bargaining agreement that is under challenge. NLRB Case Handling Manual § 10040.4.

4. The charged party is asked to submit a position statement concerning the allegations in the charge and, if the charged party is an employer, it is asked to submit “commerce data” for purposes of determining whether the Board has jurisdiction. 29 C.F.R. § 101.4.; NLRB Statements of Procedure § 101.4; NLRB Casehandling Manual § 10040.3.

It is the General Counsel’s practice to use position statements submitted in the course of the investigation for evidentiary purposes in subsequent unfair labor practice hearings. Therefore, the factual bases of the position should be carefully investigated before they are submitted. As a practical matter, it may be wise to ask the NLRB to submit the actual factual allegations within the charge before responding.

5. The charged party is informed of its right to be represented by counsel of its choice.

6. Depending on the type of charge, the Board agent commences the investigation of the charge as quickly as possible after it is assigned, generally within seven days. Allegations concerning violations of specific sections of the NLRA trigger mandatory injunction requirements and will be investigated sooner. NLRB Casehandling Manual § 10051. Under current time targets regional directors attempt to complete the investigation and reach a determination regarding disposition of the charge within thirty days of filing. Most regional

directors adhere closely to the time targets and grant extensions to the parties for the submission of evidence to the Board agent only in exceptional circumstances.

**C. The Scope of the Investigation**

1. The scope of the investigation is determined by the allegations in the charge as modified by any subsequent amendments. In the event that the investigation discloses evidence of violations not encompassed by the charge allegations, they may not be investigated further absent a new or amended charge. Such an amendment must occur within six months of the initial complaint. NLRB Casehandling Manual ¶ 10054.2.

2. Evidence of probable violations of statutes other than the NLRA will not be investigated but may be referred to appropriate enforcement agencies. NLRB Casehandling Manual § 10054.3.

3. Investigations generally consist of interviews with parties and witnessed by one or more Board agents. NLRB Case handling Manual § 10056. If necessary to conduct a thorough investigation, the Board agent may request that the regional director issue an investigative subpoena. NLRB Casehandling Manual §§ 11770-11770.3.

4. The investigation is not limited to witnesses suggested by the parties but may include anyone the agent feels may shed light on the charges. If a party is represented by counsel, the Board generally permits counsel to be present during the interview of the party or of any supervisor or agent whose testimony would be binding on the party. In the case of a charging party, the right to have counsel present must be requested. Where a charged party is cooperating with the investigation, counsel may be notified of the interview by the Board agent and afforded an opportunity to be present. In all situations, however, the privilege is contingent

upon counsel refraining from interfering with, delaying, or otherwise impeding the Board agent's investigation.

5. The right of a party to have counsel attend witness interviews does not extend to former supervisors or to other individuals whose statements and actions are not binding on the party. NLRB Casehandling Manual § 10056.6. Moreover, a Board agent may receive information from a supervisor or agent without notifying counsel if the individual comes forward voluntarily and specifically requests that counsel not be present. NLRB Casehandling Manual § 10056.2.

6. Board agents generally will attempt to incorporate the statements of all witnessed into sworn affidavits.

a. The charging party ordinarily assists the agent in every way possible in the investigation for two reasons.

(1) First, it is an attempt to persuade the Regional Director that the case has merit.

(2) Second, lack of cooperation is sufficient reason for the Director to dismiss the charges summarily. NLRB Casehandling Manual § 10056.1.

b. The case of the party charged is somewhat different. It is important to keep in mind, however, that the Board agent is acting as an impartial investigator at this stage. If the investigation discloses no merit to the charges, the case will be withdrawn or dismissed. A refusal to cooperate means that this decision will be based on facts developed primarily from the charging party. The charged party is not required to submit an affidavit and the Board may not draw adverse inferences from a refusal to give a statement.

## 7. **General Counsel Advice**

While investigating a charge, the regional director may submit a case to the Division of Advice in the General Counsel's office. After reviewing and considering the case, the Division of Advice will send it back to the Regional Director with instructions on how to proceed. Certain cases are required to be submitted to the Division of Advice by the Regional Director before they may be acted upon. The types of cases change from time to time.

The Regional Director will inform the parties when a case has been submitted to the Division of Advice. A party may request an oral discussion with the General Counsel or the Associate General Counsel for the Division of Advice. The Division of Advice does not formally encourage these discussions, however, it may be useful in ensuring that a party's position will be clearly understood by the official making the final decision.

#### **8. Deferral to Arbitration**

Disputes resolvable under the grievance and arbitration procedure of an existing collective bargaining agreement are an exception to the standard investigatory procedure. The Regional office does not process these charges, rather, the charges are deferred pending ultimate arbitration of the issues. This exception is referred to as the Collyer doctrine. See Collyer Insulated Wire, 192 NLRB 837 (1971).

a. Deferral requires an initial determination as to whether the charge is frivolous. If the charge is frivolous, the charge is dismissed. If the charge is not frivolous, the parties are asked if they agree to arbitrate the suit.

b. If the charging party refuses to arbitrate, the case is dismissed.

c. If the charged party refuses to arbitrate, a full investigation of the charge will be conducted. If the charge is found to have merit, the charged party will be asked a

second time to agree to arbitration. If the charged party agrees to arbitration, the case will be deferred. If they do not agree, a complaint will issue.

d. If both parties agree to arbitration, the regional office will defer further investigation. If arbitration settles the dispute, the case is taken out of deferred status and dismissed.

## V. **OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (“OSHA”)**

### A. **Enforcement Responsibilities and Overview**

The Occupational Safety and Health Administration (“OSHA”) is responsible for the enforcement of Occupational Safety and Health Act (“OSH Act”) standards. An employer should be familiar with three areas before a Compliance Officer appears at the workplace: (1) what to expect during an inspection; (2) its rights under the OSH Act; and, (3) the relative level of compliance of different areas in the facility. All three factors are important to surviving an inspection because each influences the overall approach to the inspection. If an employer knows what to expect, that employer can take advantage of the time prior to the opening conference to clean up or evaluate questionable areas and possibly avoid a citation. Similarly, an employer that knows its facility is in relatively good shape will probably refrain from exercising its right to a warrant.

### B. **The Permissible Scope of the Inspection**

The scope of an OSHA inspection is limited by consent, warrant or statute. The statutory limit is one of reasonableness. Under Section 8 of the OSH Act,<sup>18/</sup> representatives of the Secretary of Labor may inspect and investigate any place of employment in order to determine whether the employer has complied with safety and health standards established

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<sup>18/</sup> 29 U.S.C. § 657.

pursuant to the Act. The sole statutory limitation upon the Secretary's right to conduct inspections is to inspect only at reasonable times, within reasonable limits and in a reasonable manner.

The limitations placed on the scope of inspections conducted pursuant to warrants or with the consent of the employer are more closely defined. Generally speaking, however, inspections other than those arising from the programmed establishment list may be limited to the specific site or condition which gave rise to the inspection.

### **1. Consensual Inspections**

Employers should consent to an OSHA inspection only after careful consideration and with appropriate limitations upon the scope of the inspection. If careful attention is given to the scope of consent, employers may cooperate with OSHA while still protecting their rights during the inspection process.

When faced with a request for inspection, the employer may either consent to the inspection or request that OSHA obtain a search warrant prior to entering the facility. The employer is, of course, free to consent to an OSHA inspection at any time and for any reason. In many cases, a consent inspection, rather than one obtained pursuant to warrant, is less troublesome and costly to the employer. Although many employers have expressed the view that OSHA compliance officers will be less likely to cite a cooperative employer, recent statistics have not necessarily supported this position. Nonetheless, employers must carefully weigh this factor in determining whether to demand a warrant or permit a consensual inspection.

Even where consent is given, the entire facility need not be open for scrutiny. Rather, employers remain free to restrict the scope of their consent to those particular areas giving rise to the inspection request. For example, if an inspection is based upon an employee

complaint of inadequate machine guarding, an employer may permit a safety inspection of that machine, while not agreeing to allow either a general safety or health inspection. OSHA, however, has adopted a policy of expanding the scope of employee complaint inspections in workplaces: (1) in industries that suffered from a high lost work day injury and illness rate; (2) that had not been inspected in the past two fiscal years; and, (3) that had injury rates at or above the national average.<sup>19/</sup>

The Court of Appeals for the Sixth Circuit invalidated OSHA's policy,<sup>20/</sup> and OSHA now may not expand the scope of an employee complaint inspection beyond the scope of the complaint.<sup>21/</sup> Any inspection beyond the scope of the consent will be considered involuntary, and may be grounds for vacating a subsequent citation.<sup>22/</sup>

Employers should, however, be aware that although the scope of the consent may be limited, any violations OSHA observes while in an area for which consent has been given may be the subject of a citation and/or may be used to expand the scope of the inspection under the "plain view" exception to the warrant requirements. Similarly, a citation based upon observations from open terrain, rather than private premises, will be upheld, regardless of the lack of either consent or a warrant.<sup>23/</sup> Where there is a multi-employer site, it is also possible that

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<sup>19/</sup> OSHA Instruction CPL 2.45A.

<sup>20/</sup> Trinity Indus., Inc. v. Occupational Safety and Health Review Comm=n, 1994 WL 52576 (6th Cir. Feb. 24. 1994).

<sup>21/</sup> But cf. In re Establishment Inspection of Cerro Copper Products Co., 752 F.2d 280 (7th Cir. 1985) (issuing a warrant for a "wall to wall" inspection based upon an employee complaint).

<sup>22/</sup> Ennis Automotive, Inc., 10 BNA OSHC 1672, 1982 CCH OSHD & 26,301 (Rev. Commn. J. 1982).

<sup>23/</sup> Donovan v. A.A. Beiro Construction Co., Inc., 746 F.2d 894 (D.C. Cir. 1984); L.R.

the consent of either the owner of the site, or of one employer, may be effective to permit a full-scale inspection.

Consensual inspections have been deemed to be involuntary where an employer is misled by representations of OSHA officials. For example, where an employer was led to believe no penalties would be assessed, his consent was found to be involuntary and the resultant citations were vacated.<sup>24/</sup> Similarly, a compliance officer was found to have coerced an employer's consent by stating that he would guarantee finding a violation if he were forced to obtain an inspection warrant.<sup>25/</sup>

## **2. Inspections by Warrant**

Under the United States Supreme Court decision in Marshall v. Barlow's, Inc.,<sup>26/</sup> an employer has a Constitutional right to demand that OSHA obtain an inspection warrant prior to entering its premises. Such warrant must be based upon "probable cause," i.e., a reasonable basis for selection of the workplace. If OSHA thereafter fails to obtain a warrant, or the warrant is not based upon probable cause, employers need not permit an inspection, and any citations based upon an invalid warrant will be vacated.

The application for a warrant must specify the reason for the requested inspection and the activities that OSHA intends to perform during the course of the inspection. If the

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Willson & Sons, Inc. v. Occupational Safety and Health Review Comm=n, 134 F.3d 1235 (4th Cir. 1998) (holding OSHA did not violate employer=s 4th Amendment rights when compliance officer videotaped employer=s construction site from roof of nearby hotel).

<sup>24/</sup> Bowman Handles, Inc., 10 BNA OSHC 1454, 1982 CCH OSHD & 25,949 (Rev. Commn. J. 1982).

<sup>25/</sup> Ennis Automotive, Inc., *supra*.

<sup>26/</sup> 436 U.S. 307 (1978).

inspection is conducted pursuant to a warrant, the warrant should also detail the reasonable investigative techniques permitted to be used by the Compliance Safety and Health Officer (“CSHO”). Under certain circumstances, OSHA must secure an administrative subpoena to review records maintained by the employer.<sup>27/</sup> Again, the subpoena must describe with adequate specificity the records that are to be inspected.<sup>28/</sup>

Under OSHA regulations, a warrant may be obtained ex parte, i.e., without employer participation.<sup>29/</sup> Even where an ex parte warrant application is allowed, the employer may still challenge its propriety by refusing to permit the inspection to go forward and contesting the warrant in federal district court either by moving to quash the warrant or defending against a motion for civil contempt filed by OSHA.<sup>30/</sup> Alternatively, the employer may permit the inspection to go forward and contest the validity of the warrant in the context of proceedings before the Occupational Safety and Health Review Commission.<sup>31/</sup>

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<sup>27/</sup> See, e.g., In re Kulp Foundry, Inc., 691 F.2d 1125 (3d Cir. 1982).

<sup>28/</sup> Donovan v. Fall River Foundry Co., Inc., 712 F.2d 1103 (7th Cir. 1983).

<sup>29/</sup> 29 C.F.R. Section 1903.4; Rockford Drop Forge Co. v. Donovan, 672 F.2d 626 (7th Cir. 1982); Donovan v. Blue Ridge Pressure Castings, 543 F. Supp. 53 (M.D. Pa. 1981).

<sup>30/</sup> For example, a warrant application based upon an employee complaint must state the length of time between notification of a violation and the application, whether any prior inspections of that establishment have taken place and their scope, and the location of the alleged violation. Michigan v. Tyler, 436 U.S. 499, 507 (1978); Marshall v. North American Car Co., *supra*. In addition, the application should state whether any higher priority inspections, such as imminent danger investigations, are pending. Marshall v. Weyerhaeuser Co., 456 F. Supp. 474 (D.N.J. 1978).

<sup>31/</sup> See, e.g., Rockford Drop Forge Co. v. Donovan, *supra*. At least one jurisdiction has held that a warrant may be contested in federal court subsequent to inspection. Weyerhaeuser Co. v. Marshall, 592 F.2 272 (7th Cir. 1979). Gooch Mill & Elevator Co. v. Donovan, 10 BNA OSHC 2206, 1982 CCH OSHD &26,328 (W.D. Mo. 1982). In general, however, once an inspection has occurred, an employer must exhaust administrative remedies before the OSHA Review Commission prior to challenging the validity of a warrant in

The legal requirement of “probable cause” will vary depending upon the nature of the inspection. Thus, employers should carefully review the warrant secured by OSHA to determine whether it complies with that requirement. Inasmuch as any evidence obtained in an inspection conducted in violation of the warrant requirements may be excluded from consideration by the Commission and the courts,<sup>32/</sup> the employer should ensure that the scope of the inspection set forth in the warrant is appropriately limited, and that the warrant states the information relevant to the inspection in sufficient detail to permit a determination of probable cause.

### **C. Employer Rights and Responsibilities During An Inspection**

Once an OSHA Compliance Officer or Industrial Hygienist has entered the premises to conduct an inspection, either by consent or pursuant to warrant, the employer should ensure that proper administrative procedures are followed and that its rights under the Act are preserved. As a general rule, the employer must supply only that information which is required to be maintained or provided under the Act and accompanying regulations. Employers should be aware that any statements made or records submitted by the employer or his representative to OSHA may be utilized against it in subsequent citation proceedings.

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federal court. Robert K. Bell Enter., Inc. v. Donovan, 710 F.2d 673 (10th Cir. 1983), cert. denied, 464 U.S. 1041 (1984); In re Establishment Inspection of the Metal Bank of America, Inc., 700 F.2d 910 (3d Cir. 1983).

<sup>32/</sup> Babcock & Wilcox Co. v. Marshall, 610 F.2d 1128 (3d Cir. 1979); Savina Home Indus., Inc. v. Secretary of Labor, 594 F.2d 1358 (10th Cir. 1979); Donovan v. Sarasota Concrete Co., 9 BNA OSHC 1608 (1981), aff'd, 693 F.2d 1061 (11th Cir. 1982); Carl M. Geupel Const. Co., 10 BNA OSHC 2097 (Rev. Commn. 1982).

## 1. Opening Conference

The OSHA Compliance Safety and Health Officer must hold an opening conference with the employer and employee representatives. After presenting his credentials, the CSHO is required to state the basis and scope of the inspection, and to supply the employer a copy of the warrant and/or employee complaint, where applicable. The employer should carefully review these documents in order to ensure that the course of the inspection remains within the limits of the CSHO's authority.

At this time, the CSHO may request other information concerning, for example, the nature of the employer's operations, and may also seek to examine safety and health records maintained by the employer. The employer should provide only those records required to be maintained under the Act and effective regulations.<sup>33/</sup> To protect legitimate employee privacy expectations, individual employee records should not be disclosed absent adequate safeguards in an administrative subpoena which specifies the need for such records.<sup>34/</sup>

The Act provides for protection against unauthorized disclosure of "confidential information-trade secrets" or other proprietary information. To preserve those protections, the employer must inform the CSHO of all areas which contain trade secret information. Subsequently, any such information gathered by OSHA will be labeled as "confidential-trade secret" to prevent the unauthorized disclosure of such proprietary information. Disclosure of these documents will generally be restricted to OSHA officers and employees. However, if

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<sup>33/</sup> Generally, these records will consist of OSHA Forms 100 (Log of Occupational Injuries and Illnesses), 101 (Supplementary Record) and 102 (Annual Summary).

<sup>34/</sup> In re Establishment Inspection of Kulp Foundry, Inc., *supra*; United States v. Westinghouse Elect. Corp., 638 F.2d 570, 580-81 (3d Cir. 1980).

relevant, the same information may be required to be produced in judicial or administrative proceedings.

## 2. **Conduct of Inspection**

All employers subject to the Occupational Safety and Health Act should develop a protocol to deal with the prospect of an OSHA inspection. With the proper approach, employers may provide cooperation to the inspectors while continuing to protect their rights under the Act.

Both employer and employee representatives (e.g., shop stewards) have “walkaround” rights to accompany the CSHO during his inspections, although employees need not be paid for this time. If the employer is not permitted to accompany the CSHO and the employer is prejudiced as a result, any citations resulting from the inspection will be vacated.

During the walkaround, the employer should consider performing the same investigative activities undertaken by the CSHO. This may include conducting both air and personal monitoring, taking photographs and videotaping<sup>35/</sup>, and noting the type of measuring instruments and procedures utilized by the CSHO. The information thus gathered often becomes useful in later litigation proceedings, both as evidence at hearings and in settlement discussions. Notwithstanding OSHA’s request, the employer should be aware that they are not obligated to demonstrate the operation of any machinery or processes.

The Compliance Officer may interview employees to the extent that such discussions do not interfere with the performance of work. These interviews may be held privately, without the presence of an employer representative,<sup>36/</sup> and OSHA officials need not

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<sup>35/</sup> OSHA's authority to videotape while inspecting a facility was upheld by the United States Court of Appeals for the Seventh Circuit. See In re the Establishment Inspection of the Kelly Springfield Tire Co., 13 F.3d 1160 (7th Cir. 1994).

<sup>36/</sup> In re Keokuk Steel Castings, 638 F.2d 42 (8th Cir. 1981); Donovan v. Metal Bank of

reveal the identity of the employee(s) interviewed. The employer may, however, legitimately restrict these interviews to the employees' non-working time on or off company property. Employees should be instructed that they are free to speak with the Compliance Officer during their nonworking time or, alternatively, that they may decline to speak with the CSHO, if they so desire.

**D. The Closing Conference**

After an employer is inspected, CSHO will conduct a closing conference with the employer and employee representatives. During this conference, the Compliance Officer must advise the employer of any violations and explain and provide copies of the regulations allegedly violated. In addition, the CSHO must provide an explanation of all abatement requirements, including suggested methods and time periods to accomplish abatement. A written summary of the closing conference is prepared, and a copy of this summary is available upon request from the Area Director. The employer should be aware that any statements made at the closing conference could be considered admissions of violations, thereby limiting its right to later contest a citation. Unless the statements are made and agreed to as non-admissions of liability, they will be admissible against the employer in later proceedings.

It is advisable in scheduling the closing conference to ensure that all designated Company officials and/or counsel can attend. During the closing conference, obtain as much information from the CSHO as possible regarding any possible violations. The following checklist provides some guidance:

- Ask the CSHO to explain in detail what OSHA alleges to be violative of the Act or its regulations and specify on what basis.

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America, Inc., supra.

- Ask the CSHO to articulate specific abatement methods or alternatives. Do not volunteer abatement solutions yourself or commit to particular abatement steps or methods.
- Ask the CSHO to specify the time OSHA perceives as necessary for abatement and how it reached that determination.
- Ask the CSHO to explain what he felt was particularly good in terms of the Company's health and safety program.
- Ask the CSHO what classifications and penalties he intends to recommend.
- Ask the CSHO when the Company can expect to receive any OSHA citations which will issue.

**E. Informal Conferences and Settlements**

The purpose of the informal conference is to discuss issues raised by a citation, such as the existence of a hazard or the size of proposed penalties and abatement requirements, in order to amicably resolve the dispute. The Area Director generally attempts to conduct a joint conference between the employer and the employee representative, but an employer can insist on a separate conference if it decides that the presence of employee representatives will interfere with a settlement. The employee representatives have the right to argue about the existence of a particular violation, and extensions in the abatement period. On the other hand, employee representatives do not have the right to contest the amount of civil penalties, or to argue concerning the factors which go into determining the amount of the penalty.

In preparing for an informal conference, the employer should be thoroughly prepared to discuss the factors that OSHA considers when determining the amount of a penalty,

whether an alleged violation should be the subject of a citation, and any problems presented by the proposed abatement dates.

As in the closing conference setting, employers should consider having an attorney present at the informal conference so that they will not jeopardize any future rights they might have regarding the citation.

**1. Pre-Contest Informal Settlements**

During the informal conference or at any time during the 15 working day period following notice of the citation, the employer can negotiate a settlement with the Area Director. The Area Director has authority to modify penalties, abatement dates and characterizations of violations in a Settlement Agreement executed by OSHA and the employer. Although the employee representative is generally not a party to the agreement, the union may independently challenge the abatement dates established in such an agreement. If no settlement can be reached, the employer may file a notice of contest within fifteen working days of the receipt of the citation, thereby commencing the administrative litigation process.<sup>37/</sup>

**2. Post-Contest Formal Settlements**

Typically, post-contest settlements occur before a complaint is filed with the Occupational Safety and Health Review Commission. Formal settlement agreements are prepared by and ultimately approved by the Regional Solicitor. After the agreement is signed by

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<sup>37/</sup> As an alternative, the employer may also file a Petition for Modification of Abatement (PMA) by the end of the next working day following the abatement date specified in the citation. To receive an extension, the employer must show good faith effort to comply with the standard allegedly violated, including interim steps taken to protect employees, and specify reasons why additional time is necessary. If unopposed, this Petition will be decided by the Area Director; if opposed, the Petition will be decided by the Review Commission.

the parties, the agreement is submitted to Administrative Law Judge assigned to the case for approval, and finally to the Review Commission for final order.

**F. Commencing the Contest**

**1. Procedure**

Any aspect of a citation may be contested and formally adjudicated before the Occupational Safety and Health Review Commission (“OSHRC” or “Commission”). This section briefly discusses the pre-hearing procedures for contesting a citation. Under Section 10(c) of the OSH Act,<sup>38/</sup> a contest of a citation, penalty, abatement period, or notification of failure to correct a prior violation must be initiated by filing a written notice of contest with the Secretary of Labor (“Secretary”) within 15 working days from receipt of the citation.<sup>39</sup> Failure to file written notice within the 15 working day period will automatically convert a citation into a nonreviewable final order.

The employer is deemed to have “received” a citation at the time that the notice is actually received by an agent of the employer, even when the notice is sent to a work site rather than the corporate headquarters. According to the OSHRC, proper service occurs when the notice is reasonably calculated to provide the employer with knowledge of the citation and notification of the proposed penalty and an opportunity to determine whether to abate or contest.

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<sup>38/</sup> 29 U.S.C. § 659(c).

<sup>39</sup> “Working days” are defined as “Monday through Fridays but ... not ... Saturdays, Sundays or Federal holidays.” 29 C.F.R. § 1903.21(c). Notification to the Secretary is effective upon mailing. 29 C.F.R. § 1903.17.

Service on an employee in charge of a local worksite,<sup>40/</sup> or a clerical employee at the employer's main office,<sup>41/</sup> are typically considered to have been properly served.

The standard of what form of writing will be considered a contest has been construed liberally in favor of the contesting party. Generally, a writing filed with OSHA which shows the employer's intent to contest the citation is construed to be a notice of contest.<sup>42/</sup> However, the notice must indicate what is being appealed, i.e., the citation, the penalty, and/or the abatement period.

An exception to this filing requirement exists where the employer can show that its delay was caused by the Agency's deception or failure to follow proper procedures.<sup>43/</sup> In addition, a party who files a late notice of contest may obtain relief from the Commission by filing a motion establishing grounds for relief under Rule 60(b) of the Federal Rules of Civil Procedure, i.e., mistake, inadvertence, surprise, excusable neglect, newly discovered evidence, fraud, misrepresentation, misconduct of an adverse party, and any other reason justifying relief from the operation of the judgment.<sup>44/</sup>

In addition to filing the notice, the employer must generally post the notice of the contest at the facility that was cited.<sup>45/</sup> Once the notice is filed with the Secretary, the Secretary

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<sup>40/</sup> Henry C. Beck Co., 8 OSHC 1395 (Rev. Comm'n 1980).

<sup>41/</sup> Capital City Excavating Co., 8 OSHC 2008 (Rev. Comm'n 1980), aff'd, 679 F.2d 105 (6th Cir. 1982).

<sup>42/</sup> Harris Bros. Roofing Co., 9 OSHC 1074 (Rev. Comm'n 1980).

<sup>43/</sup> See, e.g., Merritt Electric Co., 9 OSHC 2088 (Rev. Comm'n 1981).

<sup>44/</sup> J.I. Hass Co. v. OSHRC, 648 F.2d 190 (3d Cir. 1981).

<sup>45/</sup> 29 C.F.R. 2200.7(g).

is required to notify the Commission of the contest within seven days. Once a notice of contest has been filed as to a citation, the Commission has jurisdiction to assess a civil penalty.<sup>46/</sup> An unequivocal contest of the proposed penalty, however, grants the Commission jurisdiction over only the amount of the penalty, and the Commission does not acquire jurisdiction to review the underlying citation. The notice of contest is nevertheless read in the light most favorable to the employer; if the notice is ambiguous on its face regarding whether the citation is at issue, and subsequent communications indicate that the employer is challenging the citation, the Commission will consider the merits of the citation as well as the penalty and/or abatement period.

## **VI. INTERNAL INVESTIGATIONS**

### **A. Introduction**

A valuable tool in addressing employment-related compliance is the use of periodic internal investigations or self-critical audits. Whether the catalyst is an employee's workplace injury, or an allegation of discrimination, most employers conduct audits from time to time to determine their compliance with applicable state and federal laws. Increasingly, in the age of Enron, Board of Directors must exercise due diligence in ensuring that the company is in compliance with employment-related legal and regulatory requirements in order to satisfy their fiduciary responsibilities. Further, in the wake of the Wal-Mart certification decision, an employer's self-analysis can lead to a more complete picture of workforce statistical data that may be used in order to correct illegal imbalance in hiring and promotion practices and ultimately to avoid potential litigation. This section is intended to guide the employer, and its board of directors, on how to conduct such investigations so that involuntary disclosure of any

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<sup>46/</sup> Danco Constr. Co., 3 OSHC 1114 (Rev. Comm'n 1975).

information obtained can be minimized and potential liability can be limited or avoided for both the company and the individual Board of Directors.

**B. Reasons To Conduct An Internal Audit**

Internal audits can be exceptionally valuable to an employer. The reasons an employer may wish to conduct an internal audit are: identification and control of particular problems which have come to light as the result of existing compliance programs, compliance with applicable federal regulations and statutes, compliance with fiduciary responsibilities, gathering information to support the defense of actual or threatened private civil litigation, and preparation for a government investigation. In each of these situations, there is a compelling need to gather the facts in order to develop an appropriate response and to minimize potential exposure.

Another reason a company may wish to conduct an audit is that it may wish to demonstrate its good faith willingness to meet or exceed obligations under existing laws and regulations. Also, evidence of an audit program may be well-received by governmental agencies conducting inspections. Internal investigations raise the level of awareness of all employees, including those who take no part in the procedure, but who observe that the employer is interested in assuring regulatory compliance.

**C. The Risks Of Internal Audits**

Unfortunately, the disadvantages of self-assessment are also significant. First, they may provide the government or a future litigant with an evidentiary “smoking gun.” In the regulatory context, the kinds of information discovered may provide the government with the necessary evidence to support violations of non-compliance with regulatory laws and regulations. For example, OSHA has consistently asserted in its enforcement actions that

internal self-audits of safety and health compliance are not only discoverable, but provide clear admissions of OSHA violations.<sup>47/</sup> In 1992 OSHA successfully subpoenaed records of a voluntary safety and health audit performed by Hammermill Paper. Despite Hammermill's objections premised upon the belief that it should not be penalized for good faith efforts to self-audit for compliance with OSHA Standards, OSHA successfully persuaded a federal court in Alabama that such audits should not be exempt from disclosure under the so-called "self-critical analysis" privilege. This privilege protects from disclosure certain information which is collected by a party in its efforts to comply with various legal reporting obligations. Notwithstanding the assertion of this privilege, OSHA was permitted to utilize these audits to prove safety and health violations against Hammermill.<sup>48/</sup>

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<sup>47/</sup> In the OSHA context, disclosure of the results of self-critical examinations and audits can occur through two means. First, OSHA's Records Access Rule, 29 C.F.R. § 1910.20, requires an employer to grant an employee or a designated representative of an employee access to an employer's medical and exposure records. Early employer challenges to the legality of the disclosure requirements under OSHA's Records Access Rule proved unsuccessful. See Louisiana Chem. Ass'n v. Bingham, 550 F. Supp. 1136 (W.D. La. 1982), aff'd, 731 F.2d 280 (5th Cir. 1984). However, as discussed infra, a case in the Third Circuit supports an exception to the requirements of the rule. Martin v. Bally's Park Place Hotel & Casino, 983 F.2d 1252 (3d Cir. 1993). Second, the Occupational Safety & Health Act, 29 U.S.C. § 657(b), provides OSHA with broad subpoena powers enabling it to obtain records required to be provided under the Records Access Rule as well as other OSHA Standards.

<sup>48/</sup> Martin v. Hammermill Paper Div. of Int'l Paper Co., 796 F. Supp. 1474 (S.D. Ala. 1992). The experience of USX Corporation in 1990 also is instructive on this point. In that case, the company agreed to perform an extensive safety and health audit as part of an agreement with OSHA to settle a citation issued to its Fairless Hills, Pennsylvania mill. Although the audit team found hundreds of such violations, a subsequent follow-up inspection by OSHA revealed that few, if any, of the audited violations had been abated. OSHA successfully utilized the audits prepared by USX as "admissions" of violations and issued a citation charging egregious violations and proposing penalties in excess of \$7 million dollars. The case was subsequently settled for more than \$3.5 million. In an analogous context, the EPA also has found success in forcing companies to turn over internal environmental audit reports and has used them against those companies. See United States v. Chevron U.S.A., Inc., No. CIV.A. 88-6681, 1989 WL 121616 (E.D. Pa.

Moreover, by conducting a self-audit and presumably increasing the number of officials who are aware of some kind of non-compliance and who could cure it, internal audits may simply ensnare more officials in the net of criminal liability<sup>49</sup>. Finally, comprehensive audits may be expensive to create and maintain.

**D. Due Diligence Obligations of the Board of Directors and Senior Management**

Even though the Board of Directors or senior management rarely commit the act that places a company in non-compliance with regard to its employment practices, government agencies sometime target corporate executives and Board of Director members based on their explicit or implicit responsibility for corporate actions.

The risk of individual criminal liability for individual officers of the corporation, including members of the Board of Directors, is enlarged under the “responsible corporate officer” doctrine.<sup>50/</sup> The responsible corporate officer doctrine permits the imposition of criminal sanctions against a corporate officer for violating a public welfare statute or regulation, regardless of his or her participation, as long as he or she is in position with the power to prevent and correct the violation.

Because corporate officers, including members of the Board of Directors, may be found criminally liable for non-compliance, and because complying with employment standards is good business in any event, companies should proactively put in place a due diligence mechanism to make sure they are in compliance with the legal and regulatory employment-

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Oct. 16, 1989).

49 This is most especially important given the prospective applications of the Sarbanes-Oxley whistleblower provisions.

50/ See United States v. Dotterwich, 320 U.S. 77 (1943); United States v. Park, 421 U.S. 658 (1975).

related requirements. In fact, Delaware law, under In re Caremark International Derivative Litigation, 698 A.2d 959 (Del. 1996), specifies that senior management has an obligation to make sure that an appropriate compliance program is in place, and that senior management must take affirmative steps to ensure that the compliance program is working properly.

The following elements are suggested as part of an employment practices compliance program:

1. a policy of compliance with duly adopted and promulgated employment laws and regulations;
2. the drafting of a comprehensive audit program. Such a plan should reflect a commitment of resources to auditing that is consistent with the due diligence standard;
3. a mechanism for assuring the policy is carried out by those with responsibilities that affect employment practices compliance. A written internal compliance structure should be developed, including the establishment of a Compliance Committee of the Board of Directors that includes outside directors and the appointment of a day-to-day Compliance Officer, who should be considered high-level personnel and who should have direct responsibility for the compliance program;
4. an evaluation of the Employee Handbook and/or personnel policies to protect expressly the company's right, consistent with applicable law and regulations, to conduct comprehensive workplace searches, including desks, email, computer files and lockers. Additionally, the Employee Handbook and/or personnel files should describe the compliance program and state that employees are expected to comply with the law and report violations;

5. a procedure for assuring that results of self-audit programs are resolved in a prompt manner, by either affirmative steps to correct noncompliance or resolution of the initial observations as to whether compliance or noncompliance in fact exists; and

6. reporting of the results of the compliance program to senior management and general supervision of the program by senior management.<sup>51/</sup>

**E. The Government's Position Concerning Self-Audits**

Not surprisingly, the government encourages self-audits. By way of example, one of the settlement terms which OSHA frequently insists upon in corporate-wide settlements is an employer's agreement to conduct a safety and health audit of its facilities and to correct deficiencies disclosed by such an audit. Employers should be aware, however, that the information obtained through such audits can be used by OSHA to focus inspection activity on those areas of an employer's workplace which have proven to be problematic. In addition, OSHA can use such information to substantiate willful citations where the employer has failed to rectify the problems disclosed by an audit. Thus, employers must ensure that any deficiencies disclosed by such an audit are corrected promptly.

In addition to the above, OSHA has issued new policy guidance regarding self-auditing of compliance issues. Under the terms of this policy, employers which voluntarily audit OSHA compliance issues and have developed a plan of abatement may avoid willful violations by reason of the audit's demonstrative good faith. Although OSHA contends that it will not

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<sup>51/</sup> Cf. Jeffrey C. Fort, Due Diligence in Environmental Compliance Systems: Supervising and Monitoring Ongoing Conduct in Environmental Law for Transactional Lawyers (Illinois Institute for Continuing Legal Education, November 2001); Gregory J. Wallace, Corporate Compliance Programs in Corporate Legal Departments (Practicing Law Institute, November 2001).

routinely seek such audits during inspections, it reserves the right to do so under some circumstances.

**F. Protecting The Information Obtained During An Internal Audit**

During the course of litigation or a collective bargaining agreement, an employer may be requested to produce various kinds of information obtained in an investigation which the employer considers “confidential.” Where the employer seeks to restrict or prevent disclosure of confidential information, several alternative means have been employed. Three of these means are the attorney-client privilege, the work-product rule or the self-critical analysis privilege.

**1. Attorney-Client Privilege**

The attorney-client privilege is the oldest of the common law privileges for confidential communications.<sup>52/</sup> 8 J. Wigmore, Evidence § 2290 (McNaughton rev. 1961).

a. In determining whether the attorney-client privilege is available, many federal courts have adopted the test detailed by Wigmore. Specifically,

- (1) Where legal advice of any kind is sought,
- (2) From a professional legal adviser in his capacity as such,
- (3) The communications relating to that purpose,
- (4) Made in confidence,
- (5) By the client,
- (6) Are at his/her instance permanently protected,

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<sup>52/</sup> The Supreme Court has stated that the purpose of the privilege is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

- (7) From disclosure by himself or by the legal adviser,
- (8) Except the privilege may be waived.<sup>53/</sup>

b. Another popular formulation of the required showing was developed by Judge Wyzanski in United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358 (D. Mass. 1950). The privilege applies only if:

- (1) The asserted holder of the privilege is or sought to become a client;
- (2) The person to whom the communication was made
  - (a) Is a member of the bar of a court, or his subordinate and
  - (b) In connection with this communication is acting as a lawyer;
- (3) The communication relates to a fact of which the attorney was informed
  - (a) By his client
  - (b) Without the presence of strangers
  - (c) For the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii)

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<sup>53/</sup> 8 J. Wigmore, Evidence ¶ 2292 at 554 (McNaughton rev. 1961); see, e.g., Golden Trade, S.r.L. v. Lee Apparel Co., 143 F.R.D. 514 (S.D.N.Y. 1992) (applying Wigmore's test); In re Grand Jury Subpoena Duces Tecum, 731 F.2d 1032 (2d Cir. 1984) (same); Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980); Radiant Burners, Inc. v. American Gas Assoc., 320 F.2d 314, 319 (7th Cir.) (en banc), cert. denied, 375 U.S. 929 (1963).

assistance in some legal proceeding, and not (iv) for the purpose of committing a crime or tort; and

- (4) The privilege has been
  - (a) Claimed and
  - (b) Not waived by the client.

c. For the privilege to attach, it must be explicitly raised in a timely manner with respect to a particular communication.<sup>54/</sup> Further, each element of the definition of the privilege must be demonstrated. In short, the privilege will attach if: (1) it is claimed in a timely manner; (2) there is an actual or intended attorney-client relationship; (3) there was a confidential communication between the client and the attorney; (4) no third parties were present; (5) the purpose of the communication was to solicit legal advice; (6) the privilege has not been waived; and (7) no exception to the privilege applies. If every element of the privilege is satisfied, the privilege is absolute. Levingston v. Allis-Chalmers Corp., 109 F.R.D. 546, 550 (S.D. Miss. 1985).

## 2. The Upjohn Case

In 1981, the U.S. Supreme Court provided guidance on the subject of internal corporate investigations in the case of Upjohn Co. v. United States, 449 U.S. 383 (1981). Simply put, Upjohn stands for the proposition that the attorney-client privilege and the work-product doctrine apply to internal investigations by corporations.

The case arose in the context of an internal investigation of possible illegal overseas payments. The company's lawyers sent a questionnaire to all foreign managers seeking

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<sup>54/</sup> The privilege protects both legal advice provided by a lawyer to a client, as well as information provided by a client to a lawyer to enable the lawyer to provide sound advice. Upjohn Co. v. United States, 449 U.S. 383 (1981).

detailed information concerning such payments and the responses were referred to the general counsel. The general counsel and outside counsel also jointly interviewed various officers and employees. The company subsequently disclosed the payments to the SEC and the IRS. The IRS began an investigation to determine the tax consequences of these payments and issued a tax summons demanding, inter alia, the questionnaire, memoranda, and notes of the interviews. The company resisted these summonses, relying on the attorney-client privilege and the work-product doctrine.

The lower court held that communications between attorneys and persons who did not have authority to direct Upjohn's actions in response to legal advice were not privileged (the "control group" test), and that the work-product doctrine was not applicable to proceedings to enforce IRS administrative summonses.

The Supreme Court rejected the limitations imposed by the "control group" test that restricted the scope of the attorney-client privilege. The Court noted that the control group test frustrated the underlying purpose of the attorney-client privilege by discouraging the communication of relevant information by employees of the client company to attorneys who were hired to render legal advice to the client. Significantly, the Court found that middle-level - and indeed lower level - employees can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties and it is only natural that these employees would have the relevant information needed by corporate counsel if he is adequately to advise the client with respect to such actual or potential difficulties. Upjohn, 449 U.S. at 391. The Supreme Court also observed that a narrow interpretation of the privilege would threaten to limit the valuable efforts of corporate counsel to ensure that their clients complied with the law. The Court held that the privilege protects both the giving of professional advice to those who can act

on it, and to the gathering of information by the company's lawyer to enable the lawyer to give sound and informed advice.<sup>55/</sup>

**a. Legal vs. Business Advice**

The question whether the attorney is acting as a legal or a business advisor in a given situation is, indeed, problematic. There are many reported decisions reflecting courts' determinations as to whether particular documents are entitled to protection. However, because privilege is determined on a case-by-case basis, no easily articulated general principles as to when an attorney acts as a legal advisor as opposed to a business advisor have emerged. Thus, while the case law may be helpful, a slightly different factual context may result in a different determination by a second court.

Drawing the line between legal and non-legal advice is not a simple task.<sup>56/</sup> Certain functions performed by attorneys have been deemed not to meet the "legal advice" standard. Thus, where an attorney acts as a scrivener, a friend, a business advisor, an

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<sup>55/</sup> Note, however, that in Chevron U.S.A., 1989 WL 121616, the Court, in rejecting Chevron's claim that the environmental audit documents were confidential and/or privileged by virtue of the presence of a corporate attorney on the audit team, stated: "[I]t is not enough to assert the [attorney-client] privilege merely because an attorney was present or was one of the parties to whom the communication was made . . . . The communication must be between the client and attorney in his or her capacity as an attorney rather than as, for example, a business advisor. Additionally, the communication's primary purpose must be to gain or provide legal assistance." Id. at \*18.

<sup>56/</sup> Where the general purpose concerns legal rights and obligations, a particular incidental transaction would receive protection, though it in itself was merely commercial in nature—as where the financial condition of a shareholder is discussed in the course of a proceeding to enforce a claim against a corporation. But apart from such cases, the most that can be said by way of generalization is that a matter committed to a professional legal adviser is prima facie so committed for the sake of legal advice which may be more or less desirable for some aspect of the matter, and is therefore within the privilege unless it clearly appears to be lacking in aspects requiring legal advice. 8 Wigmore, ¶2296 at 567 (emphasis in original).

executor, a negotiator or agent, or as an attesting witness to a will or deed, the services rendered are not legal and no privilege attaches.<sup>57/</sup>

Although an attorney's role in commercial negotiations usually constitutes "business" rather than "legal" advice, recent decisions indicate that, in fact, an attorney may be acting in a legal capacity when he negotiates on behalf of his client.<sup>58/</sup>

The Eighth Circuit has held that a law firm's memorandum and report detailing an investigation into alleged corporate wrongdoing, and making only business recommendations, were not privileged. The court concluded that the task in question could have been performed just as easily by non-lawyers assisted by an accounting firm. Diversified Indus.,

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<sup>57/</sup> C. McCormick, *Handbook of the Law of Evidence* 88 at 179-80 (2d ed. 1972); see United States v. Horvath, 731 F.2d 557, 561 (8th Cir. 1984) (no privilege where the attorney functioned primarily as a courier); United States v. Huberts, 637 F.2d 630, 640 (9th Cir. 1980), cert. denied, 451 U.S. 975 (1981) (no privilege where the attorney performed a ministerial or clerical function such as overseeing an equipment sale); Morgan v. United States, 380 F.2d 686, 693 (9th Cir. 1967), cert. denied, 390 U.S. 962 (1968) (no privilege where the attorney acted simply as a conduit for client's funds); Canaday v. United States, 354 F.2d 849, 857 (8th Cir. 1966) (no privilege where the attorney acted as a scrivener); Colton v. United States, 306 F.2d 633, 638 (2d Cir. 1962), cert. denied, 371 U.S. 951 (1963) (no privilege where the attorney acted as a business advisor); North Carolina Elec. Membership Corp. v. Carolina Power & Light Co., 110 F.R.D. 511, 517 (M.D.N.C. 1986) (no privilege where the attorney provided financial advice or engaged in discussion of business negotiations or acted as a lobbyist).

<sup>58/</sup> See, e.g., American Ship Bldg. Co. v. Coca-Cola Bottling Co., 822 A.2d 64 (11th Cir. 1987) (memorandum detailing status of commercial negotiations was privileged as it contained remarks and conclusions based upon the legal expertise of the attorney); Studiengesellschaft Kohle m.b.H. v. Novamont Corp., 704 F.2d 48 (2d Cir. 1983) (negotiating the settlement of a claim arising out of a contract was a legal function within the meaning of the attorney-client privilege); but see S.C.M. Corp. v. Xerox Corp., 70 F.R.D. 508, 513 (D. Conn.), appeal dismissed, 534 F.2d 1031 (2d Cir. 1976) (material revealed during negotiations between joint venturers leading to the acquisition by one of them of a controlling share of the enterprise was subject to disclosure because, at least in part, the transaction was of a business nature); Comercio E. Industria Continental, S.A. v. Dresser Indus., Inc., 19 F.R.D. 513, 514 (S.D.N.Y. 1956) (because negotiations concerned the details of a business transaction, no privilege was available).

Inc. v. Meredith, 572 F.2d 596, 603 (8th Cir. 1973). Therefore, the legal nature of the services performed needs to be clear from the document sought to be protected.

It is important to note that the mere fact that business considerations are mentioned or are factored into the analysis will not abrogate the privilege. Thus, if the primary purpose of the document is legal, it is irrelevant that it is later used for business purposes. See In re LTV Sec. Litig., 89 F.R.D. 595, 600-01 (N.D. Tex. 1981). On the other hand, where a document focuses on business strategy, it is likely that no privilege will attach.<sup>59/</sup> One court has commented that, particularly in a commercial context, business and legal considerations may be inextricably intertwined. Coleman v. American Broadcasting Cos., 106 F.R.D. 201 (D.D.C. 1985).<sup>60</sup>

**b. Application to Memoranda and Correspondence Among Co-Counsel and Agents**

As a general proposition, correspondence and memoranda between co-counsel, which are undertaken for the purpose of advising the client on a legal matter, are protected from disclosure.<sup>61/</sup> This rule appears to apply whether the communications are: (1)

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<sup>59/</sup> See Diversified, 572 F.2d at 596; In re Arthur Treacher's Franchisee Litig., 92 F.R.D. 429, 435-36 (E.D. Pa. 1981); United States v. International Business Mach. Corp., 66 F.R.D. 206, 212 (S.D.N.Y. 1974); J.P. Foley & Co., Inc. v. Vanderbilt, 65 F.R.D. 523, 526 (S.D.N.Y. 1974).

<sup>60</sup> In Coleman, the plaintiff sought discovery of certain communications between corporate management and in-house counsel relating to alleged sex discrimination. The court indicated that despite the fact that the documents had business ramifications, they were within the privilege and, therefore, not subject to disclosure. It is feasible that a court would allow the redaction of “legal advice” contained in a document which is concerned primarily with business strategies or advice.

<sup>61/</sup> See Mead Data Central, Inc. v. United States Dep't of the Air Force, 566 F.2d 242, 253-54 n.24 (D.C. Cir.1977); Burlington Indus. v. Exxon Corp., 65 F.R.D. 26, 36 (D. Md. 1974); Stix Prod., Inc. v. United Merchants & Mfrs., Inc., 47 F.R.D. 334 (S.D.N.Y. 1969); New York Underwriters Ins. Co. v. Union Constr. Co., 285 F. Supp. 868 (D. Kan.

between “in-house” attorneys; (2) between “in-house” and outside counsel; (3) between outside counsel from different firms; or (4) between attorneys in the same firm.

However, all internal legal memoranda may not be protected. It is important to remember that every element of the privilege’s definition must be met before the privilege will attach. With respect to legal memoranda, two elements of the test often are not met. First, only a memorandum which is responsive in some way to the confidential communication, or an aspect thereof, will be protected. The focus is on whether disclosure of the matter discussed would, in any way, reveal “confidential” client communications.<sup>62/</sup> Also, many courts have found that a writing is not automatically privileged simply because its author is an attorney or because it contains an opinion of the attorney.<sup>63/</sup> According to these courts, an attorney’s legal opinions are privileged only to the extent that they reveal confidential client communications. See generally Upjohn, 449 U.S. at 401. Second, only a memorandum reflecting primarily legal rather than business advice will be protected from disclosure. See In re John Doe Corp., 675 F.2d 482, 488 (2d Cir. 1982) (“Upjohn privilege is clearly limited to communications made to attorneys solely for the purpose of seeking legal advice”).

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1968); United States v. United Shoe Machine Corp., 89 F. Supp. 357, 359-60 (D. Mass. 1950).

<sup>62/</sup> Laitram Corp. v. Hewlett-Packard Co., 827 F. Supp. 1242, 1246 (E.D. La. 1993) (to enjoy privilege, investor must intend the information transmitted to be confidential); Advanced Cardiovascular Syst., Inc. v. C. R. Bard, Inc., 144 F.R.D. 372, 375-77 (N.D. Cal. 1992) (same).

<sup>63/</sup> See, e.g., Matter of Fischel, 557 F.2d 209, 211 (9th Cir. 1977); Ohio-Sealy Mattress Mfg. Co. v. Kaplan, 90 F.R.D. 21 (N.D. Ill. 1980); Herbert v. Lando, 73 F.R.D. 387, 398 (S.D.N.Y. 1977), rev'd on other grounds, 568 F.2d 974 (2d Cir. 1977), rev'd on other grounds, 441 U.S. 153 (1979).

**c. General Guidelines**

There are three general guidelines a company should follow to improve the likelihood of protecting internal audits under the attorney-client privilege.

**(1) Use of Counsel**

The corporation should document a request that counsel render legal advice regarding the conduct of an investigation and the processing of the audit results. While this counsel could be either in-house or outside counsel, to clearly distinguish business advice from other legal advice, it may be advantageous in some circumstances to utilize outside counsel.

**(2) Control of the Audit**

Counsel should strictly control and direct all meetings and documents related to the audit.

**(3) Confidentiality**

Access to auditing results should be strictly limited to counsel, the expert, and directly responsible corporate officers. The auditing results should be kept confidential, clearly marked as “attorney-client privileged,” and stored in a secure area.

**3. Work-Product Doctrine**

In the event that the attorney-client privilege is not available, it is possible to claim a qualified privilege under the so-called “work-product doctrine.”

**a. The Rule**

This doctrine has been codified in Fed. R. Civ. P. 26(b)(3).<sup>64/</sup> The rule is a partial codification of the Supreme Court’s decision in Hickman v. Taylor, 329 U.S. 495 (1947). See also Upjohn, 449 U.S. at 398. In Hickman, the Court adopted the Third Circuit’s use of the term “work-product” to describe “interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs and countless other tangible and intangible” material. 329 U.S. at 511. Although Rule 26(b)(3) is limited to documents and other tangible materials, the terms “work-product” and “trial preparation materials” are often used interchangeably to describe items prepared in anticipation of litigation.

**b. Comparison to Attorney-Client Privilege**

Unlike the attorney-client privilege, which protects only confidential communications, this broader privilege protects from disclosure documents and tangible things which were prepared with an “eye toward litigation.”<sup>65/</sup> Further, to the extent that these items reflect an attorney’s theories, observations, opinions, and impressions, they are to be afforded a higher degree of protection.

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<sup>64/</sup> Fed. R. Civ. P. 26(b)(3) provides that: “[A] party may obtain discovery of documents and tangible things otherwise discoverable . . . and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.”

<sup>65/</sup> It should be noted that although witness statements gathered in the course of an investigation may be ordinary work product, Rule 26(b)(3) provides that the witness may obtain a copy of his or her statement upon request without any showing of substantial need or inability to obtain the substantial equivalent without undue hardship. Fed. R. Civ. P. 26(b)(3). Moreover, there is nothing to stop a witness from turning over a copy of his statement to a party who unsuccessfully sought to obtain the statement through discovery.

Another distinction between attorney-client privilege and the work-product rule is that the work-product rule is procedural in nature. Accordingly, Rule 26(b)(3) applies in all federal court discovery--whether the claim is based on federal question or diversity jurisdiction. See United Coal Cos. v. Powell Constr. Co., 839 F.2d 958, 966 (3d Cir. 1988).

**c. Documents and Tangible Things**

The applicability of the doctrine is subject to significant definitional limitations. First, Rule 26(b)(3) protects only “documents and tangible things.” Thus, facts or information gleaned from the documents are not protected, although the documents themselves are protected. National Union Fire Ins. Co. v. Murray Sheet Metal Co., 967 F.2d 980, 984 n.5 (4th Cir. 1992).

**d. Anticipation of Litigation**

It must be shown that the documents were prepared in “anticipation of litigation.” E.g., Simon v. G. D. Searle & Co., 816 F.2d 397, 401 (8th Cir. 1987); Martin v. Valley Nat’l Bank, 140 F.R.D. 291, 304 (S.D.N.Y. 1991). Most courts construing the “litigation” requirement have decided that litigation need not be imminent but must be, at least, probable or likely.<sup>66/</sup>

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<sup>66/</sup> See, e.g., Herbert v. Lando, 73 F.R.D. 387, 402 (S.D.N.Y.) rev'd on other grounds, 568 F.2d 974 (2d Cir. 1977), rev'd on other grounds, 441 U.S. 153 (1979). While a showing of a remote possibility of litigation is insufficient, see Garfinkle v. Arcata Nat'l Corp., 64 F.R.D. 688, 690 (S.D.N.Y. 1974), the prospect of litigation or the intention to avoid litigation may suffice. See Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 604 (8th Cir. 1973); Sylgab Steel & Wire Corp. v. Imoco-Gateway Corp., 62 F.R.D. 454, 457 (N.D. Ill. 1974), aff'd mem., 534 F.2d 330 (7th Cir. 1976); Vilastor-Kent Theatre Corp. v. Brandt, 19 F.R.D. 522 (S.D.N.Y. 1956).

Federal Rule of Civil Procedure 26(b)(3) does not protect investigative materials prepared in the ordinary course of business with the work-product privilege. Fed. R. Civ. P. 26(b)(3), Advisory Committee Comment at 158. See also Petersen v. Douglas County Bank & Trust Co., 967 F.2d 1186, 1189 (8th Cir. 1992) (documents compiled by an

Similarly, cases suggest that notes of an investigation by a non-lawyer of alleged sexual harassment in the workplace constitutes “materials assembled in the ordinary course of business or pursuant to public requirements unrelated to litigation or for other non-litigation purposes.” EEOC v. General Motors Corp., 47 Emp. Prac. Dec. (CCH) ¶ 38,262 (D. Kan. 1988); EEOC v. Commonwealth Edison, 119 F.R.D. 394, 395 (N.D. Ill. 1988).

In Janicker by Janicker v. George Washington Univ., 94 F.R.D. 648 (D.D.C. 1982), the court found that an investigation of a dormitory fire by the university’s vice president and treasurer was not performed in anticipation of litigation. In relevant part, the court noted:

The mere contingency that litigation result is not determinative. If in connection with an accident or an event, a business entity in the ordinary course of business conducts an investigation for its own purposes, the resulting investigative report is producible in civil pretrial discovery. . . . The fact that a defendant anticipates the contingency of litigation resulting from an accident or event does not automatically qualify an “in house” report as work product.

94 F.R.D. at 650.

The Third Circuit affirmed a ruling by the OSHRC that the attorney work-product doctrine can protect the results of a self-critical workplace safety and health compliance audit from disclosure even when requested pursuant to OSHA’s Record Access Rule, 29 C.F.R.

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insurance company regarding claims of insured are generally considered business records); State Farm Fire & Casualty Co. v. Perrigan, 102 F.R.D. 235, 237 (W.D. Va. 1984) (“nature of the insurance business requires an investigation prior to the determination of the insured’s claim”); Mercy v. County of Suffolk, 93 F.R.D. 520, 522 (E.D.N.Y. 1982) (police internal affairs department investigation of police brutality charge constituted primarily factual accounts of events at issue, contained no evidence of counsel’s legal analysis, theories of case, or anticipated strategy, and thus was prepared in the ordinary course of department’s duty to public to investigate charge); United States v. O’Neill, 619 F.2d 222, 227 (3d Cir. 1980) (same).

§ 1910.20.<sup>67/</sup> In Martin v. Bally's Park Place Hotel & Casino, 983 F.2d 1252 (3d Cir. 1993), the court held that an employer may use the attorney work-product doctrine to prevent OSHA from obtaining access to exposure records which were prepared and obtained because of the "prospect of" litigation. Bally's Park Place, 983 F.2d at 1263-64 (quoting In re Grand Jury Proceedings, 604 F.2d 798, 803 (3d Cir. 1979)). The court's decision is significant in that it rejected the Secretary of Labor's contradictory assertion that the work-product privilege protects attorney work-product only where litigation has begun or is "imminent."

In Bally's Park Place, an unidentified employee filed a complaint with OSHA charging that a certain glass washing machine at Bally's Atlantic City, New Jersey casino was creating iodine emissions. Based upon the complaint, OSHA wrote to Bally's requesting that the company investigate iodine emissions from the machine. Upon notification of the complaint and, anticipating the possibility of an OSHA inspection, Bally's general counsel directed that the machine be tested for emissions, and that a confidential report of the testing results be sent to him. An outside consultant was hired to prepare the report. Relying on the attorney work-product privilege, Bally's refused repeated requests for information by the union and refused to comply with OSHA's administrative subpoena seeking production of the testing results. The OSHRC and, subsequently, the Third Circuit held that the records were protected from disclosure by the attorney work-product privilege and, absent a special showing of need and lack of alternatives, the report was exempt from disclosure because the Secretary of Labor could have obtained the same information through its own inspection.<sup>68/</sup> In doing so, the court

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<sup>67/</sup> Pursuant to this Rule, employers must make available to OSHA voluntarily generated "medical records" and "exposure records." 29 C.F.R. § 1910.20(a).

<sup>68/</sup> The significance of the requirement that the work product itself must be performed at the direction of an attorney is highlighted by OSHA's previous success in obtaining access to

noted the distinction between the report itself, which reflected the work-product of counsel, and the underlying information, which could be obtained through normal discovery.

Left open by the case, however, is the issue of what constitutes the “prospect” or “expectation” of litigation so as to trigger protectable work-product. In Bally’s, the investigation was triggered by OSHA’s sending a letter to the employer notifying it of the employee complaint.

**e. Prepared By or For Another Party**

The final criterion for protection of documents under Rule 26(b)(3) is that they be “prepared by or for another party or by or for the other party’s representative.” The work-product immunity extends to any document prepared at the request of an attorney to assist that attorney in preparation for litigation.<sup>69/</sup>

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internal investigatory information and material assembled without the participation of legal counsel. For example, in Martin v. Hammermill Paper Div. of Int'l Paper Co., 796 F. Supp. 1474 (S.D. Ala. 1992), OSHA successfully subpoenaed records of a voluntary safety and health audit performed by Hammermill Paper. Despite Hammermill's objections that it should not be penalized for good faith self-examination to ensure compliance, OSHA prevailed in its position that such audits should not be exempt from disclosure under a self-critical analysis privilege. Thus, OSHA was permitted to utilize those audits, in which legal counsel did not participate, to prove safety and health violations against Hammermill.

<sup>69/</sup> See In re Int'l Sys. & Controls Corp. Sec. Litig., 693 F.2d 1235 (5th Cir. 1982); see Notes of Advisory Committee, Fed. R. Civ. P. 26(b)(3) (“Subdivision (b)(3) reflects the trend of the cases by requiring a special showing not merely as to materials prepared by an attorney, but also as to materials prepared in anticipation of litigation or preparation for trial by or for a party or any representative acting on his behalf”); Augenti v. Cappellini, 84 F.R.D. 73, 79 (M.D. Pa. 1979) (“Traditionally, the work-product of a lawyer in preparation for trial was not subject to discovery and Rule 26(b)(3) extends that immunity to work-products not only of lawyers, but to documents prepared 'by or for a party'”) (emphasis in original); United States v. Chatham City Corp., 72 F.R.D. 640 (S.D. Ga. 1976) (FBI agents' interview notes are work-product).

Documents prepared by or for non-lawyer corporate employees in anticipation of litigation may not be protected by the doctrine. Although historically the work-product doctrine has only applied to material “prepared or collected by an attorney or at the direction of an attorney,” e.g., Conoco v. United States Dep’t of Justice, 687 F.2d 724 (3d Cir. 1982), a literal reading of the rule supports the extension of the protection to documents prepared by a non-lawyer for a “party.” Courts tend to scrutinize documents prepared by non-lawyers more carefully to avoid giving work-product protection to materials prepared in the ordinary course of business.

**f. Seeker’s Burden**

The party requesting discovery may still be able to obtain ordinary work-product upon a showing of substantial need and an inability to obtain the substantial equivalent of the material from some other source without undue hardship.<sup>70/</sup> Because the sufficiency of the need depends upon the circumstances presented, courts must determine “need” on a case-by-case basis. See, e.g., Handgards, Inc. v. Johnson & Johnson, 413 F. Supp. 926 (N.D. Cal. 1976); Arney v. Hormel & Co., 53 F.R.D. 179 (D. Minn. 1971).

**g. Opinion Work-Product**

Rule 26(b)(3) offers a higher degree of protection to materials prepared in anticipation of litigation which contain “the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.” It is well-settled that an attorney’s interview or conference notes or memoranda summarizing the statements of a witness may be considered to be opinion work-product under Rule 26(b)(3). See

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<sup>70/</sup> Fed. R. Civ. P. 26(b)(3). See, e.g., National Union Fire Ins. Co. v. Murray Sheet Metal Co., 967 F.2d 980, 985 (4th Cir. 1992); Horn & Hardart Co. v. Pillsbury Co., 888 F.2d 8, 12 (2d Cir. 1989).

In re Grand Jury Investigation, 412 F. Supp. 943, 949 (E.D. Pa. 1976) (notes of conversations with witnesses “are so much a product of the lawyer’s thinking and so little probative of the witness’ actual words that they are absolutely protected from disclosure”).

Unlike ordinary work-product, opinion work-product is not discoverable upon a showing of substantial need and undue hardship in obtaining the information by alternative means. Upjohn, 449 U.S. at 401-02. Unfortunately, the Upjohn Court expressly declined to decide whether opinion work-product should be afforded absolute protection against disclosure. Id. at 401. Accordingly, there is confusion among the courts as to the degree of protection required by the rule.

Some courts hold that the act of collecting or synthesizing information may create a work-product privilege. See Petersen v. Douglas County Bank & Trust Co., 967 F.2d 1186, 1189 (8th Cir. 1992); Sporck, 759 F.2d at 316. The analysis however is by no means unanimous. See Bohannon v. Honda Motor Co., 127 F.R.D. 536, 539 (D. Kan. 1989) (rejecting the Sporck view); In re San Juan Dupont Plaza. Moreover, rather than precluding discovery of the entire document, a court may require, where possible, that the portion of the document containing the attorney’s mental impressions be redacted. See, e.g., Chaney at 534.

#### **h. Weaknesses**

There are several problems with relying on the work-product doctrine to shield auditing reports. First and foremost, much internal auditing is done as a regular business practice. While litigation may arise, this auditing generally is not done “in anticipation of litigation.” Auditing that is done in the regular course of business is not protected by the work-product doctrine.

Secondly, as with the attorney-client privilege, the work-product doctrine does not protect the underlying facts of otherwise protected documents. Finally, even if the protection does apply, a litigant may be able to claim “undue hardship” if the information in the auditing reports is completely unavailable by other means, thus discovering the results despite work-product protection.

There are three general guidelines that a company should follow to improve the likelihood of protecting auditing results under the work-product doctrine.

(1) **Control of the Audit**

Counsel should strictly control all documents relating to the auditing.

(2) **In Anticipation of Litigation**

The corporation should document the specific litigation towards which the audit is being prepared. It may be desirable to utilize outside counsel to do or direct the work in order to avoid a claim that in-house counsel did the auditing in the ordinary course of business.

(3) **Confidentiality**

Strict confidentiality must be maintained on all auditing results.

4. **Self-Critical Analysis**

The self-critical analysis privilege protects from discovery self-critical internal reports prepared to improve an organization’s performance or legal compliance. Bredice v. Doctors Hosp., Inc., 50 F.R.D. 249 (D.D.C. 1970), aff’d, 479 F.2d 920 (D.C. Cir. 1973) (confidential hospital staff meeting minutes, recorded for purpose of self-improvement, entitled to qualified privilege). The policy behind this protection is to prevent the chilling effect on self-

improvement that discovery of such self-critical reports would produce. Webb v. Westinghouse Elec. Corp., 81 F.R.D. 431, 433 (E.D. Pa. 1978).

**a. Formulations of the Privilege**

The privilege is still emerging in the law. Therefore, there is not yet any uniformity as to the exact formulation of the privilege. The Northern District of Illinois applies the following four-part test:

(1) To be privileged, the materials must have been prepared for mandatory government reports.

(2) Any privilege extends only to subjective, evaluative materials.

(3) It does not extend to objective data in the same reports.

(4) Discovery has been denied only where the policy favoring exclusion has clearly outweighed plaintiff's need. Vanek v. Nutrasweet Co., No. 92-C-0115, 1992 WL 133162, at \*3 (N.D. Ill. June 11, 1992); see also Webb, 81 F.R.D. at 434. The Ninth Circuit considered the following three-part test, and then added an element of its own:

(1) The information must result from a critical self analysis undertaken by the party seeking protection;

(2) The public must have a strong interest in preserving the free flow of the type of information sought;

(3) The information must be of the type whose flow would be curtailed if discovery were allowed.

Note, The Privilege of Self-Critical Analysis, 96 Harv. L. Rev. 1083, 1086 (1983).

(4) To these requirements should be added the general proviso that no document will be accorded a privilege unless it was prepared with the expectation that it would be kept confidential, and has in fact been kept confidential. Dowling v. American Hawaii Cruises, Inc., 971 F.2d 423, 426 (9th Cir. 1992).

**b. Negative Treatment By Courts**

Courts have failed to agree on a precise formulation of the self-critical analysis doctrine. Some courts have rejected it outright. See e.g., United States v. Noall, 587 F.2d 123 (2d Cir. 1978); F.T.C. v. TRW, Inc., 628 F.2d 207, 210-11 (D. C. Cir. 1980); Spencer Savings Bank, SLA v. Excell Mortgage Corp., 960 F. Supp. 835, 839 (D.N.J. 1997); United States v. Dexter Corp., 132 F.R.D. 8 (D. Conn. 1990). Other courts have adopted the privilege only with severe restrictions. For example, at least one court has held that the privilege is inapplicable where the government is the party requesting the information. See, e.g., FTC, 628 F.2d at 210.

Other courts limit the privilege (at least in the employment discrimination context) to reports required by the government. Vanek v. Nutrasweet Co., No. 92-C-0115, 1992 WL 133162 (N.D. Ill. June 11, 1992); see also, Webb, 81 F.R.D. at 434; Hardy v. New York News, Inc., 114 F.R.D. 633, 641 (S.D.N.Y. 1987). Many courts hold that the privilege applies only to conclusions and analyses in reports, not the facts or statistics uncovered or compiled as a result of the investigation. Hardy, 114 F.R.D. 633; Roberts v. Carrier Corp., 107 F.R.D. 678, 685 (N.D. Ind. 1985).

**G. Waiver**

The easiest way to waive any of these privileges is to breach the confidentiality of the information. Once an outsider is made privy to the results of an investigation, the privileges are

nullified. Dow Jones & Co., Inc. v. United States Dep't of Justice, 880 F. Supp. 145, 150 (S.D.N.Y. 1995), rev'd on other grounds 907 F. Supp. 79 (S.D.N.Y. 1995) (holding voluntary disclosures of all or part of document may waive otherwise valid FOIA exemption).

**1. The Martin Marietta Case**

In a decision which sent shock waves through the defense bar, the Court of Appeals for the Fourth Circuit found that a company which had appeared to follow the Upjohn procedures had waived the attorney-client privilege and the protection of non-opinion work-product in the context of the resolution of a criminal prosecution of a corporation. In re Martin Marietta Corp., 856 F.2d 619 (4th Cir. 1988), cert. denied, 490 U.S. 1011 (1989). The court found that an implied waiver of the attorney-client privilege and non-opinion work-product protection had occurred when Martin Marietta settled the criminal and administrative charges with the Department of Defense ("DOD").

The underlying case against Martin Marietta involved claims that travel cost rebates from a travel agency were improperly recorded so that Martin Marietta could overstate the costs for which it would receive reimbursement from the DOD. In the settlement negotiations, counsel for the company disclosed some limited confidential information to the United States Attorney's Office and the Defense Logistics Agency. The company was ultimately indicted and entered a guilty plea, and concurrently settled the administrative proceedings. Thereafter, the prosecutor separately indicted one employee, charging him with conspiracy to defraud the DOD and mail fraud. The employee issued a pretrial subpoena duces tecum to the company pursuant to Federal Rule of Criminal Procedure 17(c), seeking, inter alia, the company's internal audit, the interview notes, transcripts and recordings on which the audit's

findings were based, and correspondence and notes concerning the administrative settlement with the government.

The company argued against production, claiming that submission of the materials to the government constituted only a limited waiver of the attorney-client and work-product protections; i.e., the waiver only extended to the materials actually disclosed and not to the underlying source documents. The Fourth Circuit rejected this concept of "limited waiver" and ordered that the employee defendant have access to all the investigation reports, as well as underlying interview notes, transcripts and audit results, in order to mount his defense.

Thus, the Fourth Circuit nullified the privilege in two distinct ways. First, it held that once information was disclosed to one party, other parties could then successfully argue that the privilege was waived as to them, as well.<sup>71/</sup> Second, the court found that once some information was disclosed, the privilege was nullified with respect to "all information related to the same subject matter," Martin Marietta, 856 F.2d at 623, at least as to the attorney-client privilege and non-opinion work-product.<sup>72/</sup>

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<sup>71/</sup> Both the Third and D.C. Circuits have similarly rejected this "limited waiver" doctrine. Westinghouse v. Republic of the Philippines, 951 F.2d 1414 (3d Cir. 1991); Permian Corp. v. United States, 665 F.2d 1214 (D.C. Cir. 1981). The Eighth Circuit, however, has endorsed the limited waiver rule. Diversified Indus., Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1973).

<sup>72/</sup> Other cases with similar holdings include: In re Sealed Case, 877 F.2d 976, 980-81 (D.C. Cir. 1989) and United States v. Bernard, 877 F.2d 1463, 1465 (10th Cir. 1989). However, the Ninth Circuit has held that "the disclosure of information resulting in the waiver of the attorney-client privilege constitutes waiver `only as to communications about the matter actually disclosed.'" Chevron Corp. v. Penzoil Co., 974 F.2d 1156, 1162 (9th Cir. 1992) (quoting Weil v. Investment/Indicators, Research & Management, 647 F.2d 18, 25 (9th Cir. 1981)); see also In re von Bulow, 828 F.2d 94, 102-103 (2d Cir. 1987).

## 2. **Internal Dissemination or Leak of Confidential Information**

A waiver of a privilege can occur even if the confidential information never leaves the company. The confidentiality of the communication may be breached by unrestricted circulation within the corporation as well as outside of the corporation. See Upjohn, 449 U.S. at 395. To ensure against a waiver of the privilege, it is important that the communication not be made in the presence of, or transmitted to, nonessential third parties. Super Tire Eng'g Co. v. Bandag Inc., 562 F. Supp. 439, 441 (E.D. Pa. 1983); Union Carbide Corp. v. Dow Chem. Co., 619 F. Supp. 1036, 1051 (D. Del. 1985). However, limited circulation of the communication within the corporation is permissible. Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854 (D.C. Cir. 1980).<sup>73/</sup> The extent of permissible circulation was expanded by the Supreme Court in Upjohn to include both middle-and lower-level employees who have the ability to “embroil the corporation in serious legal difficulties.” 449 U.S. at 391.

## 3. **Governmental Inquiries**

Congressional inquiries and investigations can also expose privileged information. Waiver can occur at hearings, at meetings with investigators for congressional committees, or with representatives of the General Accounting Office. Similarly, SEC reports (e.g., 10K, 10Q) must be truthful; however, they should not make the plaintiff's case against the

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<sup>73/</sup> The level of circulation to be permitted has been described by the Coastal States court as follows: “When the client is by nature a group, as is true of both the government and corporations, the courts have agreed that the privilege should not be defeated by some limited circulation beyond the attorney and the person within the group who requested the advice. The test . . . is whether the agency is able to demonstrate that the documents, and therefore the confidential information contained therein, were circulated no further than among those members ‘of the organization in relation to the subject matter of the communication.’ The purpose of the privilege is limited to protection of confidential facts. If facts have been made known to persons other than those who need to know them, there is nothing on which to base a conclusion that they are confidential.” 617 F.2d at 863.

company. There must be close coordination between the company's SEC counsel and counsel conducting the investigation.

#### **4. Parallel Proceedings**

Parallel proceedings can pose special problems. The timing of civil and criminal discovery carries special dangers. If a company is a government contractor, it may face suspension or debarment at the same time it faces civil and/or criminal liability. Waiver of the privilege, to keep from being suspended, can expose the company to treble damages in the civil case. If it is dealing with more than one agency of the federal government, it should try to negotiate a global agreement in which the government agrees not to disclose the information to others (e.g., plaintiffs) and agrees not to argue in court that the company has waived the privilege by making limited disclosures to the government.

#### **5. Collective Bargaining Issues**

Employers faced with requests for information from their unions have additional defensive weapons that go beyond the ones mentioned thus far. In the negotiation and enforcement of collective bargaining agreements, unions have the right to information under a "discovery-type standard." NLRB v. Acme Indus. Co., 385 U.S. 432, 436-37 (1967) (duty exists "beyond the period of contract negotiations"); NLRB v. Truitt Mfg. Co., 351 U.S. 149, 153 (1956) (duty exists during contract negotiations).

However, employers may refuse union requests not just on grounds of privilege, relevance and other typical discovery-type defenses, but also on grounds such as employee privacy, Minnesota Mining & Mfg. Co., 261 NLRB Dec. (CCH) § 27 (1982), express waiver under the collective bargaining agreement, Hearst Corp., Int'l News Serv. Div., 113

NLRB (CCH) § 1067 (1955), and confidentiality of witness statements, Anheuser-Busch v. International Bhd. of Elec. Workers, Local Union No. 2295, 237 NLRB (CCH) § 982 (1978).

In analyzing these issues, the Board will often balance the interests, rather than simply applying a straight-forward rule.<sup>74/</sup>

## **6. Fifth Amendment Protection**

A company executive may, in some circumstances, wish to utilize the Fifth Amendment right against self-incrimination. Although the privilege is that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself,” U.S. Const. amend. V, the right can be “asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; and it protects against any disclosures which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used.” Kastigar v. United States, 406 U.S. 441, 444 (1972).

## **H. Specific Recommendations for Conducting Internal Investigations**

### **1. In-House vs. Outside Counsel**

The decision whether to use in-house or outside counsel is important and should be made at the outset. The principal reasons for using in-house counsel are their greater initial familiarity with the company’s business practices and personnel, the desire to minimize interference with the normal operations of the business, and a need to minimize cash expenditures for counsel fees.

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<sup>74/</sup> See, e.g., Detroit Edison Co. v. NLRB, 440 U.S. 301, 318-20 (1979) (rejecting the rule that "union interests in arguably relevant information must always predominate over all other interests."); United States Postal Serv. v. American Postal Workers Union, 305 NLRB (CCH) 997 (1991) (finding that union's interest in individual test scores did not outweigh employer's interest in maintaining confidentiality).

The principal reasons for using outside counsel, particularly where alleged or suspected misconduct by employees is involved, are the need to complete the investigation within a time frame or in a depth which is beyond the resources of in-house counsel, avoidance of actual or potential conflicts of interest or other personal inhibitions which in-house counsel might experience, outside counsel's greater experience in conducting such investigations, the greater appearance of independence and objectivity outside counsel's work will have to judges, prosecutors and administrators, and a somewhat greater ability to structure the investigation in a manner best calculated to preserve the attorney-client privilege and attorney work-product protection. One approach is to have senior counsel within the company be assigned to work closely with outside counsel, who actually control the investigation.

**a. Thirteen Steps To Increased Protection**

Regardless who performs the investigation, certain standardized procedures should be followed. These procedures should be understood by all concerned before the need to begin an investigation arises. In order to maintain both the integrity of the investigation and the legal protection available to its product, the following 13 points should be integral to every corporate investigation.

(1) A memorandum should be prepared for signature by the responsible senior executive, directing the general counsel or designated outside counsel to conduct a confidential investigation on behalf of the corporation. It should refer to known litigation or investigations in order to invoke both the attorney-client privilege and the work-product doctrine. It should be clear that the purpose of the investigation is to provide legal advice to the corporation. It should stress the need for confidentiality and direct the lawyers to use any other departments or personnel, internal or external, that they feel are necessary. Those

personnel, in their assigned tasks, must report to lawyers directly and not through their usual chain of command. This is designed to be precautionary so that years later there will be no doubt that the attorney-client privilege was intended to be invoked.

(2) Counsel should confirm, in writing, the direction to conduct the privileged investigation. A simple memo back to the senior executive will do.

(3) Anyone else assigned to work on the investigation should receive written instruction from counsel describing the general outlines of the investigation (e.g., the caption of the case and what division or products are involved) and advising them that: (i) they have been asked to help the lawyers conduct the investigation; (ii) they are to treat all information as privileged and confidential; (iii) they should not discuss their work or findings with others; and (iv) they should not make copies of their notes or reports but should deliver all originals and work papers to the lawyers.

(4) All documents generated during the course of the lawyers' investigation should be marked "Privileged and confidential. Attorney-client communication and/or work-product material. Do not duplicate. Do not disseminate."

(5) Treat all the privileged and confidential information in a manner which tells the world that you are serious about protecting it. The more you do, the more likely that a court will uphold the privilege. Limit any disclosure to those people absolutely necessary for providing legal advice to the corporation.

(6) If you generate summaries of witness statements, sprinkle them liberally with observations about the witness, mental impressions and analysis of how that witness fits in the overall case. That will help bolster the work-product opinion quality of the summaries.

(7) When written reports are generated, number each copy and limit the distribution. Good practice suggests that the lawyers keep all the copies and only lend them to people have an absolute need to know, will not copy them, and who will promptly read and return them.

(8) If a search warrant is being executed that could snare privileged material, alert the agents and quickly call the Assistant U.S. Attorney or District Attorney in charge. Generally, they will respect the privilege. Do not be shy about seeking judicial relief.

(9) The responsibility for responding to press inquiries and government inquiries directed to the corporation should be clearly established. If the business has an in-house public relations department, a senior representative of that department should be designated to respond to press inquiries after consultation with appropriate in-house counsel (who, in turn, will coordinate with management and counsel conducting the investigation). Responses to government inquiries which relate in any fashion to the subject matter of the investigation must also be coordinated through in-house counsel in touch with the investigators to insure that the corporation does not make inconsistent or incorrect (untrue) responses to different inquiries.

(10) Senior management must be firmly discouraged from initiating non-privileged fact-gathering in the shape of demands for immediate answers addressed to junior management. These reports would not be privileged and may be inconsistent with the internal investigation. In addition, these activities can give the appearance of “headhunting,” and may also poison the well for the formal investigators.

(11) Two principal components of the internal investigation are identifying and understanding the relevant documents, and determining the extent of knowledge

of the employees. While review of the documents prior to employee interviews is preferable, time constraints often do not permit that luxury, and counsel must begin with the immediate interview of employees. At the outset, an effort should be made to identify the general categories of relevant documents and to issue a request to various departments which may house them. This is best accomplished by a memorandum over the signature of a responsible corporate official, showing that the request was made by counsel and the information is for counsel's utilization. However, in some cases special steps may be necessary to prevent the alteration or destruction of pertinent documents.

(12) In some cases, it may be beneficial to make a company-wide announcement concerning the investigation. Such an announcement can help prevent rumors and help employee morale. It may also prevent the employees from being surprised by contacts from lawyers or government agents outside the workplace.

(13) Finally, individuals may come and go from the investigation and from the company. Remind them regularly that the privilege still applies after they leave. Try to keep track of everyone who worked on the investigation. Keep current addresses and phone numbers for them. Ask them to notify you immediately if anyone asks them about the investigation or subpoenas them to testify about it.

**I. Employee Interviews as Part of the Investigation**

Employees will supply both the government's and the company's investigations with most of the relevant facts. Employees must be made aware of their rights with respect to both investigations. Non-unionized employees may now have additional rights under Epilepsy Foundation of Northeast Ohio v. NLRB, 268 F.3d 1095 (D.C. Cir. 2001), cert. denied, 122 S. Ct.

2356 (2002), to have a co-worker present during investigatory interviews where the employee reasonably believes that the interview may result in disciplinary action.

**1. The Need to Advise Employees of Their Rights and Obligations During The Internal Investigation**

It is standard practice of government investigators to contact employees directly to seek interviews. These contacts often occur at the employee's home when he or she is relaxed, away from the job environment, and more likely to communicate on an informal basis with the investigator. Some government investigators may suggest to employees that they do not need to seek counsel or consult with company representatives.<sup>75/</sup>

a. Employees are free to talk to government agents but may not know they have no obligation to do so. It is important, and entirely appropriate, for the company to advise its employees of their rights and obligations should they be contacted by government agents and asked to submit to interviews. The company may wish to distribute a memorandum to its employees containing the following points:

(1) The government is conducting an investigation as to certain matters;

(2) The government investigators may wish to interview a

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<sup>75/</sup> Government investigators operate on the principle that the fact that the corporate employer is represented by counsel is not an obstacle to interviews of the employees. Justice Department guidelines and regulations provide that unless a current employee is a controlling individual, such employee is not considered to be represented by counsel for the corporation. See 28 C.F.R. §77.10(a). Former employees are also not considered to be represented by company counsel. *Id.* § 77.01 (b). Even if the employee is represented by separate counsel, the government does not prohibit in all cases direct contact with that employee. See 28 C.F.R. Part 77; DOJ Manual §§ 9-13.210 through 9-13.260.

number of employees in connection with its investigation, and the employee has a right to decline to be interviewed by an agency or individual or to provide information, absent a subpoena;

(3) The company has retained outside counsel experienced in these matters to represent it in connection with the investigation;

(4) The company has arranged for those attorneys to be available to answer any questions and to discuss proper procedures with employees who wish to consult with counsel in the event they are contacted;

(5) The employee has a right to consult with an attorney prior to and during every interview and to have an attorney present during the interview to advise the employee;

(6) The role of separate counsel is to advise employees: (a) as to the nature of the investigation and the purpose of the government interviews, (b) of their rights and obligations in connection with the interview, and (c) whether it is in the employee's interest to be interviewed and, if so, the appropriate conditions for any such interviews;

(7) Although the company recommends that the employee consult with counsel prior to any interviews, it is the employee's sole decision whether or not to do so;

(8) The employee has an absolute right to consult with counsel prior to dealing with government's investigators or to deal with government investigators without the presence or advice of counsel;

(9) The company will be responsible for the legal fees and related expenses incurred for the employee's legal representation in connection with the

investigation, including the payment of the fees for counsel of the employee's choice should he or she decide not to consult with the attorney's retained by the company;

(10) The employee should be cautioned against turning over any documents to the investigators, since a subpoena is required. In the event the investigator has a search warrant, the "contact person" in the company must be notified immediately;

(11) The names of the persons within the company who should be contacted in the event the employee is contacted by a government investigator should be listed on the memo, as well as the names and telephone numbers of the attorneys who are involved; and

(12) In all circumstances, the employee must be truthful in responding to questions at any interview or when testifying.

b. Use of this type of memorandum has a number of advantages. It documents the nature and extent of the advice given to the employees and the propriety of that advice. It also establishes a record that will help counsel and the corporation avoid the proscriptions of the obstruction of justice statutes.

**2. Company Counsel's Obligation to Advise Employees that Counsel Does Not Represent the Employee**

a. The interviewed employee must be advised clearly at the outset that the lawyer is counsel for the company and not for the employee. The employee should be provided with a short statement<sup>76/</sup> of the purpose of the interview, which will include the fact that the government is conducting an investigation, the nature of the problem being investigated, that counsel has been retained to provide advice to the company, and that the interview is necessary

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<sup>76/</sup> The use of a standard, written Ascript≡ may be advisable.

in order for counsel to obtain the information needed to provide appropriate advice to the company.<sup>77/</sup> The employee must not be led to believe that information provided to company counsel will not be disclosed to management or to the government.

b. Indeed, the company, and not the employee, has the privilege to determine whether to share the substance of the conversation with others. It must be made clear that the employee cannot preclude its discloser either within the company or to the government.

### **3. Points of Caution in Interviews**

a. During the course of the interview, counsel must avoid any statements or comments that could be construed as an attempt to mislead the witness or to influence his or her possible testimony. Therefore, characterization of the company's position or the testimony of other witness should be avoided. The close of the interview will provide counsel with a convenient occasion to restate the employee's rights and the importance of answering truthfully any questions posed by government investigators.

b. Decisions to bring regulatory actions often depend upon inferences of employee knowledge and intent concerning conduct that occurred in the past. It is imperative that the witness thoroughly review his or her recollection of the events in question with counsel and be prepared to articulate that recollection accurately.

### **4. Do's and Don'ts – Weingarten Requests**

On June 9, 2004, the National Labor Relations Board held that employees who are not represented by a union do not have the right, under the National Labor Relations Act, to

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<sup>77/</sup> The employee may be given a memorandum from senior management instructing him or her to participate in the investigation. See Cal. Labor Code § 2856 (employee required to comply with all lawful directions Aconcerning the service on which he is engaged≅). It may also include how the employee=s time is to be charged.

have a coworker present during an investigatory interview. IBM Corp., 341 NLRB No. 148 (June 9, 2004) This right is known as the Weingarten right, based upon the Supreme Court's decision in NLRB v. J. Weingarten, 420 U.S. 251 (1975). The Board's decision in IBM marks a return to earlier precedent holding that Weingarten does not apply in a nonunion workplace. The decision eliminates this obligation for the more than 90 percent of private sector employers whose employees are not represented by a union.

For the unionized workforce, however, Weingarten imposes a specific set of obligations on unionized employers and compels new approaches to internal investigations which might result in disciplinary action. While each situation requires individualized examination and exercise of good judgment, there are certain things to remember and certain dos and don'ts:

- \* **DO** determine whether the meeting is for the purpose of an investigation of a problem or incident that could result in disciplinary action. If it is **not** investigatory, but instead, a coaching session or a meeting to implement discipline, there is no right to have a co-worker present. When you are uncertain, **do** allow a co-worker to be present if requested.
- \* **REMEMBER** to always react in the manner consistent with good human resources practices in dealing with requests to have co-workers present and in implementing discipline.
- \* **DO** inform the employee of the subject matter of the interview at the beginning of every meeting so that the employee cannot later argue that he/she was unaware that it was an investigatory meeting;
- \* **DON'T** announce that the employee has a right to have a co-worker present unless you believe that the presence of a second employee will be helpful (and most employers **don't**.)
- \* **REMEMBER** there is no obligation to read the employee his/her "rights";
- \* **DON'T** lose sight of the purposes of the investigatory meeting -- to investigate the incident or problem in order to insure that the good decisions are being made regarding possible disciplinary action;

- \* **DO** go forward with the investigation except in very limited circumstances. You will have lost the opportunity to learn more about the facts which may result in bad decisions;
- \* **DON'T** insist upon going forward with the meeting without a co-worker if the employee asks for one. You will have bought an unfair labor practice charge which could result in the disciplinary action being overturned;
- \* **DO** allow the employee to select the co-worker to be present; but
- \* **DON'T** delay the meeting if the employee's "first choice" is not available. Allow the employee to choose another co-worker. A rule of reason should be used;
- \* **REMEMBER** that the person selected must be a "co-worker" -- the right does not extend to attorneys or other third parties;
- \* **DON'T** allow the co-worker to interfere with or disrupt the investigatory meeting. If either the employee or co-worker is disruptive and cannot be brought under control, discontinue the meeting;
- \* **DO** allow the employee and co-worker to confer in private if requested;
- \* **DON'T** discipline or discriminate against employees who ask to have a co-worker present and/or refuse to meet without a co-worker being present;
- \* **DO** stress confidentiality, particularly in sexual harassment or other sensitive investigatory meetings. This should apply to both the employee and the co-worker;
- \* **DON'T** allow an employee to serve as a co-worker if the employee is a material witness or a potentially subject to disciplinary action for the same matter. Under these circumstances, advise the employee that he/she should select another co-worker to be present;
- \* **REMEMBER** most employees are not likely to be aware of their right to ask to have a co-worker present. Those who do are likely to be litigious. Be careful.

By following the suggestions above and exercising good judgment, a company should be able to avoid unfair labor practice charges and insulate itself from unions using such refusals as a rallying point to organize a company's employees.

## **J. Privacy Concerns**

Invasions of employees' privacy interests must be avoided when conducting internal investigations. Employee privacy expectations often do not mesh with the employer interest in assuring a safe workplace by monitoring or investigating workplace behavior. Privacy law generally permits an employer to reasonably investigate suspected employee misconduct; but employers must remain aware of the privacy issues that may arise.

In addition to complying with applicable statutory requirements, an employer should clearly communicate workplace regulations to all employees. Such policies should meet individual business needs and fit the reasonable privacy expectations of employees. The policy should be given to all employees and included in the employee manual. This may help an employer to limit or avoid liability pertaining to an internal investigation.

Discussed is an overview of employer practices that implicate employee privacy rights, including drug testing and testing for truthfulness. In addition, employer background checks, office searches and telephone, voicemail, and email surveillance implicate employees' privacy interests. Employers may run into additional privacy concerns and should investigate the legal implications of any policy contemplated for implementation.

### **1. Drug Testing**

Various legal standards apply to the drug and alcohol testing programs of public and private employers. Generally, private sector employees do not have protection under the United States Constitution from their employers' actions in this arena. Therefore, a private employer's drug testing of employees typically does not implicate federal constitutional rights. A private employer, however, may be subject to state common law claims where drug testing violates a legally cognizable privacy interest.

A substantial and growing body of statutory law explicitly regulates drug testing of employees. For example, certain states have enacted laws relating to substance abuse testing of both employees and applicants. Employers should be aware of the applicable laws in their states prescribing guidelines for them to follow when drug testing employees.

**a. ADA**

The Americans with Disabilities Act contains several sections related to drug and alcohol programs. The Act protects users of illegal drugs who have been successfully rehabilitated (or are in a rehabilitation program) against discrimination in private employment. 42 U.S.C. § 12114(a). However, an individual who is currently engaging in the illegal use of drugs does not qualify as a protected disabled individual. 42 U.S.C. § 12111(6)(A). Therefore, employers may lawfully prohibit the use of drugs or alcohol at the workplace, prohibit employees from being under the influence of drugs or alcohol at the workplace, hold employees responsible for alcohol and drug-related misconduct and require employees to conform with federal drug and alcohol guidelines. See 42 U.S.C. §§ 12112(c)(1)-(5).

**b. NLRB**

When drug testing union-represented employees, employers face additional restrictions. The National Labor Relations Board has held that employers must bargain under the Taft-Hartley Act prior to establishing drug and alcohol-testing programs for current employees. (This is not required for testing job applicants.) Such employers cannot unilaterally implement employee drug testing programs without committing an unfair labor practice.

## **2. Polygraph Testing & Fingerprinting**

The Employee Polygraph Protection Act of 1988 prohibits most private employers from using lie detector tests to test current employees unless the employer is:

- a. a private security firm which primary business purpose is to provide security services for public transportation facilities, proprietary information services, financial institutions handling currency, negotiable securities or precious commodities, or industries which pose a public safety risk;
- b. authorized to manufacture, distribute or dispense controlled substances and there has been a controlled substance loss or prospective employees will have access to controlled substances;
- c. investigating a workplace theft or other incident resulting in economic loss, and 1) the employee had access to the property under investigation; 2) the employer has a reasonable suspicion that the employee was involved; 3) the employer provides the employee with a written statement 48 hours before the testing takes place giving its reasons for testing particular employees; and 4) the employer maintains a written copy of the statement for at least three years.

Even where the Act allows polygraph testing, employers must adhere to strict procedural requirements.

Employees have used state Constitutional provisions to challenge polygraph testing. States such as New York and California prohibit employers from requiring an employee to be fingerprinted or photographed as a condition of employment. In such jurisdictions, employers cannot use these resources to conduct background checks.

### **3. Workplace Searches**

Employers may have a number of reasons to search in the workplace, such as discovering weapons, preventing employee use or sale of drugs, preventing theft, or even locating documents at an employee's work area. Searches of these kinds, however, may sometimes invade an employee's reasonable expectation of privacy. To determine whether the search was reasonable under the circumstances, courts balance the employer's legitimate interests in conducting the search with the privacy interests of the employee.

An employee may have some expectation of privacy even in certain items - like desks - within the employer's control, depending on usual office practices, procedures or actual regulation. Employers should provide notice to employees of their right to search desks, vehicles, briefcases, lockers, and other items without consent or knowledge.

As a general rule, courts are reluctant to interfere with the private employer's need to monitor the actions of employees for the purpose of deterring theft or other misconduct in the workplace. Even public employers have wide latitude to search the offices of their employees.

Personal searches are highly intrusive and can only be justified by a strong showing of need. Even in industries where such a need can be established, courts have required higher standards for justifying such searches. Employers should avoid conducting personal searches of employees unless absolutely necessary or obviously necessary based on suspected misconduct.

#### **Guidelines for Employer Searches**

Employer search policies should meet the following tests:

1. Search policy should be rationally related to a legitimate need of the employer.
2. There should be prior communication of the search policy to employees and applicants.
3. Intrusiveness of the search should be the minimum needed to meet the legitimate needs of the employer.
4. Employee consent - express or implied - should be obtained whenever possible (e.g., search policy is accepted work rule known by all concerned employees).
5. Searches should not be discriminatorily implemented (i.e., they should be uniformly or randomly enforced).
6. The search should provide adequate safeguards for protecting employee privacy.
7. The search results should only be communicated to those who need to know.

#### **4. Custodial Interrogations**

Employers detaining employees for questioning, even during work hours, may face false imprisonment claims. Nevertheless, most states permit employers to detain and interrogate employees for a reasonable time and in a reasonable manner; but such questioning must be supported by a legitimate business purpose.

By giving employees the option of cooperating in an investigation or facing discharge, employers may avoid the “confinement” element of false imprisonment. Employers may seek an employee waiver by requesting advance written consent to reasonable investigations and searches during the job application process.

**5. Wiretapping, Eavesdropping and Monitoring of Telephone Conversations, Voicemail, Email, and Internet Communications**

Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §§ 2510-2521 (“Title III”), proscribes (1) the intentional interception by any person of any wire, oral or electronic communication and (2) the intentional use of any electronic mechanical or other device to intercept any oral communications under many circumstances, unless the activity is covered by an exception to the prohibition. Exceptions are provided where one party to the interception has given prior consent, unless the interception is under color of law or for a criminal or tortious purpose, 18 U.S.C. § 2511(2)(d), and where interception is over a telephone extension used by the employer in the ordinary course of its business, 18 U.S.C. § 2510(3)(d).

Under the business extension exception, it has been found to be in the ordinary course of business to listen in “for at least as long as the call involves the type of information [the employer] fears is being disclosed.”

A number of states have enacted statutes that regulate the monitoring of telephone conversations, voicemail, email and internet communications. These statutes differ in whether the employer or agent recording the conversation must obtain the consent from all parties to the conversation or only one party.

Any email and internet communications policy should have the following elements to avoid employee privacy claims:

1. E-mail and internet communications are an important form of communication.
2. All communications, whether sent or received through company email or internet communications, are the property of the company and should be for legitimate business purposes only.

3. All email and internet communications should be professional in nature.

4. The use of email or internet communications for defamatory, obscene, sexually explicit, illegal, offensive, threatening communications is strictly prohibited and may lead to discipline, up to and including termination.

5. The company retains the right to monitor all email messages and internet usage during the ordinary course of business without notice to user, sender, or recipient of the message, except as restricted by applicable law.

6. Since all email messages and internet communications are the property of the company, employees have no right or expectation of privacy in these communications.

#### **6. Mail Tampering**

Federal law prohibits any person from taking mail addressed to another person before it has been delivered with the intent “to obstruct the correspondence, or pry into the business or secrets of another.” Even absent the statute, an employer may be held liable for reading employee’s personal mail.

#### **7. Federal Labor Law**

The NLRB has prohibited employer surveillance of employees engaged in union organizing activities. The Board and courts have also prohibited employers from creating an “impression of surveillance” where no actual surveillance occurs. Employee destruction of property may provide legitimate business justifications for increasing surveillance of employees during a union organizing campaign. Also, where the union organizer is a non-employee, the employer may, in most cases, engage in surveillance of his activities on the employer’s property.

## **8. Hidden Cameras**

Courts will typically be responsive to an employer's need to conduct legitimate video surveillance, so long as the employer can demonstrate that such surveillance closely serves a legitimate business purpose and that care is taken not to invade the employee's legitimate personal interests.

In the private sector, invasion of privacy and other tort claims will likely depend on whether the employee had a reasonable expectation of privacy in the area videotaped.

## **9. Informers and Spies**

State laws may restrict an employer's right to use undercover agents posing as employees. Even if permitted, the employer must use extreme care to avoid problems of invasion of privacy or entrapment.

## **10. Credit and Reference Checks - Fair Credit Reporting Act**

Many employers routinely conduct background checks on applicants and current employees to verify the accuracy of information provided and conduct criminal background checks. Effective September 30, 1997, the Fair Credit Reporting Act ("FCRA") was amended in a number of pertinent ways. 15 U.S.C. § 1681 *et seq.* As it relates to employment use of consumer reports, the FCRA was amended to require that employers provide "consumers," which includes applicants for employment and employees, with disclosure and notice that a "consumer report" may be obtained. It also requires that employers obtain authorization from consumers prior to obtaining such reports. A "consumer report" is any report containing information bearing on an individual's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics or mode of living that is provided by a third-party "consumer reporting agency." An investigative consumer report is a type of

consumer report in which the information is obtained through personal interviews. Consumer reports include records such things as criminal background histories and employment histories, as well as credit information, provided those records are obtained from a consumer reporting agency. The FCRA also requires that employers provide applicants and employees with a clear and conspicuous, separate disclosure notice informing the individual that a consumer report may be obtained. This notice must be a stand-alone document; very little other information is permitted to be included on the form.

The FCRA also governs use of consumer reports for employment purposes. Specifically, the FCRA requires that when an adverse action is taken against a consumer (such as the denial of an employment application or termination) and that action is based in whole or in part upon information contained in a consumer report, the consumer (or applicant) be notified of the information contained in the sample "Pre-Adverse Action Notice" in the attached materials. This letter must be sent prior to taking adverse action against an applicant or employee. A copy of the actual consumer report, as well as a copy of a form titled "A Summary of Your Rights Under the Fair Credit Reporting Act" must be enclosed with the Pre-Adverse Action Notice. Based upon advice from the Federal Trade Commission ("FTC"), which administers the FCRA, we recommend waiting five business days between sending the Pre-Adverse Action Letter and sending the Adverse Action Notice.

Importantly, where a facility obtains a criminal background check directly from a public source – such as the State Police – no consumer report is created. Thus, because no consumer report has been obtained, the facility need not comply with any of the requirements of the FCRA. That being said, the FTC has taken the position that employers who hire outside lawyers and others to conduct sexual harassment investigations may be liable under the FCRA.

Consequently, where an employer chooses to utilize outside counsel, both parties should be clear whether the role of the attorney is to investigate or to provide legal advice, and should be careful to draw clear lines between these functions. Where counsel is retained to provide legal advice, the attorney should refrain from engaging in fact-finding and should not be used to interview persons who might be potential witnesses in subsequent litigation. All communications between the attorney and the employer should be clearly labeled as subject to attorney-client privilege or, if appropriate, the attorney work product doctrine.

**K. Special Considerations Relative to Sexual Harassment Investigations**

Although investigation of any employee complaint should be prompt, complaints of sexual harassment must be given an even higher level of priority because the employer's liability may hinge on the employer's response. The employer must show "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise." Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 118 S.Ct. 2257, 2267 (1998); Faragher v. City of Boca Raton, 118 S.Ct. 2275 (1998). Thus, a prompt and thorough investigation is essential.

Furthermore, the duty to investigate exists regardless of whether the complainant wants an investigation. Courts have uniformly agreed with the position taken by the EEOC that an employer is not liable for sexual harassment perpetrated by co-employees if it does not have knowledge of their activity or if, when it learns of the harassment, it takes effective action to end it.

(a) The employee must have a reasonable avenue for giving notice. Courts may excuse plaintiff from the requirement of showing notice if he or she can show that there was

no reasonable means by which the employee could give notice. For example, one court credited an employee's argument that giving her employer notice of the harassment would have been futile as a practical matter, where the manager was a roommate of the alleged harasser. This was true despite the employer's promulgation of a "fair treatment policy" in its employee handbook. This is why employers are advised to provide in their employee handbook that, where a complaint to an immediate supervisor or other direct manager is not possible (such as where the complaint is against that manager), the employee may direct the complaint to another official.

(b) Harassment outside the scope of employment. In atmosphere cases, it is not necessarily a defense that the harassing employee was acting outside the scope of his employment. If an employer knows or has reason to know that sexual harassment is taking place, but does nothing about it, the employer may be directly liable for torts committed against one employee by another. One court imposed liability even though the tort was not committed in furtherance of the employer's business. The court reasoned that the employer could have prevented the harassment by reasonable care in hiring, supervising, or even firing the tort-feasor. Accordingly, the court imposed employer liability because the management had actual and constructive knowledge, but failed to remedy the harassment.

Similarly, an employer is liable for sexual harassment by non-employees, such as customers and clients, only if it had adequate notice of the harassment. One employer was found liable for requiring a female employee to cheerfully accept suggestive remarks by a non-employee client who provided the employer a substantial amount of business. Generally speaking, it is better for management to be perceived as being slightly over-reactive than under-reactive.

Record and memorialize interviews. Employers have successfully used such evidence to defend themselves when the accused claims he or she was punished excessively, or if the victim claims the harasser was not punished severely enough. Talk only to those who need to know or who you believe have information you need to verify (or discount) the complaint. In most states, management has a conditional privilege against defamation charges while investigating a sexual harassment complaint. Depending on state law, the organization may lose its privilege if it over-publicizes its investigation and conclusions.

Alleged victims and harassers, in addition to co-workers, often request both anonymity and confidentiality as a “precondition” to their cooperation with the corporate investigation. Many companies very quickly and uncritically grant “confidentiality” before realizing that the organization is not in a position to do so. Specifically, it may well be that the organization will need to rely on the information and provide it to state and/or federal investigators. The organization may find it necessary to introduce the evidence into a court of law as part of its defense to a lawsuit. Accordingly, the better practice is to promise the employee that the organization will proceed with discretion and will proceed confidentially as to those who do not “need to know.” It should be noted that absolute confidentiality is not possible.

It is also often the case that employees and manager witnesses wish to obtain a copy of the investigator’s notes. Whether to accede to such a request is a matter of management discretion. There is no federal statute or regulation, which requires a private employer to make available to witnesses a copy of corporate investigative notes. However, many investigators do share a copy with witnesses they interview and request that the person interviewed review and sign the notes to insure accuracy and later avoid a claim of inaccurate reporting. Some companies allow the witness, in addition, to take a copy of the note upon request. If such a

practice is employed, the investigator should develop a habit and practice of separately recording his/her observations, mental impressions, and conclusions in a separate, private and confidential memorandum not disclosable to the witness so as to avoid a waiver of any attorney-client or other privilege, and to avoid revealing corporate strategy should one or more of the witnesses be (or later become) hostile.

For sexual advances to constitute sexual harassment, they obviously must be unwelcome. An employer must determine in some way whether the activities complained of were indeed welcomed when they took place. In this regard, the victim's demeanor and his or her behavior at work are directly related to the inquiry. On the other hand, complainant's prior sexual conduct unrelated to the incidents at issue is not relevant to the investigation.

A complainant's credibility may be hurt if she is not a mere bystander in the sexual activity.

Some employers have a legitimate concern that notes, papers or other information gathered in the course of a harassment investigation may be self-incriminating, i.e., damaging evidence in the event of a later lawsuit. Counsel should be obtained in such cases. Often, it may be more important to be able to prove that a thorough investigation was conducted.

A prompt and effective investigation of sexual harassment claims together with prompt and effective remedial action, may limit employer liability.

If the complainant has not yet filed a lawsuit and management's conclusion is that resolution of the matter (whether in favor of the complainant or not) may resolve the claim short of litigation, the typical practice is to issue, in draft form, proposed "findings" letters to the complainant and the alleged harasser. Such a practice has the advantages that it: (1) renders an appearance of an independent impartial investigation to which a subsequently reviewing agency

or court will typically pay deference; (2) renders some assurance to the complainant and alleged harasser that the complaint has been dealt with professionally and with due process; and (3) will help record the organization's findings and conclusions for the record.

Such letters should indicate that (1) the organization had concluded a thorough and exhaustive investigation of the matter; (2) note the significant facts found (or the uncertainty with respect to certain facts); (3) proposed conclusion; and (4) proposed resolution. The letters should invite the recipient to review them for factual accuracy and to respond. Thereafter, the organization should undertake its final deliberations, issue a final letter to the parties and implement the proposed resolution, if any.

Should management conclude no unlawful sexual harassment occurred or no violation of the organization's policies occurred, it should indicate that the complainant had not brought forward facts sufficient to make out a violation of either organizational policy or a violation of law. This approach is better than telling a complainant no violation occurred. Finally, the organization should invite the complainant to supply further facts if there are any not presently known to the organization and which may serve to alter its judgment. Moreover, the organization should invite the complainant to submit further information should there be future acts of legitimate concern.

Should management conclude that sexual harassment occurred, it must make a strategic decision whether to state that unlawful employment discrimination occurred, or to simply state that a violation of "organizational policy" occurred, without reference to whether the organization is of the opinion that a violation of federal or state law occurred in addition - particularly if the complainant is not entirely satisfied with the remedy proposed by the organization.

It is also useful to attach a copy of the organization's sexual harassment policy and to note the organization's firm adherence to that policy. This will avoid any perception by the complainant that the organization does not wish to hear about or address sexual harassment complaints.

**L. Special Considerations Relative to Disability Discrimination Investigations**

The issue of whether an employer may prohibit an applicant or employee from taking or continuing in a certain position because the workers' disability poses a direct threat to his own health is an issue that has arisen in the Equal Employment area, as well as the Occupational Safety and Health area. In conducting investigations into whether an employee poses a danger to himself and/or others, a recent United States Supreme Court decision, Chevron U.S.A. Inc. v. Echazabal, 122 S. Ct. 2045 (2002), sheds much needed light in this area.

When an employer has a concern that an employee's health may cause himself further injury in the workplace or injuries to others, the employer may undertake an investigation to see whether there exists objective facts upon which the applicant or employee can be excluded from employment based on his disability under the ADA's direct threat defense. The recent Echazabal decision makes clear that an employer has an affirmative defense if it uses qualification standards to screen out qualified individuals with disabilities under the ADA if such standards are job-related and consistent with business necessity. In turn, "consistent with business necessity" has been construed to mean that an individual shall not pose a direct threat to his own health or safety or the health and safety of other individuals in the workplace. In this way, the Supreme Court noted, this affirmative defense allows employers to avoid the risk of violating OSHA, while at the same time complying with disability discrimination law.

Nevertheless, even though an employer may have an affirmative defense in not hiring or terminating a disabled worker if he or she poses a threat to himself or herself or others, the Supreme Court emphasized in Echazabal that a particularized inquiry into the harms an employee would probably face must be undertaken by the employer. In order to comply with the dictates of the ADA, the employer's direct threat defense may not be a sham, excluding a disabled individual from the workforce by relying on untested and pretextual stereotypes about disabled individuals and what functions at work they are capable of performing. Thus, an employer should strive in its internal investigation of a disabled workers' claim to be able to work in a potentially dangerous environment to ascertain objective facts which reasonable observers would agree would place that an individual in a unsuitable precarious environment for himself and/or for others.

As an example, the Echazabal case upheld the direct threat defense for Chevron in a case in which an oil refinery worker was not hired by Chevron because of the worker's liver condition, which doctors said would be exacerbated by continued exposure to toxins at the refinery. It is important to note that in Echazabal the employer relied on objective evidence from the worker's doctors in coming to its conclusion that the worker posed a direct threat to himself in the workplace.

**M. Contents of the Investigation Report**

1. After counsel has completed the interviews of the relevant employees and has reviewed the documents, a decision should be made whether to generate an internal report. If it is decided that one is appropriate, it should consist of the following components:
  - a. A description of the investigative process, including why and by whom, how the investigation was conducted, and what issues were explored;

- b. A detailed summary of the facts;
- c. An analysis of applicable legal principles;
- d. An identification of perceived weaknesses in the company's practices and procedures;
- e. A review of the potential administrative and criminal sanctions;
- f. An outline of the arguments against those sanctions and criminal prosecution; and
- g. Recommendation of corrective action to cure the deficiencies and enhance the company's administrative and criminal defenses.

5. If a report is prepared for outside disclosure, its emphasis may be somewhat different from the internal report. However, any report prepared for outside disclosure must be absolutely consistent on all material points with any internal report.<sup>78/</sup> An outside report might include the following elements:

- a. An introduction addressing how and why the investigation was begun, by whom it was conducted, over what time period, and what issue(s) it addressed;
- b. A description of the investigative process set forth in a fashion designed to show its thoroughness (for example, setting forth the number of documents reviewed and interviews conducted).
- c. A summary of the pertinent factual findings;

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<sup>78/</sup> The internal report and the outside report also must be completely consistent with any underlying notes or memorandum.

- d. A description of any corrective actions taken, with emphasis on how they will help prevent the problem from recurring;
- e. A brief description of any disciplinary actions taken (probably without names); and
- f. Any financial action with the company has taken or intends to take (for example, refunds or restitution to customers).
- g. An outside report also may include appendices containing more detailed findings and pertinent documents. These must be tailored to the purpose that the outside report is intended to serve and its expected audience. However, in excluding information care must be taken to avoid concealing pertinent information or creating the appearance of a superficial report.

**N. Workplace Violence**

The murder of seven people by a coworker at Edgewater Technology, Inc. in Wakefield, Massachusetts heightened awareness of the ongoing problem of violence in the workplace. Workplace homicides remain the third leading cause of on-the-job deaths.

In addition, employers may face legal liability for workplace violence, whether perpetrated by an employee or customer, against an employee or third party. By following the below-mentioned suggestions for developing a workplace violence prevention policy, employers may be able to avoid incidences of workplace violence and minimize their liability should such an incident occur.

**1. Employer Liability to Employees and Third Parties**

Employers whose workplaces have been the site of violence may be subject to citation by OSHA or to civil suits by employees or third parties who were victims of such

violence. OSHA bases its authority to regulate workplace violence on the General Duty Clause, Section (5)(a)(1), of the OSH Act. The General Duty clause requires employers to furnish employees with a working environment free from a condition or activity in the workplace which (1) presents a hazard to employees; (2) is recognized by the employer or industry as hazardous; (3) has the potential for causing death or serious physical harm; and (4) can be eliminated or reduced by feasible means.

However, the Occupational Safety and Health Review Commission (OSHRC) has been reluctant to hold employers liable for workplace violence, particularly where the act of violence was committed by a third party. In Secretary of Labor v. Megawest Financial, Inc., OSHRC Docket No. 93-2879 (May 8, 1005), the first workplace violence case to go to trial before the OSHRC, an administrative law judge dismissed the citation against the owner of an apartment complex whose employee had been attacked by a resident of the complex. The judge found that there was insufficient proof that the employer was aware of the hazard posed by third parties to the employee. The judge also noted that the legislative history of the Act is devoid of any indication that OSHA should police social behavior, and that OSHA enforcement in this area would create an extraordinary burden on both OSHA and employers.

Despite this reluctance of the OSHRC to impose liability on employers under the Act, there are still several reasons for employers to be concerned. First, state statutes modeled after the Act may be used to impose liability. The New Jersey Worker Health and Safety Act, for example, which largely mirrors the federal statute, requires that employers maintain a reasonably safe and healthful place of employment, and that employers utilize protective devices and safeguards where a substantial risk is inherent in the operation.

In addition to breach of statutory duties, employers may be held liable under theories of negligence, including vicarious liability (respondeat superior), negligent hiring, retention, and supervision, and premises liability. Vicarious liability is predicated on the agency relationship between the employer and employee, and is therefore limited to acts committed by the employee within the scope of employment. However, liability for negligent hiring, retention, and supervision is direct liability and is not limited to acts committed within the scope of the employment relationship. An employer can be held liable for these torts beyond the scope of employment where the employer knew or had reason to know of an employee's particular unfitness and could have reasonably foreseen that such qualities created a risk of harm to others.

Some courts have also applied a theory of premises liability in cases of workplace violence committed against both employees and third parties. Premises liability is based on the notion that the proprietor of a business owes a duty to patrons to provide a reasonably safe place to do that which is within the scope of the invitation. Whether or not an employer has been negligent in failing to prevent a violent incident will depend on whether the harm was foreseeable, given the totality of the circumstances. However, even in cases where an employer has taken some preventive measures, the court may deem these to be inadequate. For example, in Butler v. Acme Markets, Inc., 89 N.J. 270, 280, 445 A.2d 1141, 1146 (1982), the court reinstated a verdict for the plaintiff, who had been assaulted and mugged in the defendant's parking lot. The court held that a jury could have reasonably concluded that hiring one security guard who remained primarily inside the store was an insufficient measure, given the history of attacks on the premises.

## **2. Preventing Workplace Violence: Recommendations for Employers**

In order to avoid workplace violence and minimize liability if an incidence does occur, employers must develop a cohesive workplace violence prevention program. The following Ten Tips for Preventing Workplace Violence can serve as a foundation for such a program:

1. Conduct a thorough assessment of violence-related hazards in the workplace. (Employers should be aware that such assessments may be discoverable unless protected by attorney-client privilege.)

2. Develop a written workplace violence policy statement. This should include work rules prohibiting violent acts and threats, including examples of forbidden conduct, and should state a zero-tolerance policy towards such behavior. The policy should outline disciplinary procedures, and procedures for handling and reporting violent incidences.

3. Institute a training program which will educate employees the workplace policy, as well as signs of potential workplace violence, prevention strategies and emergency procedures.

4. Create a threat assessment team, including human resources and security personnel, for receiving, reporting and investigating incidences of workplace violence.

5. Implement security measures and safe work practices, which are feasible given the nature of the business. Such measures may include external lighting, surveillance systems, sign-in systems or key card access.

6. Conduct careful pre-employment screening, including reference, previous employment, and criminal background checks where appropriate. Such investigative

measures should be implemented with the assistance of legal counsel, as there are limits and procedural safeguards for requesting such information under both federal and state statutes.

7. Monitor employees for signs of workplace violence and provide supervisors with training on how to do so. Warning signs may include belligerent behavior towards supervisors, coworkers and customers, anger and depression,

8. Provide Employee Assistance Programs (EAPs) which can provide troubled employees with confidential assistance for problems, which may contribute to workplace violence.

9. Respond promptly to all threats of workplace violence.

10. Keep careful records of all incidences of workplace violence, even if they are relatively small.

Additionally, OSHA has issued two industry-specific sets of recommendations, “Guidelines for Preventing Workplace Violence for Health Care and Social Service Workers” and “Guidelines for Workplace Prevention Programs for Night Retail Establishments.” These guidelines may provide helpful suggestions for employers in other types of businesses.

Workplace violence prevention programs should be developed in consultation with legal counsel to ensure that they are both adequate to minimize liability and not violative of federal or state laws.

### **CONCLUSION**

In sum, corporate awareness of the appropriate manner in which to respond to external investigations and to conduct internal investigations is an indispensable tool in today’s employment environment. Further, by conducting internal investigations, a corporate entity can

ensure compliance with state and federal employment laws and regulations and thereby be prepared for external agency investigations and limit or avoid the costly litigations and potentially enormous financial liability. This paper has attempted to identify the manner in which investigations are conducted by various governmental agencies charged with enforcing employment statutes. It has also attempted to describe the manner in which employers may prepare for such investigations by conducting internal investigations and/or self-critical audits in order to identify and correct possible deficiencies. Careful preparation is the key component of any company-based program or procedure designed to meet compliance responsibilities under myriad employment related statutes.

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