

CONDUCTING A LABOR RELATIONS SELF-AUDIT: AN OUTLINE FOR EXAMINING PERSONNEL POLICIES & PROCEDURES

§ 1 I. RECENT TRENDS & DEVELOPMENTS

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Now more than ever, employers are facing an escalation in potential liabilities and obligations created by the continuing trend of enormous growth and expansion in employment litigation.¹ Recent events have led to significant developments in potential employer liability. Significant developments in legal doctrine and the creation of new areas of risk, including the possibility of joint employer liability for franchisors and franchisees, have fueled the growth of employer liability. For example, the continued expansion of social networking media has created new danger zones of potential risk for employers by complicating the intersection between employee privacy and the workplace. First we will present some of the recent trends in employment law necessitating a focus on preventive measures to minimize the potential for litigation and employment-related claims.

Following that discussion, we will raise a series of important questions regarding labor and employment relations to guide employers through a critical self-audit to identify problem areas. The self-audit is designed to aid employers in evaluating the strengths and weaknesses of their personnel policies and procedures. Although some of these issues may already be apparent, the audit focuses attention on deficiencies and potential problems that employers may have overlooked but need to address and resolve.

§ 1.1 A. PRIVACY

A. PRIVACY

From employee blogs, Twitter and Facebook pages to background checks and cross-border transfers of information within multinational corporations, more and more aspects of the employer-employee relationship are raising privacy concerns. Properly resolving those concerns presents an enormous challenge for employers as the web of federal, state, local and international privacy laws becomes increasingly complex. For instance, employers must meet the challenge of on-going compliance with the Health Insurance Portability and Accountability Act (HIPAA) Privacy and Security Rules. Also, the Genetic Information Nondiscrimination Act of 2008 (GINA),² which is intended to encourage Americans to take advantage of advances in the genetic sciences without fear of adverse consequences, provides broad protections in employment and health benefits against the improper collection, use or disclosure of employees' genetic

¹ The Equal Employment Opportunity Commission (EEOC) publishes statistics on the number of discrimination and retaliation charges filed each year. The numbers reflect a sobering reality for employers. See U.S. Equal Emp't Opportunity Comm'n, *Enforcement and Litigation Statistics*, available at <http://www.eeoc.gov/eeoc/statistics/enforcement/index.cfm>.

² 42 U.S.C. § 2000ff-10.

information. In 2013, the Equal Employment Opportunity Commission (EEOC) filed its first lawsuit alleging genetic bias, which was soon followed by the filing of the EEOC's first class-action lawsuit under GINA.³ The EEOC's class-action lawsuit alleges that the employer unlawfully demanded and obtained applicants' genetic information in violation of GINA by conducting post-offer, pre-employment medical exams of applicants and requesting family medical histories.⁴ The EEOC's actions are consistent with its Strategic Enforcement Plan where it announced its intention to target class-based recruitment and hiring practices, as well as stay vigilant in enforcing new legislation and in addressing and pursuing emerging issues affecting the workplace.⁵

In the past several years, there has been an explosion in online social networking. More and more employees are resorting to the Internet and social media to rant about their employers, and with employees increasingly providing information about their personal lives online, social networking has important implications for employers. Between August 2011 and May 2012, the National Labor Relations Board's (NLRB) Acting General Counsel issued three separate reports discussing social media cases, including cases involving review of employer social media policies as well as cases involving employee terminations or discipline for social media postings.⁶ Largely following the opinions provided by the Acting General Counsel in these reports, the NLRB has issued several decisions showing its willingness to strike down employer social media policies or other policies purportedly limiting employee speech and to protect employee social media postings.⁷ Further, more than a dozen states in the past two years have enacted laws prohibiting employers from demanding or accessing job applicants' or employees' social media passwords, and at least 36 states have introduced or have similar legislation pending.⁸ These trends provide

³ U.S. Equal Emp't Opportunity Comm'n, Press Release, *Fabricut to Pay \$50,000 to Settle EEOC Disability and Genetic Information Discrimination Lawsuit*, May 7, 2013, available at <http://www.eeoc.gov/eeoc/newsroom/release/5-7-13b.cfm>.

⁴ U.S. Equal Emp't Opportunity Comm'n, Press Release, *EEOC Files Class Genetic Information Discrimination Suit Against Corning Rehab Center*, May 16, 2013, available at <http://www.eeoc.gov/eeoc/newsroom/release/5-16-13a.cfm>.

⁵ U.S. Equal Emp't Opportunity Comm'n, *Strategic Enforcement Plan: FY 2013–2016*, available at <http://www.eeoc.gov/eeoc/plan/sep.cfm>.

⁶ Anne Purcell, *Report of the Acting General Counsel Concerning Social Media Cases* (Mem. OM 12-59) (May 30, 2012); Anne Purcell, *Report of the Acting General Counsel Concerning Social Media Cases* (Mem. OM 12-31) (Jan. 26, 2012); Anne Purcell, *Report of the Acting General Counsel Concerning Social Media Cases* (Mem. OM 11-74) (Aug. 18, 2011).

⁷ *Dish Network Corp.*, 359 N.L.R.B. No. 108 (2013); *Design Technology Group, L.L.C.*, 359 N.L.R.B. No. 96 (2013); *Hispanics United of Buffalo*, 359 N.L.R.B. No. 37 (2012); *Karl Knauz Motors, Inc.*, 358 N.L.R.B. No. 164 (2012); *Costco Wholesale Corp.*, 358 N.L.R.B. No. 106 (2012).

⁸ See National Conference of State Legislatures, *Employer Access to Social Media Usernames and Passwords*, available at <http://www.ncsl.org/research/telecommunications-and-information-technology/employer-access-to-social-media-passwords-2013.aspx>.

proper warning that employers must review (and likely revise) their policies regarding employee use of social media.

Employers should also consider developing appropriate policies to regulate the workplace use of the latest technologies—location-based tracking, real-time communications monitoring, instant messaging and video/camera phones, to name a few. Additionally, drug and alcohol testing policies and employee assistance agreements should respect employee privacy rights.

With the latest and greatest technological advancement comes the risk for potential security breaches. Such security breaches can result in damaging publicity, significant out-of-pocket expenses and undercut employee and customer loyalty. These steps should be considered in preparing for and responding to a security breach:

1. Preparing for a security breach:

- a. Build an incident response team, which should include: information technology personnel; human resources professionals; business unit leaders; in-house or outside counsel; and public relations specialists.
- b. Prepare the team for a security incident by assigning specific roles and responsibilities to the team members.
- c. Conduct security awareness training on how to improve the security of information systems and how to identify suspicious activity indicative of a security breach.

2. Responding to a security breach:

- a. Investigate the breach.
- b. Contact law enforcement.
- c. Determine notice obligations.
- d. Prepare a notice of security breach.
- e. Take appropriate remedial action.

Further, in a 2010 case, the U.S. Supreme Court, for the first time, addressed the intersection of workplace monitoring of electronic communications and employee privacy expectations. In *City*

of *Ontario v. Quon*, the Court held that the City of Ontario Police Department did not violate the Fourth Amendment’s proscription on unreasonable searches by reviewing sexually explicit text messages sent by a police sergeant using a City-issued pager.⁹ In reaching this conclusion, the Court recognized the judiciary must exercise caution when determining employee privacy rights or expectations “vis-à-vis employer-provided technological equipment [which] might have implications for future cases that cannot be predicted.”¹⁰

Following its own instruction, the Court in *City of Ontario* ultimately avoided making any decision as to whether the police sergeant had any expectation of privacy in his text messages because the Court was able to determine that the City’s “noninvestigatory work-related” search did not violate the Fourth Amendment.¹¹ It is worth noting, however, that the City maintained a computer use policy advising employees they had no expectation of privacy in communications sent or transmitted using the City’s equipment, and the Court did acknowledge that “employer policies concerning communications will of course shape the reasonable expectations of their employees, especially to the extent that such policies are clearly communicated.”¹² In this regard, courts have concluded that such policies defeat employee expectations of privacy when using an employer’s electronic equipment to store information or to send or transmit messages, effectively likening such situations as having the employer looking over the employee’s shoulder and listening to conversations.¹³

§ 1.2 B. CORPORATE LEGAL COMPLIANCE

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The demand for corporate legal compliance continues to grow, especially in light of disclosures that rocked corporate America after the turn of the century. The corporate scandals involving Enron, Arthur Andersen, WorldCom, Tyco, ImClone and Xerox caused investors around the world to lose confidence in corporate America. That shaken confidence was further damaged by the collapse of the global financial markets in 2008 and the resulting recession. These events spawned numerous proposals to improve companies’ financial reporting processes and re-establish investor confidence. Most notably, Congress passed the Sarbanes-Oxley Act in 2002 to require public companies to affirmatively report on the internal control over their financial reports

⁹ 130 S. Ct. 2619 (2010).

¹⁰ 130 S. Ct. at 2630.

¹¹ 130 S. Ct. at 2631.

¹² 130 S. Ct. at 2625, 2630.

¹³ See, e.g., *U.S. v. Hamilton*, 701 F.3d 404 (4th Cir. 2012); *Holmes v. Petrovich Dev. Co., L.L.C.*, 191 Cal. App. 4th 1047, 1051–52 (2011); *Alamar Ranch, L.L.C. v. County of Boise*, 2009 U.S. Dist. LEXIS 101866, at **11–12 (D. Idaho Nov. 2, 2009); *Scott v. Beth Israel Med. Ctr. Inc.*, 847 N.Y.S.2d 436, 440 (N.Y. Sup. Ct. 2007); *Long v. Marubeni Am. Corp.*, 2006 U.S. Dist. LEXIS 76594, at **11–12 (S.D.N.Y. Oct. 19, 2006).

and to have auditors confirm the accuracy of the company's report. The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank") followed, in which Congress strengthened a number of provisions in Sarbanes-Oxley.

Individual liability is a reality for corporate officers. Sarbanes-Oxley and Dodd-Frank, as well as increasing enforcement by federal regulators, have created additional grounds for individual corporate officer liability. Individual liability also extends to labor and employment law, as supervisors can be held personally liable under the Family and Medical Leave Act (FMLA), the Fair Labor Standards Act (FLSA) and some state harassment laws, such as California's Fair Employment and Housing Act.

The keys to implementing a successful compliance program lie within the human resources and corporate counsel departments. It is particularly important that these departments choose to take an active role in promoting compliance policies by:

- learning the nomenclature of the compliance world—in particular, the governing standards set forth by the Federal Sentencing Guidelines;
- applying this nomenclature to their compliance programs; and
- using the company's code of conduct to strengthen existing human resources policies.

§ 1.3 C. CLASS ACTION AVOIDANCE

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In a well-publicized jury verdict in 2010, a New York jury awarded \$3.4 million in compensatory damages and \$250 million in punitive damages in a gender discrimination class action—one of the largest gender discrimination verdicts ever.¹⁴ This case provides a chilling example of a "policy and practice" discrimination class action fueled by anecdotal examples of isolated, inappropriate conduct, and underscores the need on behalf of organizations for significant class action avoidance efforts.

In conjunction with corporate compliance, self-audits of labor and employment policies identify potential problems before claims are filed and thereby limit the risk of future litigation. In particular, self-audits can eliminate the possibility of future wage and hour class action lawsuits.

Practical compliance recommendations in preventing employment law class actions include "Eleven First Steps:"

¹⁴ *Velez v. Novartis*, 2010 U.S. Dist. LEXIS 125945 (S.D.N.Y. Nov. 30, 2010).

1. Assess the company's current compliance efforts and policies.
 - Are those efforts covered by the attorney-client privilege?
 - Does the company conduct a self-audit?
 - Does the company conduct a more formal audit?
 - How does the company coordinate all the compliance assessments that it conducts?
2. Determine who is responsible for the compliance effort and at what levels.
 - What is the expertise of those responsible?
 - What are the limits, if any, on their authority?
 - Consider the creation of a Chief Compliance Officer (CCO) position.
3. Review employee complaint processes, documentation process and the speed of a company response.
4. Review (and upgrade, if necessary) the investigation processes. (Evaluate the human resource skills available and whether any additional or upgraded training is necessary.)
5. Evaluate and upgrade training programs for managers. Consider employee training as well.
6. Review the hiring and promotion avenues available within the company.
 - Are jobs posted?
 - What standards are used—subjective and/or objective standards?
 - What is the review process for hiring and promotion decisions?
7. Conduct a “protected” statistical evaluation of the workforce, including the following areas:

- hiring decisions;
- promotions; and
- managerial statistics.

8. Review each job description and the work actually performed. Include reviews of:

- exempt positions;
- nonexempt positions; and
- if changes in classification need to be made, what process should be followed?

9. Monitor class action trends and industry developments, including:

- breaks, meal periods and bonuses;
- court decisions and changes in legislation or regulation; and
- industry trends highlighted by trade association publications.

10. Evaluate and use technology, such as:

- time records (the 50% solution);
- Open Compliance and Ethics Group (OCEG) online learning library;¹⁵
- Employment Law Learning Technologies, offering online training solutions through NAVEX Global;¹⁶
- compliance systems; and
- hotline technologies.

¹⁵ See the Open Compliance and Ethics Group's website at <http://www.oceg.org>.

¹⁶ See NAVEX Global's website at <http://www.navexglobal.com>.

11. Consider alternative dispute resolution (mediation and arbitration), and monitor evolving standards of compliance.

- While federal and state law may vary to a degree on this issue, the U.S. Supreme Court has increasingly acted to support class-action waivers and enforce arbitration agreements.¹⁷ Following this trend, the Second Circuit Court of Appeals in *Sutherland v. Ernst & Young L.L.P.*¹⁸ enforced a class-action waiver and rejected an employee's attempt to avoid arbitration on the basis that proceeding in arbitration individually would be "prohibitively expensive."

- In *D.R. Horton, Inc.*, the National Labor Relations Board (NLRB) held that an employer's mandatory arbitration policy requiring employees to pursue any claims against the employer individually, and preventing employees from pursuing class or collective actions, violated the National Labor Relations Act.¹⁹ On appeal, the Fifth Circuit Court of Appeals overturned the NLRB's decision. In addition, numerous courts addressing the validity of class action waivers in arbitration agreements have rejected the NLRB's reasoning in *D.R. Horton* as violative of the policies underlying the Federal

¹⁷ See, e.g., *American Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012); *AT&T Mobility L.L.C. v. Concepcion*, 131 S. Ct. 1740 (2011). As for the variances between federal and state law, certain jurisdictions—most notably, California—have taken a strong stance against the enforceability of class-action waivers. See, e.g., *Gentry v. Superior Court*, 42 Cal. 4th 443 (2007). However, the continuing validity of the *Gentry* case is questionable, and various federal courts have concluded that its reasoning does not withstand the U.S. Supreme Court's ruling in *AT&T Mobility L.L.C. v. Concepcion*, which overturned a lower court's decision invalidating an arbitration agreement covered by the Federal Arbitration Act because it disallowed classwide proceedings. While at least two California state appellate courts have questioned *Gentry*'s continued validity, the California Supreme Court has not yet disapproved or overruled it, and, until such time, it appears to remain the law in California. See *Truly Nolen of Am. v. Superior Court*, 208 Cal. App. 4th 487, 505–07 (2012). But see *Marmet Health Ctr. Inc. v. Brown*, 132 S. Ct. 1201, 1203–04 (2012) (reiterating that the FAA displaces any state law purporting to prohibit arbitration of claims made arbitrable under the FAA). However, an opinion from the California Supreme Court is expected in 2014 that may weigh in on this issue, as it granted review in a case questioning the continued validity of *Gentry* in 2013. See *Iskanian v. CLS Transp. of Los Angeles*, 2012 Cal. LEXIS 8925 (Sept. 19, 2012).

¹⁸ 726 F.3d 290 (2d Cir. 2013); see also *Pomposi v. Gamestop, Inc.*, 2010 U.S. Dist. LEXIS 1819 (D. Conn. Jan. 11, 2010) (holding that an arbitration agreement waiving employee's right to pursue class action claim is enforceable).

¹⁹ 357 N.L.R.B. No. 184 (2012).

Arbitration Act (FAA) and the U.S. Supreme Court's decision in *AT&T Mobility L.L.C. v. Concepcion*.²⁰

§ 1.4 D. WORKPLACE CRISIS MANAGEMENT

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A self-audit can assist employers with implementing a system of workplace crisis management. In early 2009, the United States declared a “health emergency” regarding an outbreak of the H1N1 influenza. The ensuing crisis had a ripple effect into the workplace. Employers were suddenly confronted with difficult questions about how to respond (Can sick employees be sent home? Can employers require vaccinations? Do employers have to inform all employees when one employee is diagnosed with H1N1?). These questions reminded employers once again that it pays to be prepared.

Following September 11, 2001, the dismal state of private sector emergency preparedness prompted the highest levels of government to first identify and then endorse a “national preparedness standard.” The National Fire Protection Association Standard on Disaster Management, Emergency Management, and Business Continuity Programs (“NFPA 1600”) is the “National Preparedness Standard” for the private sector. The roadmap for establishing an emergency preparedness plan is contained in NFPA 1600.²¹ Compliance with NFPA 1600 is voluntary, but, as discussed below, employers have very good reasons to take NFPA 1600 seriously because it is increasingly becoming the benchmark against which preparedness is measured.

§ 1.4(a) NFPA 1600 Preparedness Checklist

- Ensure that the organization knows about NFPA 1600 and has considered its potential application.
- Identify a key person as responsible for crisis preparedness planning.

²⁰ *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1053–54 (8th Cir. 2013); *Carey v. 24 Hour Fitness USA, Inc.*, 2012 U.S. Dist. LEXIS 143879, at **3–6 (S.D. Tex. Oct. 4, 2012) (“The *Horton* decision has been widely criticized by many district courts who have refused to follow its ruling.”); *Truly Nolen of Am.*, 208 Cal. App. 4th at 514–15; *see also Sutherland*, 726 F.3d at 297 n.8 (noting that the NLRB’s decision in *D.R. Horton* may be invalid if the appointment of three members was unconstitutional) (citing *Canning v. NLRB*, 705 F.3d 490, 499 (D.C. Cir. 2013), *cert. granted*, 133 S. Ct. 2861 (2013)).

²¹ NFPA 1600 sets forth a comprehensive process for devising and implementing a crisis management plan. NFPA 1600 itself can be downloaded at www.nfpa.org, or www.ready.gov/business, a site operated by the Department of Homeland Security (DHS).

- Create a multidisciplinary committee to bring together the resources and expertise to create and administer a plan.
- Revisit the existing plans and match them against the elements of NFPA 1600.
- Where appropriate, use the language of NFPA 1600. If it becomes necessary to show that the organization is meeting the National Preparedness Standard, the similarity of language will be helpful.
- Examine the training recommendations within NFPA 1600 and make sure that the organization meets those standards.
- Evaluate the plan and compliance efforts periodically.
- Monitor any changes to NFPA 1600 and the evolution of legal requirements and standards surrounding the areas of crisis preparedness. Especially, follow any industry or state requirements that may evolve.
- Evaluate the impact of NFPA 1600 on the organization's insurance coverage and investment potential. Take advantage of the organization's compliance where appropriate.
- Monitor DHS announcements regarding recommendations or educational offerings associated with Crisis Management. Check www.ready.gov/business.

§ 1.5 E. CHANGES IN DISCRIMINATION & RETALIATION: RECENT CASES

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In *Lewis v. City of Chicago*, the U.S. Supreme Court unanimously held that the plaintiffs alleged a viable claim of disparate impact discrimination when a charge of discrimination was filed within 300 days of the *application* of an alleged discriminatory employment policy, even if the policy was *adopted* by the employer well outside the statute of limitations.²² In this case, the City of Chicago adopted an allegedly discriminatory employment practice that disparately impacted African American applicants. While the adoption of this employment practice occurred long before the 300-day charge-filing deadline, the application of this employment practice (*i.e.*, the actual selection of other candidates) occurred *within* 300 days of when one plaintiff filed his EEOC discrimination charge. On that basis, the Court held the case could go forward,

²² 130 S. Ct. 2191, 2197–98 (2010).

significantly increasing the potential liability for employers from disparate impact claims. Under this ruling, employers may be liable for ongoing policies that have a disparate impact on protected classes of employees, even if the policy was adopted long before.

While the federal courts have remained active in this area, state courts have also increased the stakes for employers in employment discrimination and retaliation cases. For example, employers should also keep in mind a 2010 controversial decision by the New Jersey Supreme Court. In *Quinlan v. Curtiss-Wright Corp.*, the New Jersey Supreme Court found that an employee's act of stealing and using her employer's confidential personnel documents in furtherance of her discrimination lawsuit constituted protected activity under the New Jersey Law Against Discrimination, for which she should not have been terminated.²³ The decision raises serious employer-employee privacy and trust concerns, as employers may no longer safely discharge a thieving or disloyal employee if the stolen documents may evidence conduct prohibited under workplace discrimination or whistleblower laws. However, in December 2013, a New Jersey Superior Court ruled that the qualified privilege recognized in *Quinlan* should not be applied to protect a criminal defendant from prosecution for having taken confidential documents to support a retaliatory discharge claim.

Beyond case law, there has also been an almost constant evolution of legislative efforts to support discrimination and retaliation (in particular) claims. For example, in March 2011, the EEOC issued its final regulations to implement the American with Disabilities Act (ADA) Amendments Act of 2008. The amendments make it easier for an employee to prove that he or she has a disability covered under the ADA.²⁴

§ 2 II. OVERVIEW: THE LAW OF SELF-AUDITS

There is no law that generally requires an employer to conduct a comprehensive self-audit. However, the increasing number of laws and regulations that regulate the employment relationship and the workplace make the use of periodic audits important to avoid legal landmines.

The potential benefits of conducting a comprehensive self-audit are significant. For instance, accurate recordkeeping is essential to ensuring compliance with the FMLA.²⁵ As a further example, employee background checks are becoming more regular, and

²³ 8 A.3d 209 (N.J. 2010).

²⁴ 29 C.F.R. § 1630; *see also* 76 Fed. Reg. 16977 (Mar. 25, 2011), *available at* <https://www.federalregister.gov/articles/2011/03/25/2011-6056/regulations-to-implement-the-equal-employment-provisions-of-the-americans-with-disabilities-act-as>.

²⁵ 29 U.S.C. §§ 260 *et seq.*

employers must be certain to comply with the required but complicated consent and notice provisions under the Fair Credit Reporting Act (FCRA).²⁶

Evaluating and updating job descriptions to determine whether an individual or group of employees are accurately considered exempt or nonexempt under the FLSA²⁷ and corresponding state laws and regulations is crucial to avoid the current tidal wave of class-action lawsuits seeking back wages and statutory penalties for misclassified employees. By the same token, determining whether workers are properly designated as independent contractors can avoid significant potential liability under the FLSA as well as federal tax laws.

Ensuring personnel files are complete and include all essential components such as copies of offer letters, applications, drug testing/background check consent forms, personnel manual acknowledgements, at-will employment acknowledgements and any other forms used by the employer is crucial to defending potential claims for wrongful termination, breach of contract or other causes of action frequently asserted in an employment lawsuit under state law. Often, poorly maintained personnel files create unnecessary hurdles exploited by plaintiffs' counsel in employment litigation.

Although numerous laws make a self-audit increasingly complicated, the potential benefits cannot be understated. On the other hand, failing to conduct periodic evaluations of an employer's policies, procedures, practices and other issues outlined below can result in a multitude of legal liabilities. Consequently, the self-audit remains an important tool for all employers.

In the franchise setting, franchisors should remain cognizant of being considered a joint employer with the franchisee if the franchisor exerts too much control. Currently, only legally separate entities that exert a significant and direct degree of control over employees, and their essential terms and conditions of employment, are considered joint employers. Essential terms and conditions of employment are those involving hiring, firing, discipline, supervision and direction of employment.

The NLRB has not issued a formal decision stating a new rule to find a joint employer, but has shown a willingness to consider a new rule.²⁸ The NLRB General Counsel advocated looking for "indirect control" and determining whether "industrial realities" make a company a necessary party to collective bargaining.²⁹ This would shift the inquiry from whether there is day to day

²⁶ 15 U.S.C. §§ 1681 *et seq.*

²⁷ 29 U.S.C. §§ 201 *et seq.*

²⁸ The NLRB invited *amicus* briefs as to whether it should adopt a new joint employer standard in *Browning-Ferris Industries of California, Inc., d/b/a Newby Island Recyclery & FRP-II, LLC. d/b/a Leadpoint Business Services*, NLRB Case. No. 32-RC-109684 (filed April 30, 2014).

²⁹ The General Counsel filed an *amicus* brief advocating a new standard as discussed above. *See Amicus*

control to whether there is operational control. Franchisors should interact mainly with managers and supervisors, leaving day to day employee contact to be handled by the franchisee. This means to the extent possible, franchisees should institute procedures to conduct the audits and take action to ensure compliance to establish the franchisee has day to day operational control.

§ 3 III. PRACTICAL RECOMMENDATIONS

§ 3.1 A. OUTLINE OF ISSUES & CONCERNS TO BE ADDRESSED IN A SELF-AUDIT

A. OUTLINE OF ISSUES TO BE ADDRESSED IN A SELF-AUDIT

A comprehensive outline of the issues, policies and practices that all employers should consider is set forth below. Although the frequency of periodic self-audits will vary with the size and complexity of each employer, annual self-audits are appropriate for most of the issues identified below. Whether more frequent self-audits are necessary should be discussed with legal counsel depending on the issue involved.

Although strict confidentiality may be difficult to maintain, the information gathered and considered during a self-audit should be carefully controlled. If appropriate, a team of company representatives should be designated to gather relevant information; a smaller employer may designate a single human resources representative to conduct the self-audit.

Gathering accurate information about the employer is the cornerstone to any self-audit. The outline of issues and concerns below includes notations for key documents that should be gathered during the self-audit. If documentation does not exist for any of the issues and concerns identified in the self-audit, the employer should take proactive steps to implement appropriate reporting and recordkeeping procedures.

Once all the relevant information is gathered, it should be considered in a timely manner to ensure that recommendations arising from the analysis of the information can be implemented appropriately. Changes to an employer's policies, procedures and practices arising from a self-audit should be supported by appropriate documentation that can be retrieved and referenced if the need arises for subsequent regulatory or litigation purposes. For instance, copies of outdated policies and procedures that are periodically updated should nevertheless be archived to document the employer's good faith efforts to meet its legal obligations. Ensuring that updated policies and procedures are distributed to each worksite or to all employees, as appropriate, is also important to ensure the benefits of the self-audit are realized throughout the company.

Brief of the General Counsel, *Browning-Ferris Industries of California, Inc., d/b/a Newby Island Recyclery & FRP-II, LLC. d/b/a/ Leadpoint Business Services*, NLRB Case. No. 32-RC-109684. (filed June 26, 2014) (“*Amicus Brief*”).

Concerns raised by this audit may require consultation with legal counsel to ensure that personnel policies and practices comply with applicable state and federal laws. In fact, many of the issues and questions discussed here are also raised by former employees and their attorneys in lawsuits following termination of employment. Careful consideration of the issues and questions raised in this audit, prior to legal consultation, can greatly reduce the time and expense of having legal counsel thoroughly review a company's personnel policies and procedures.

When conducting an audit, employers should recognize that discussions and notes regarding the audit ordinarily will be subject to discovery during subsequent litigation. Plaintiffs' counsel could use these discussions and notes as a "road map" to potential areas of weakness in a lawsuit, or even to prove the employer's liability. There are several privileges that employers may be able to apply to limit the use of audit information. However, the privileges apply only in limited circumstances, and it may be extremely burdensome, if not impossible, to satisfy all of the legal requirements for certain privileges. Employers are therefore advised to conduct audits and investigations, even those utilizing attorneys, as though the information generated will later be discoverable. This is particularly important when there is a possibility of criminal investigation by law enforcement agencies. Before undertaking an audit, it is advisable to consult with legal counsel to determine the applicability of any privileges and what steps can be taken to preserve any privileges that are potentially applicable. In general, do not assume that any audit will be completely "confidential."

The following outline identifies issues, concerns, policies and practices that should be addressed in a self-audit, and serves as a roadmap for the collection of audit information.

§ 3.1(a) *Company Organization*

A. Total number of employees:

1. Currently?
2. One year ago?
3. Two years ago?

B. Does the company have an organization chart?

1. If so, obtain copies of company-wide and departmental charts.

2. If not, is there some other document showing the organization (*e.g.*, a telephone directory, etc.)?

3. If not, prepare a “draft” working chart showing major functional areas and reporting relationships (*e.g.*, production, sales, engineering, finance, human resources, etc.).

a) Make sure that the “draft working chart” is labeled as such.

4. Is there a chart showing the Franchisor/Franchisee relationship or the franchise operational structure?

C. Organizational structure:

1. Is the structure appropriate for meeting goals?

2. Are levels of supervision appropriate?

3. Is there an appropriate span of control?

4. Does authority overlap?

5. Are there multiple superiors?

6. Is authority commensurate with responsibility?

7. How does the franchisor set and monitor operational and brand standards?

8. What authority does the Franchisor have over the Franchisee’s employees?

9. Does the Franchisor retain direct control over hiring, firing, discipline, supervision and direction of the Franchisee’s employees?

D. Organizational effectiveness:

1. Is employee competence appropriate for positions?
2. Is the quantity of employees adequate to meet goals?
3. Do employees know their responsibilities?
4. Do employees understand reporting relationships?
5. Are decisions being made at proper levels?
6. Is work delegated to appropriate levels?
7. Are responsibilities accepted?
8. Is supervision of subordinates adequate?

E. What are the job classifications or positions?

F. How many employees are in each classification or position?

G. How many employees are employed:

1. Full-time?
2. Part-time?
3. In temporary positions?

H. Job descriptions:

1. Who prepares the job descriptions? Franchisor or Franchisee?
2. Does the company have job descriptions for employees in the following categories? (If so, obtain copies.)
 - a) Managerial?
 - b) Supervisory, administrative, technical and professional?
 - c) Nonexempt salaried?
 - d) Hourly?
3. Are job descriptions reviewed and updated regularly?
 - a) What are the procedures for update and review?
 - b) Are changes in existing jobs incorporated?
 - c) Are descriptions adopted for new jobs?
4. Do the job descriptions clearly specify in detail:
 - a) Responsibilities?
 - b) Authority?
 - c) Essential and non-essential job functions?
 - d) Reporting relationships?

e) Titles?

f) Qualifications?

g) Range of compensation?

5. Do the job descriptions include job specifications regarding:

a) Physical requirements?

b) Education and training?

c) Skills and experience?

d) Scheduling limitations?

e) Licensing?

f) Bonding?

6. Are the job descriptions used:

a) In evaluating jobs?

b) In recruiting and advertising open positions?

c) In organizational planning?

d) In counseling?

e) In evaluating whether an employee is eligible for a medical leave of absence, or to return to work from such a leave?

7. To whom are job descriptions available?

8. What organizational sector has responsibility for preparing and maintaining job descriptions?

9. Have the job descriptions been reviewed by an outside consultant such as an attorney specializing in employment and labor law?

I. Does the company utilize independent contractors? If so:

1. Are they covered by a written contractor agreement? (If so, obtain copy.)

2. Has their independent contractor status been verified by counsel?

J. Does the company require employees to sign an agreement protecting the company's proprietary information, inventions and/or trade secrets? (If so, obtain copies.)

K. Do employees enter into agreements preventing solicitation and unfair competition? (If so, obtain copies.)

L. What efforts are undertaken to protect the company's proprietary information, inventions and/or trade secrets?

1. What security provisions are in place?

2. Is information provided on a need to know basis?

3. Are these standards set by the Franchisor?

4. How does the franchisor monitor compliance to protect brand proprietary information?

§ 3.1(b) *Administration of Human Resources & Industrial Relations*

A. Does the company have a human resources department? If so:

1. How many employees are on its staff?
2. Are the human resources staff employees of the Franchisor or the Franchisee?
3. What is the ratio of company employees to human resources staff?
4. What is the amount of its annual budget?
5. Obtain a copy of the department's organizational chart or construct a functional chart if none is available.
6. To whom does the manager report?

B. Which of the following functions does the human resources department perform?

1. Employment:

a) Recruiting?

b) Selection?

c) Placement?

d) Orientation?

2. Human resources services (*e.g.*, recreation, employee facilities, counseling)?

3. Human resources record maintenance? Are records kept by both the Franchisor and Franchisee?

4. Wage and salary administration?

5. Employee and labor relations?
 6. Internal investigations?
 7. Review of disciplinary action?
 8. Training and supervisory/management development?
 9. Safety?
 10. Medical?
 11. Food service?
 12. Research?
 13. Benefits?
 14. Benefits or insurance plans provided by an outside organization?
 15. Communications?
 16. Administration of affirmative action/equal employment opportunity programs?
 17. Other?
- C. To what legal/professional organizations do the human resources staff members belong?
- D. Which professional journals do they receive?
- E. What training/continuing education do the human resources staff members undergo?
- F. Are they aware of all the current legislative requirements?
- G. How does the human resources department keep apprised of new legal developments?
- H. Does the human resources department have an ongoing liaison with outside labor and employment law counsel?

I. How is the human resources department's function viewed by supervisors and management?

J. Do human resources department representatives meet with supervisors and management to assist in solving day-to-day personnel issues?

K. Do human resources department representatives solicit suggestions or information from supervisors and management before developing programs?

L. Is the human resources department proactive or reactive?

M. Does the human resources department view itself as representatives of management or advocates for employees?

N. Does the company have a Human Resources Policy Manual? (If so, obtain copy.)

O. Does the company have a Human Resources Procedures Manual? (If so, obtain copy.)

P. Who is responsible for assuring that the company complies with all current state and federal posting requirements?

Q. Summary evaluation of human resources department:

1. Is department organization appropriate?

2. Is the staff adequate?

a) Quality?

b) Quantity?

c) Ongoing training?

3. Its role in the company:

- a) Is it properly utilized?
- b) Is its authority adequate?
- c) Is there sufficient communication?
- d) Is its contribution respected?

4. What is its cost per new hire?

R. Does the company maintain a personnel record for each employee? If so:

- 1. What does it contain? (Obtain blank copy of each document.)
- 2. Does it impermissibly identify employees' race, color, religion, sex, national origin, ancestry, sexual orientation, physical or mental disability, including AIDS or positive HIV status, age, genetic characteristics, or marital or veteran status?
- 3. Does the company have a policy permitting a supervisor to maintain, or prohibiting a supervisor from maintaining, "shadow" personnel files?
- 4. What are retention and storage requirements for "shadow" personnel files?
- 5. Is there a procedure for retention of the "shadow" personnel files when supervisors leave or are promoted out of the position?

S. How does the company record changes in employee status, such as promotions, leaves of absence, rates of pay, etc.? (Obtain blank copies of any forms used.) Are those forms created by the Franchisor or the Franchisee?

T. Does the company provide employees with copies of documents that affect their status?

U. Do employees have access to their own personnel records?

1. Can they make copies?
2. What are the rules for access?
3. Can employees add responsive documents or statements?
- V. Are there security procedures in effect to protect employee privacy?
- W. Are medical records or records containing medical information stored in a location separate from other personnel records?
- X. Is all employee genetic information stored in a confidential medical file separate from the employee's personnel file?
- Y. Are I-9 forms kept in a location separate from other personnel records?
- Z. Does the company use personnel records in connection with any of the following:
 1. Hiring?
 2. Transfers?
 3. Promotions?
 4. Performance reviews?
 5. Disciplinary action?
 6. Staff planning?
 7. Development of employment statistics?
 8. Company reorganizations?
 9. Reductions in force, layoffs or downsizing decisions?

§ 3.1(c) *Workforce Planning*

A. Staffing:

1. Is the number of open positions acceptable?
2. Is the level of competence adequate?
3. Is the company understaffed?
4. Is the company overstaffed?
5. Is backup personnel adequate?
6. Is talent appropriately distributed?

B. Planning techniques:

1. Are there any formal workforce plans? (If so, obtain copies.)
2. Does the Franchisor play any role in determining Franchisee staffing levels? Please describe.
3. Are these plans consistent with company objectives:
 - a) Short term?
 - b) Long term?
4. Are the planning criteria appropriate for determining company needs?
5. Are workforce forecasts:

a) Accurate?

b) Based on effective application of sufficient source data?

6. Do Franchisor planners work closely with Franchisees?

7. Are tools and aids (charts, etc.) effectively used?

8. Are plans updated sufficiently and frequently?

C. Planning programs:

1. Is planning authority at the appropriate level?

2. Are control mechanisms centralized?

3. Is planning feedback adequate? How does the Franchisee provide feedback to the Franchisor?

4. Is coordination adequate with:

a) Internal placement?

b) External recruiting?

c) Management development?

5. Management inventory program:

a) Is it formally established?

b) Is it centrally controlled?

c) Is information easily retrievable?

d) Is information sufficient regarding the following:

(1) Vital statistics?

(2) Background?

(3) Special skills?

(4) Current performance?

(5) Potential for advancement?

e) Is the company sufficiently aware of its internal talent?

6. Is there a succession program?

7. Are there other planning programs? (If so, describe.)

8. Do franchisees share information about their employees with other franchisees?

§ 3.1(d) *Recruitment & Hiring*

A. Requisition:

1. Is the requisition procedure for staffing adequately standardized and formalized? Is it efficient?

2. Does the Franchisor set the requisition standards and policies?

3. Are the means adequate for specifying the requirements of the position to be filled? Does the Franchisor specify the requirements for franchise positions?

4. Is the authority to hire or create positions at the proper level? Does the Franchisee make all hiring decisions for its operations?

B. Recruitment:

1. Are current employees given appropriate consideration?
2. Are recruitment programs planned? Does the Franchisor conduct any company-wide recruitment programs?
3. What recruitment sources are used and what is the annual cost?

a) Advertising?

b) Internal referrals? (Describe program, if any.)

c) Employment agencies?

d) Executive search?

e) Other? (Describe.)

f) Does the Franchisor's website refer applicants?

4. Are recruitment procedures in step with the EEOC's revised Compliance Manual?

C. Selection:

1. Which of the following selection methods are used?

a) Preliminary screening?

b) Interview by:

(1) Human Resources department? At the Franchisor or Franchisee level?

(2) Supervisor?

(3) Staff psychologist?

c) Testing:

(1) If so, describe the tests.

(2) who develops the tests? Are the tests used throughout the brand?

(3) Are the tests validated?

d) Reference investigation. (If so, describe.)

e) Credit and criminal records investigation. (If so, describe.)

(1) If performed by a third party, is the investigation in compliance with the federal FRCA and any applicable state law?

(2) Does the company use authorization and disclosure forms that comply with the FCRA and any applicable state law?

f) Education verification. (If so, describe.)

g) Legally permissible physical examination. (If so, describe.)

h) Legally permissible preemployment drug test. (If so, describe.)

i) Legally permissible honesty test. (If so, describe.)

j) Legally permissible search for information regarding the applicant on the Internet. (If so, describe.)

2. Are the methods used appropriate and job-related?

3. Are interviewers properly trained?

4. Are applicants provided information about the company, the position and career potential?

5. Are applicants provided with a written job description?

6. Are applicants given a realistic picture of the position to be filled?

7. When vacancies are filled by outside hires, are the reasons explained to affected current employees?

8. Are applicants required to complete and sign an employment application?

9. If so:

a) Obtain a copy.

b) Is the job application prepared and provided by the Franchisor?

c) Has the company filed a copy with the appropriate state agency such as the California Division of Labor Standards Enforcement?

d) Is the applicant provided a copy?

e) Does the application contain any questions or specifications as to race, color, religion, sex, national origin, ancestry, sexual orientation, marital or veteran status, genetic characteristics, physical or mental disability, including AIDS or positive HIV status, age or other categories protected by state and local law?

f) Does the application inform the applicant that employment with the company is at will?

g) Does the application require the employee to authorize the company to conduct a background investigation?

(1) If so, does the authorization language comply with the FCRA and any applicable state law?

10. Is anyone under 18 years of age employed?

a) If so, is the company in compliance with legal requirements regarding the employment of minors?

11. Are any employees required to be bonded? If so, who pays for the bond?

12. Are applicants required or requested to furnish photos? If so, who pays for them? If so, is there any state law prohibiting such a request?

13. Are applicants required to submit the documentation required by the Immigration Reform and Control Act (IRCA) before commencing employment?

14. Does the company complete and properly maintain I-9 forms as required by the IRCA?

15. Are candidates kept informed of their status?

16. Are selection determinations appropriately communicated to candidates?

17. Is appropriate relocation assistance provided?

D. Are the following aspects of the company's candidate evaluation procedures adequate?

1. Initial screening?

2. Technical skills?

E. Job offers:

1. Are appropriate personnel involved in hiring decisions?
2. Are offer procedures appropriate?
3. Are offer procedures standardized? (If in writing, obtain copy.) Who prepares those standards?
4. Does the company have a standardized offer letter? (If so, obtain copy.)
5. If an offer letter is provided:
 - a) Does it establish at-will employment status?
 - b) Does it establish the company's right to change terms and conditions of employment?
 - c) Does it provide for alternative dispute resolution or arbitration?
6. Are outstanding offers monitored?
7. Is follow-up on offers adequate?

F. Recruiting staff:

1. Is the number of recruiters sufficient? Who employs the recruiters?
2. Are recruiters qualified?
3. Are the recruiters' goals consistent with the company's?

G. Statistics:

1. What is the number of new hires annually?
2. How many vacancies are filled by internal transfers or promotions? Are vacancies filled with employees from other Franchisees?
3. How many offers are made?
4. What is the interview/offer/acceptance ratio?

H. Payroll expenses:

1. What is the company's total salary expense?
2. What is the salary expense as a percentage of all expenses?
3. What percentage of fringe benefits is paid by the company versus that paid by the employee? Who sets that ratio?

4. Trends:

- a) What is the current number of employees?
- b) What is the company's total salary plus fringe benefit expense?
- c) How does the salary expense compare to other expenses?
- d) What is the average salary per employee?

§ 3.1(e) *Orientation, Training & Development*

A. Training function:

1. Is the training function adequately planned?

a) Who establishes the training standards for the franchise?

b) What employee/manager groups receive training?

c) Is the training budget adequate to provide training to the target groups?

d) Who pays for training? Franchisor or Franchisee?

e) What is the size of the training staff?

(1) Is this size sufficient to effectively administer training?

2. What types of training are offered?

a) One-on-one training.

b) Group training.

(1) Classroom.

(2) Distance learning.

c) Computer-based training.

(1) Web-based.

(2) Server or Intranet.

(3) CD-ROM.

3. Who performs the training?

a) In-house staff?

(1) Training department?

(2) Human resources?

(3) Corporate counsel?

(4) Franchisor staff?

b) Outside trainers?

(1) Organizations specializing in workplace training?

(2) Human resources consultants?

4. Do professional trainers (outside trainers) conduct the training?

a) Does the organization review the skills and experience of the trainers providing the specific training involved?

b) Has the organization verified the trainer's credentials and resume?

- c) Has the organization verified the trainer's references and recommendations?
 - d) Has the organization reviewed the specific training materials used?
 - e) Have the training materials been customized to meet the organization's specific training objectives and priorities and to incorporate the organization's policies and procedures?
5. Are the (in-house) individuals who are providing the training properly trained?
- a) Is there adequate documentation of the skills of the individuals providing the training?
6. Is the training properly documented?
- a) Are training materials retained?
 - b) Are sign-in sheets or other evidence of attendance used and retained?
7. Who develops the programs?
8. How is program content determined?
9. Are needs analyses and job analyses performed?
10. Are the programs objective-oriented?
11. How are the programs evaluated?
12. Does the program content match the goals of the training?
13. Is the human resources department appropriately involved?
14. Is in-house legal counsel appropriately involved?
15. Is there any brand required training?

B. New employees:

1. Does the organization have an orientation program? (If so, describe or obtain copy if in writing.)
2. Are the individuals providing orientation properly trained?
 - a) Does the Franchisor conduct training for new Franchisee employees?
 - b) Who prepares the training materials for new Franchisee employees?
3. Does the organization have an instructional program? (If so, describe or obtain copy if in writing.)
4. Does the organization have an employee handbook? (If so, obtain copy.)
5. What materials are provided to new employees regarding the organization, benefits, and the job? (Obtain copies.)
6. Is training provided to new employees in addition to orientation?
7. Does the new employee training include training related to harassment and discrimination?
8. Who provides the training?
9. Do the materials provided to new employees include policies pertaining to employee privacy, use of electronic equipment and social networking? (Obtain copies.)

C. Current employees:

1. Is continued training provided to current employees to broaden their present skills and enable them to acquire new skills? (If so, describe.)

a) Does the company comply with any state law mandating training for supervisors, managers and/or employees?

2. Does the organization have any apprenticeship programs? (If so, describe.)

3. Is training provided to supervisors regarding any of the following? (If so, describe and obtain copies of any materials provided.)

a) Organization policies and procedures?

b) Organization structure and operations?

c) The role of supervisors?

d) Supervisory/managerial skills?

e) Legal requirements of the job?

f) Managing within legal requirements (hiring, performance management, terminations).

g) Actions that could generate lawsuits, such as harassment (including harassment of all protected categories), discrimination, wrongful discharge, privacy, defamation, assault and battery, false imprisonment, etc.?

h) Safety and health training?

i) Violence and threatening conduct in the workplace?

j) Employee/human relations?

k) Substance abuse in the workplace?

l) Appropriate use of e-mail and the Internet?

m) Union avoidance?

n) Managing the unionized workforce?

o) Wage and hour law, compensation and employee benefits?

p) Leaves of absence (workers' compensation, FMLA)?

q) Social networking policies?

4. Is training provided to nonsupervisors regarding any of the following? (If so, describe and obtain copies of any materials provided.)

a) Workplace harassment (including harassment of all protected categories)?

b) Discrimination?

c) Violence in the workplace?

d) Safety and health training?

e) Human relations (sensitivity training)?

5. Has the organization adequately identified its training needs and goals?

a) Has the organization identified applicable laws requiring training as set forth in federal, state, and local statutes, regulations and ordinances, as well as case law?

b) What is the process for updating information regarding applicable laws requiring training?

c) Has the organization identified additional training requirements such as skills training, harassment training, workplace violence training and occupational safety and health training?

d) Has the organization identified industry practices regarding additional training?

e) Has the organization reviewed its prior claims and litigation experience in determining training needs?

f) Has the organization surveyed its supervisors and employees to determine the areas in which they believe training is needed?

6. Describe any other in-house training programs.

a) Do employees verify in writing that they have attended such programs?

b) Are these training programs informational or skill-related?

7. Does the organization support, provide or sponsor any outside training or educational programs for its employees? (If so, describe.)

8. Does the organization have tuition assistance or other program to assist employees in furthering their education? (If so, describe.)

9. Is the training offered on a nondiscriminatory basis and does the organization reasonably accommodate trainees with disabilities?

D. Management development:

1. How is management trained?

2. Is there a formal training program? (Obtain copies if in writing.)

3. What is the program content?

4. Who provides the program instruction?

5. Who determines management training needs and program content?

6. Does the organization use any outside programs?

7. How is use of outside programs determined?

8. How does the organization evaluate the results of these training programs?

9. Does the organization utilize any of the following means of developing management skills?

- a) Rotational job assignments?
- b) Task forces?
- c) Personal counseling or coaching?
- d) Development plans for identified weaknesses?
- e) Self-development?

§ 3.1(f) *Promotions & Transfers*

A. When are employees eligible for promotion?

- 1. Is an employee eligible for promotion within the brand?
- 2. Who determines eligibility requirements for Franchisee employees?

B. Does the company conduct any tests to determine employee eligibility for promotion? If so, are these tests validated? Who prepared the tests.

C. Who is responsible for determining individual employee eligibility for promotion?

D. Are such tests open equally to all employees?

E. What are the selection criteria for choosing among employees with equal qualifications?

F. Are employees informed of open positions?

G. Are all employees eligible for promotional opportunities considered equally?

H. Does the company attempt to fill job openings by internal promotion before considering outside applicants?

I. Are internal candidates given official preference to external applicants?

J. Who makes promotion decisions?

K. How are promoted employees' pay rates determined?

L. If employee fails to perform satisfactorily after promotion or transfer:

1. Is employee eligible for transfer?

2. Is employee offered return to prior position?

3. What other action does company take?

M. Who prepares the forms used for promotions and transfers?

§ 3.1(g) *Fair Employment Practices*

A. Does the company have policies against discrimination based on race, color, religion, creed, sex, national origin, ancestry, sexual orientation, physical or mental disability, including AIDS or positive HIV status, age, genetic characteristics, marital status, veteran status and all other categories protected by state and local law for the following:

1. Applications?

2. Hiring?

3. Promotions and demotions?

4. Transfers?

5. Salary increases?

6. Work assignments?

7. Terminations?
8. Reductions in force?
9. Reorganizations?
10. Employee discipline and performance management?
11. Other?

B. If so:

1. Are such policies in writing? (Obtain copy.) Who prepared the policies?
2. How are they communicated to employees?
3. Are policies reviewed and updated regularly?
4. Do managers receive regular training on nondiscrimination policies and procedures?

C. Has top management taken any action to demonstrate the company's opposition to discrimination and harassment in the workplace?

1. If so, describe such action.
2. Obtain copies of any pertinent written instructions and policies.

D. Has the company implemented a policy prohibiting harassment?

1. How has the policy been communicated to employees?
2. Is the policy in writing? (Obtain copy.)

3. Is the policy posted in the workplace?

4. Does the policy comply with state and federal requirements regarding dissemination of harassment policies?

a) In addition to prohibiting sexual harassment, does the policy prohibit all forms of prohibited harassment?

5. Is there a confidential complaint procedure included in the policy and procedure prohibiting harassment?

E. Have the company's supervisors and human resources department been required to familiarize themselves with, and act in conformance with, state and federal equal employment opportunity laws, including the ADA? (If so, obtain copies of any written instructions.)

F. Do company job advertisements, employment applications or personal interviews contain any specifications as to race, color, religion, creed, sex, national origin, ancestry, sexual orientation, physical or mental disability, including AIDS or positive HIV status, age, genetic characteristics, marital status, veteran status or other categories protected by federal, state or local law? If so:

1. Describe.

2. Obtain representative copies.

G. Have any government agencies been informed of the company's policies?

H. Does the company employ any persons who are members of minority groups or classifications protected by equal opportunity laws?

I. Does the company maintain a record of employees' or applicants' race, color, religion, sex, national origin, ancestry, sexual orientation, physical or mental disability, including AIDS or positive HIV status, age, genetic characteristic, marital status, veteran status or

other categories protected by federal, state or local law for use in legal reporting? (If so, obtain copy.)

J. If the company employs any persons who are members of minority groups or classifications protected by equal opportunity laws:

1. Total number?
2. What are their job classifications?
3. Total number of promotions?
4. Total number of terminations?
5. Number of supervisors and managers?

K. Who in the company is responsible for administering fair employment practices?

L. Is the company involved in government contracting? If so:

1. Does the company have affirmative action requirements?
2. Does the company have affirmative action plans and goals? (Obtain copy.)

M. What is the company's history regarding discrimination complaints, conciliations, outstanding or pending lawsuits, or other actions?

N. If subject to the ADA, has the company taken any of the following steps to ensure compliance:

1. Identified an individual or group of individuals to be responsible for ensuring compliance?

2. Reviewed existing job descriptions and/or prepared new job descriptions to clearly specify:

a) the requisite skills, experience, background and other qualifications for the job position;

b) the essential job functions; and

c) the non-essential job functions?

3. Reviewed job applications to ensure compliance?

4. Reviewed preemployment testing to ensure that all testing is job-related and does not screen out qualified individuals with disabilities?

5. Ensured that medical examinations are required of all new hires in a particular job category and are required only after a job offer has been extended?

6. Trained supervisory personnel on the requirements of the ADA?

7. Reviewed personnel policies to ensure nondiscriminatory treatment of individuals with disabilities?

8. Prepared a written policy describing the company's adherence to the requirements of the ADA and setting forth the internal procedures for compliance and enforcement?

9. Established a team of individuals to review requested accommodations, discuss options for accommodation and recommend methods for overcoming workplace and job-related barriers and impediments?

10. Prepared a form for documenting all efforts at reasonable accommodation?

11. Conducted a survey of the workplace and physical environment to ensure compliance with all ADA requirements (*e.g.*, appropriate number of disabled parking spots, access ramps, etc.)

§ 3.1(h) *Hours of Work*

- A. What is the established number of workday and workweek hours?
- B. What is the established number of workweek days?
- C. When does the workday and workweek begin and end?
- D. How many shifts are operated?
- E. Do all employees work the same shift? If not, how are shift assignments made?
- F. What are the starting and quitting times?
- G. How are work hours recorded?
- H. Do any employees work more than six days in a week? If so, under what circumstances?
- I. Does the Franchisee report workday, shifts or employee hours to the Franchisor?
- J. Does the company provide rest periods? If so:
 - 1. What is their duration?
 - 2. At what time of day are they taken?
 - 3. Are break times recorded?
 - 4. Does local law permit voluntary waiver of rest period by employees?
 - a) Has company obtained written, signed waiver of rest period that complies with all legal requirements?
- K. Does the company provide meal periods? If so:

1. What is their duration?
2. At what time of day are they taken?
3. Are meal break times recorded?
4. Are any employees required to eat on the job?

a) If so, does the company comply with legal requirements for on-the-job meal periods?

5. Does local law permit voluntary waiver of meal period requirement by employees?

a) Has company obtained written, signed waiver of meal period requirement that complies with all legal requirements?

L. Overtime work:

1. Does the company have a policy for authorization of work beyond regular work hours?
Who prepared that policy?

a) Is overtime authorization policy regularly monitored and properly enforced?

2. Are all overtime work hours properly documented?

3. How is overtime work assigned?

4. Does the company equalize hours?

5. How and when does the company notify employees assigned overtime work?

6. What policy does the company maintain regarding an employee's refusal to work overtime? Who prepared that policy?
7. If the company offers compensatory time off in lieu of overtime, does it comply with all the legal requirements?
8. Does the company have an attendance control system? Who monitors that system?

§ 3.1(i) *Compensation*

- A. What is the company's minimum rate of pay? Who sets that rate of pay?
- B. How frequently are employees paid? What are the company's regular paydays?
- C. Has the company posted a notice of day, time and place of regular paydays? (If so, obtain copy.)
- D. Does the company pay by cash or check?
- E. What deductions does the company withhold?
- F. If deductions are taken for other than taxes, how are deductions authorized?
- G. Does the company furnish itemized statements of deductions with pay?
- H. Does the company pay nonexempt employees for overtime hours worked in accordance with state and federal law?
- I. How does the company calculate an employee's regular rate in determining the amount of overtime due?
- J. Does the company pay overtime-exempt employees for overtime hours worked? If so, describe the circumstances and rate of premium pay.
- K. What criteria are used to distinguish between exempt and nonexempt employees?
- L. Are exempt employees paid a salary or fee in accordance with applicable law?

M. Are any impermissible deductions made from an exempt employee's salary for time not worked (*e.g.*, deductions for partial week absences, etc.)?

N. Does the company pay a premium for work by nonexempt employees on the sixth consecutive day of work? If so, at what rate?

O. Does the company pay a premium for work by nonexempt employees on the seventh consecutive day of work? If so, at what rate?

P. Does the company pay a premium for work by nonexempt employees on Saturdays or Sundays? If so, at what rate?

Q. Does the company pay a premium for work by nonexempt employees on holidays? If so, at what rate?

R. What is the company's practice when an employee reports for work and there is no work to perform? Who sets that policy?

S. Does the company ever request employees to return to work after they have gone home? If so, how are these employees compensated?

T. How soon after voluntary and involuntary termination of employment is an employee paid his or her final wages?

U. Are employees paid for absences for personal reasons? If so, under what circumstances? Who sets that policy?

V. Are employees paid for absences for:

1. Personal illness or injury?
2. Illness or injury in the immediate family? (Define.)
3. Death in the immediate family? (Define.)
4. If so, under what circumstances in each instance?

W. What attendance records does the company keep?

X. How does the company treat absences without notice?

Y. Does the company have a formal sick leave program? (If in writing, obtain copy.)
Who sets that policy? If so:

1. How many days of sick leave are accrued per year?

2. What is the length of service eligibility requirement?

3. What type of absences are covered by sick leave?

a) Is doctor's certification required?

4. Is sick leave monitored?

5. Are abuses of sick leave properly addressed?

6. Is accumulation of unused sick leave in excess of one year's allowance permitted?

7. If the company permits accumulation, is there a cap on the total amount?

8. Under what circumstances, if any, does the company pay employees for unused sick leave?

Z. Does the company pay employees who attend summer military encampments (*i.e.*, Reserve or National Guard)? If so, what amount?

AA. Does the company deduct from pay for tardiness of nonexempt employees? If so, describe the policy and practice. (If in writing, obtain copy.)

BB. Does the company have a policy or practice of taking deductions from the salary of exempt employees or any form of paid time off for absences of less than one day?

CC. Does the company keep records of tardiness?

DD. Does the company grant cost-of-living adjustments? If so, describe the practice and method used to calculate.

EE. Does the company grant paid time off for voting? If so:

1. How much time?

2. Is advance notice required?

FF. Does the company grant time off for jury or witness duty? Who sets that policy? If so:

1. Are employees paid? How much?

2. Is there a cap on paid time off?

GG. Does the company accept wage assignments from employees? If so, what is the procedure?

HH. What is the company's policy and practice regarding payment to employees who resign?

II. What is the company's policy and practice regarding payment to discharged employees?

JJ. Does the company provide severance pay on termination, layoff, resignation or discharge?

1. If so, describe or obtain copy.

2. Has this policy been verified for compliance with the Employee Retirement Income Security Act (ERISA)?

KK. Does the company have a formal compensation program? (If so, obtain copy.)

LL. Are compensation ranges established for each job classification? If so, how are the ranges determined?

MM. Are all employees paid within the applicable range for their job? Does the Franchisor play any role in setting applicable ranges for Franchisee employees?

1. Is documentation required for exceptions to applicable compensation range?

NN. Is the compensation paid to the company's female employees comparable to that paid to male employees performing the same work?

OO. Are jobs within the company rated in relation to each other? Does that rating apply to different Franchisees?

PP. How are jobs evaluated? How frequently are jobs reevaluated or updated?

QQ. Are wage surveys performed? Who performs those surveys? If so:

1. Are they current?

2. Do they cover all employees?

3. Are they performed properly?

RR. Are pay ranges revised as a result of these surveys?

SS. Is the compensation program administered effectively?

TT. Are compensation decisions made at the proper level?

UU. Are compensation adjustments:

1. Timely?
2. In line with the compensation program?
3. Properly approved?

VV. Are starting wages:

1. In line with compensation ranges?
2. Properly determined and approved?
3. Comparable to existing wages of other recent hires?

WW. Does the system permit exceptions (red-circle rate)?

XX. Do employees appear satisfied with their wages?

YY. Incentive programs:

1. Does the company have a formal incentive program? Who prepared that program? (If so, obtain copy if in writing.)

2. Does the company have any kind of profit-sharing plan? Who prepared that plan? If so:

a) Obtain copy if in writing.

b) Who is eligible to participate?

c) How is the extent of participation determined?

d) In what form is payment made?

3. Does the company have a year-end bonus plan? Who determines that plan? If so:

a) Obtain copy if in writing.

b) Does the company have minimum service requirements for eligibility?

c) How is the amount determined?

4. Are bonuses discretionary or triggered by productivity goal?

a) If nondiscretionary, are bonuses calculated into base rate for calculation of rate of overtime compensation?

5. Do the incentives improve productivity, etc.?

6. Are the amount of incentives paid used in calculating the amount of extra overtime compensation due nonexempt employees?

7. Employee attitudes:

a) Are they satisfied with the program?

b) Are they aware of the incentives?

c) Do they recognize the relationship between performance and compensation?

ZZ. Performance reviews:

1. Does the company conduct employee performance reviews? If so:

a) For which employees?

b) How frequently?

c) Who performs the review?

d) Is feedback provided to employees at appropriate intervals?

e) Are supervisors trained in reviewing subordinate employees' job performance? Who conducts the training?

f) Are reviews made in connection with prospective pay increases?

g) Is a checklist or guide provided for evaluation purposes? Who prepares the checklist for Franchisee employees?(If so, obtain copy.)

h) Do the reviews appropriately measure performance?

i) Do supervisors discuss performance reviews with each employee?

j) Is the accuracy and objectivity of evaluations monitored to avoid inappropriately positive or negative evaluations?

k) Is the performance review data used in management development/training and staffing requirements?

l) Is the human resources department appropriately involved?

m) Are employees required to sign an acknowledgment that they received the performance review?

(1) Is there a practice or procedure for employees that refuse to acknowledge receipt of performance reviews?

AAA. Merit increases:

1. Have performance criteria been established in advance and communicated to employees? Who establishes that criteria?
2. Is there a formal means of relating compensation to performance?
3. Is there an appropriate relationship between compensation and performance?
4. Are wage increases based solely on merit?
5. How frequently are wages reviewed?
6. How is the amount of increase determined?
7. Do employees in the same pay range receive the same merit increase?

§ 3.1(j) *Fringe Benefits*

A. Which of the following fringe benefits does the company offer? Who determines the benefit plans for Franchisee employees? (Obtain copies of all fringe-benefit plans if in writing.)

1. Life insurance?
2. Hospitalization, surgical and medical insurance?
3. Sickness and accident insurance?
4. Major medical insurance?
5. Disability insurance?
6. Dental insurance?

7. Optical or vision care insurance?
8. Travel accident insurance?
9. Pension or retirement plan?
10. Savings plan?
11. Stock purchase plan?
12. Credit union?
13. Paid holidays?
14. Paid vacations?
15. Educational reimbursement plan?
16. Length-of-service benefits?
17. Childcare?
18. Other?

B. Life insurance:

1. What are the eligibility requirements (service and salary level)?
2. What is the schedule of benefits (amounts)?
3. Who pays for the insurance?
 - a) Fully paid by the company?
 - b) Partially paid, partially contributory?

c) Entirely contributory?

4. What is the company's cost per month?

5. What is the employee's cost per month?

C. Hospitalization, surgical and medical insurance:

1. What are the benefits?

2. Who is covered?

a) Employee only?

b) Employee and spouse?

c) Employee, spouse and dependents?

d) Domestic partners or parties to a civil union?

3. Who pays for the insurance?

a) Fully paid by the company?

b) Partially paid, partially contributory?

c) Entirely contributory?

4. What is the company's cost per month?

5. What is the employee's cost per month?

D. Sickness and accident insurance:

1. What are the benefits?

2. Who is covered?

a) Employee only?

b) Employee and spouse?

c) Employee, spouse and dependents?

d) Domestic partners or parties to a civil union?

3. Who pays for the insurance?

a) Fully paid by the company?

b) Partially paid, partially contributory?

c) Entirely contributory?

4. What is the company's cost per month?

5. What is the employee's cost per month?

E. Describe any other insurance benefits provided.

F. Consolidated Omnibus Budget Reconciliation Act (COBRA):

1. Did the company employ a sufficient number of employees last year to be covered by COBRA?

2. Has the company adopted COBRA implementation policies?
 3. Did the company notify all covered employees and their spouses of their rights under COBRA on its effective date?
 4. Does the company notify new employees and their spouses of their rights under COBRA regarding any health care plans maintained by the company?
 5. Does the company offer continued health care coverage to terminated employees and members of their families?
 6. If company employees die, or become divorced, or become eligible for Medicare benefits, does the company offer continued health care coverage to their spouses and dependent children?
- G. Does the company have a pension or retirement plan? Who determines that plan? (If so, describe.)
- H. Does the company have a savings plan? Who determines that plan? (If so, describe.)
- I. Does the company have a stock purchase plan? Who determines that plan? (If so, describe.)
- J. Does the company have paid holidays? Who establishes the holidays? If so:
1. What are they?
 2. When does the company observe holidays that fall on a Saturday?
 3. When does the company observe holidays that fall on a Sunday?
 4. How does the company handle employees who extend a holiday by an unexcused absence?
 5. Do nonexempt employees who work on a holiday receive:

a) Compensatory time off?

b) Premium pay?

6. Do employees who work overtime hours on a holiday receive overtime pay?

7. Do employees receive holiday pay if their holiday falls outside of their regularly scheduled workweek?

8. Do employees receive holiday pay for holidays that occur during:

a) Leaves of absence for personal reasons?

b) Leaves of absence for illness or injury?

c) Military leaves?

d) Vacation?

e) Leaves of absence for family care?

f) Leaves of absence for pregnancy, childbirth and related medical conditions?

K. Vacation:

1. Does the company have a vacation year for purposes of time and pay accrual? Who sets the standards for the vacation plan? If not:

a) How is the amount of paid vacation time employees accrue determined?

b) How is the rate of vacation pay determined?

2. What is the company's schedule for vacation accrual?

3. What are the service eligibility requirements?
4. How are vacations scheduled?
5. When do employees receive vacation pay?
6. In calculating service eligibility, are periods of personal leave deducted?
7. What is the effect of an employee's resignation and rehire on service eligibility?
8. Are employees permitted to substitute sick leave or other leaves of absence during their vacation period?
9. How is accrued, unused vacation treated for employees terminated due to:

a) Resignation?

b) Discharge?

c) Layoff?

L. Do the company's wage surveys compare benefit packages? If so:

1. Are the company's benefits competitive?
2. Are the company's benefits adequate?
3. Do employees appear to be satisfied with the benefit package?

M. Are the personnel assigned to administer these benefits adequate?

1. Skills?

2. Number?

N. How is benefit information provided to employees? Is it adequate?

O. Are benefits processed in a timely and efficient manner (*e.g.*, payment of claims, responses to questions)?

P. Are the reporting and disclosure requirements of ERISA being followed for all benefit programs?

Q. Are there summary plan descriptions of each benefit program? (If so, obtain copies.)

R. Is there a specific written statement for all benefit programs reserving the company's discretion to make all determinations concerning eligibility and interpretation of the plan?

S. Do written plan documents reserve the company's right to amend, modify or terminate each benefit program and do the documents articulate a procedure for such actions?

T. Are benefits described in the company handbook? If so, are the descriptions contained in the handbook consistent with the benefit plan documents?

U. Do all descriptions of benefits clearly and consistently set forth eligibility standards?

V. Have the eligibility standards been reevaluated in light of the U.S. Supreme Court's decision in *U.S. v. Windsor*,³⁰ which acted to provide federal recognition for same-sex spouses?

W. Who determines the benefit plans for franchisee employees?

§ 3.1(k) *Safety & Health*

A. Does the company have a safety program? Who sets the safety standards and rules for that program? If so:

³⁰ 133 S. Ct. 2675 (2013).

Who directs it?

How is it implemented?

Are there written safety regulations?

Obtain copies of all written program materials.

How are the safety standards enforced throughout the brand?

B. Does the company provide employees with any safety equipment (*e.g.*, shoes, glasses, etc.)? If so, at whose cost?³¹

C. Does the company investigate all injuries that occur on its premises and in the use of its vehicles?

D. Has the company established accident frequency and severity ratios? If so, obtain copies of the following:

1. Most recent ratios.
2. Ratios from last year.
3. Ratios from two years ago.

E. Does the company have an alcohol and drug abuse policy? Who sets the policy? (If so, obtain copy if in writing.)

³¹ The Occupational Safety and Health Administration (“Fed-OSHA”) requires employers to pay for personal protective equipment used to comply with Fed-OSHA standards. Employer Payment for Personal Protective Equipment, 29 C.F.R. §§ 1910, 1915, 1917, 1918, 1926 (2007).

1. Does it inform employees that they may not report to work under the influence of alcohol or drugs?
2. Does it inform employees that they may not possess or utilize alcohol or drugs while at work?
3. Does it require employees to inform the company if they are taking prescribed medication that might affect their ability to perform their job safely?
4. Does it advise employees that the company retains the right to search company property?
5. Does the company require preemployment drug tests?
6. Does the company conduct alcohol or drug tests for current employees? If so:
 - a) Under what circumstances?
 - b) How are they conducted?
 - c) What is the effect of an employee's refusal to be tested?
 - d) What happens to an employee who tests positive?
- F. What is the company's history responding to workers' compensation claims?
- G. Does the company provide first-aid facilities?
- H. Does the company provide rooms for resting and a place for breast feeding mothers to express milk?
- I. Does the company retain physicians' services?
- J. Does the company have an industrial nurse?
- K. Does the company's maintenance staff look for, document and repair possible unsafe conditions before accidents occur?

L. Has the company made arrangements with a medical clinic for handling emergencies?

M. Are the company's supervisory and management personnel knowledgeable about Fed-OSHA and parallel state programs?

§ 3.1(l) *Communication*

A. Are company personnel policies in writing? (If so, obtain copies.) Who prepares the company policies for Franchisee employees?

B. Are company personnel policies available to managers in the form of a manual or otherwise? (If so, obtain copy.)

C. If not, how are personnel policies communicated to managers?

D. Have written personnel procedures been adopted to implement personnel policies? (If so, obtain copies.)

E. Does the company have a personnel procedures manual? (If so, obtain copy.)

F. If personnel procedures are not in writing, how are they communicated?

G. Have all company personnel policies and procedures been reviewed to avoid contradiction and inconsistency?

H. Are all employees informed of their responsibilities and authority under the company's personnel policies and procedures?

I. Does top management provide information internally as to company objectives, forward planning and significant achievements? If so, by what means?

J. Does top management support and encourage internal communication?

K. Are supervisors informed of top management's interpretation of company personnel policies? If so, by what means?

L. Are personnel policies applied consistently throughout the company? Do the same policies apply throughout the brand? If not, identify problem area(s).

M. Does the company have an employee handbook? (Obtain a copy). Who prepared the employee handbook for Franchisee employees? If so:

1. Does it accurately reflect company personnel policies and procedures?
2. Do the personnel policies set forth in the employee handbook comply with state and federal law?
3. Is the employee handbook reviewed and revised periodically? If so, are appropriate personnel assigned to perform this task?
4. Are the policies and procedures set forth in the handbook followed?
5. Is each employee provided with a copy of the employee handbook and requested to acknowledge receipt in writing?
 - a) Is each employee provided with the periodic updates and/or revisions to the employee handbook?
6. Does the employee handbook set forth the company's policy concerning at-will employment?
7. Does the employee handbook contain an alternative dispute resolution or arbitration provision?
8. Has legal counsel reviewed the employee handbook?

N. Have appropriate personnel documents been reviewed for the inclusion of employment-at-will language?

O. Are employees provided a method to express their views and reactions to management?

P. Is there a written procedure for hearing and resolving nonunion employee complaints? (If so, obtain copy.) Is this procedure effective?

Q. Are the following barometers observed for signs of employee discontent?

1. Increased turnover?
2. Increased absenteeism?
3. Reduced productivity?
4. Reduced cooperation?
5. Reduced motivation?
6. Increased complaints?

R. If these signs indicate an employee attitude problem, what is done to diagnose and correct this problem? Can Franchisee employees report problems to the Franchisor?

S. Has the company ever conducted an employee attitude survey and, if so, what changes, if any, were made in policies or procedures as a result?

T. Does the company have a newsletter or other periodic publication? (If so, obtain copies.)

U. Does top management use a management letter or other device to regularly communicate with employees? (If so, obtain copies.)

V. Is management receptive to employee ideas?

W. Is there a suggestion system? If so, to what extent do employees utilize it? Is it brand wide?

X. How are employees notified of changes to company policy?

§ 3.1(m) *Discipline, Termination & Leaves of Absence*

A. Discipline:

1. Has the company published rules of conduct? Who drafted those rules for Franchisee employees. If so:

a) How are employees informed of them?

b) Who enforces the rules?

c) Obtain a copy.

2. Does the company have a method to assure consistent interpretation and application of these rules? If so:

a) Who is responsible for assuring consistency?

b) Is this method effective?

3. Does the company have regulations providing for consistent corrective action? If so:

a) Are the regulations disseminated to employees?

b) Who is responsible for assuring consistency?

c) Is the program effective?

d) Obtain copy.

4. In the event of employee discipline, who takes the action?

5. If the company does not have published rules of conduct, how is employee discipline handled?

B. Terminations:

1. Does the company maintain a written policy regarding basis for termination of employment? (If so, obtain a copy.) Who prepared that policy for Franchisee employees?
2. Does the company maintain any procedures for initiating a termination?
3. Do terminations of employment occur for any of the following reasons?
 - a) Resignation with notice?
 - b) Resignation without notice?
 - c) Resignation by mutual agreement?
 - d) Discharge?
 - e) Layoff?
 - f) Retirement?
 - g) Improper extension of leave of absence?
 - h) Failure to return from leave of absence?
4. What documentation does the company utilize for terminations?
5. Who completes the requisite documentation? Where is that documentation maintained?
6. Does the company maintain labor turnover records? If so, what is the company's turnover rate?

a) Currently?

b) One year ago?

c) Two years ago?

7. Are exit interviews conducted for terminating employees? If so:

a) Who conducts the interview?

b) What is the nature of the interview?

c) How are the results utilized?

8. How long does the company retain terminated employees' records?

9. Does the company have procedures for terminating employees? If so:

a) Are they followed?

b) Obtain copy if in writing.

10. Does the company consider the following before terminating employees?

a) Length of service?

b) Documentation in personnel file?

c) Wage increases?

d) Promotions?

e) Commendations?

f) Criticism of work or lack thereof?

g) Prior discipline or warnings?

11. Who makes the decision to terminate an employee?

12. Are termination decisions reviewed by higher level management or the human resources department prior to implementation?

13. Are terminations handled as confidentially as possible?

14. Is legal counsel consulted prior to termination?

15. Does the company have procedures for adjudicating employee disputes regarding basis for termination decision?

16. Does the company ensure that terminations occur in accordance with its policies and procedures?

17. Does the company have guidelines for achieving consistent justification for terminations?

C. Layoffs:

1. If the company needs to reduce its workforce for an extended period due to lack of work:

a) How are employees selected for layoff?

b) Do laid-off employees receive any severance pay?

c) Does the company comply with all notice requirements concerning reductions in force required by the Worker Adjustment and Retraining Notification Act (“WARN Act”) and any state law equivalents?

2. If the company needed to increase its workforce after a cutback for an extended period, would laid-off employees be offered employment? If so:

a) How are employees selected for recall?

b) How is length of service/seniority affected for purposes of vacations, etc.?

D. Leaves of Absence:

1. What types of leaves does the company grant, if any?

a) Personal?

b) Medical?

c) Pregnancy?

d) Work-related disability?

e) Family care?

f) Bereavement?

g) Military?

h) Jury duty?

2. If the company is required by law to grant a certain type of leave, is the company in compliance with the requirements of any such law(s)?

3. Do employees on any type of leave receive pay?

4. How does the company treat employees who fail to return from leaves of absence?

5. How does the company treat employees who overextend leaves of absence without permission?
6. How does the company treat employees who work elsewhere during leaves of absence without authorization?
7. What is the company's procedure for granting leaves?
8. How do leaves affect employees' status, seniority, benefits, etc.?
9. Are employees advised of these effects prior to taking leaves?
10. Does the company monitor the status of employees out on workers' compensation leave?
11. Are employees reinstated to their previous position upon return from leaves of absence? If not, why not?
12. What happens to company-paid benefits during a leave of absence?

§ 3.1(n) *Union Relations*

A. What is the number of company employees that are:

1. Supervisory?
2. Nonsupervisory?
3. Hourly?
4. Salaried?

B. Is the company unionized? If so:

1. Describe the bargaining unit or units.

2. Which union represents each bargaining unit?
3. How long has the union represented each bargaining unit?
4. What is (are) the expiration date(s) of any current contract(s)?
5. What is the extent of union membership?
6. Was recognition preceded by an election?
7. Confirm the company has copies of any union contract(s).
8. Are there any side agreements, oral or written? (Confirm the company has copies of all side agreements.)
9. Are there any significant past practices between the company and union(s)?
10. Who represents the company in negotiations?
11. Which management representatives are present in negotiations?
12. Are contract settlements generally preceded by a strike?
13. At what step in the process are most grievances settled?
14. What is the number of grievances annually for each unit?
15. What is the number of arbitrations annually for each unit?
16. Is either of the following provisions contained in the contract(s)?
 - a) Union shop clause?
 - b) Check-off for dues and/or initiation fees?
17. Has the company experienced any unauthorized walkouts?

C. If company employees are not represented by a union:

1. Does the company have an informal dispute resolution procedure? (If so, obtain copy if in writing.)
2. Is the informal dispute resolution procedure used?
3. Have any groups attempted to organize?
4. If so, which groups and how frequently?
5. Have union elections been held?
6. If so, by what majority was unionization defeated?
7. Has the company experienced any work stoppages?
8. Has the company been charged with any unfair labor practices?

§ 3.2 B. CONCLUSION

B. CONCLUSION

Even a brief glance at the preceding outline of issues and concerns makes it evident that conducting a self-audit is a significant task. Nonetheless, the short-term effort of conducting such an audit yields important long-term gains by identifying problems the employer may need to address.

Such an audit is merely the first step in preventing and confronting potential employment problems. Once problems are identified, employers must act to correct those policies, procedures, and practices that are inconsistent with the employer's goals or legal requirements. Employment audits should not be regarded as one-time events, but rather as an ongoing process that must be engaged in with regularity as circumstances and legal requirements change.