



# Employment Practices Liability Loss Prevention Guidelines

*for Not-for-Profit Organizations*



**It's Chubb. Or it's Chance.**





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**EMPLOYMENT PRACTICES  
LIABILITY LOSS PREVENTION  
GUIDELINES**

**FOR NOT-FOR-PROFIT ORGANIZATIONS**

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Note: The views expressed herein are those of the author and may or may not reflect the views of any member of the Chubb Group of Insurance Companies.

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# TABLE OF CONTENTS

|   |    |
|---|----|
| Introduction .....  | 3  |
| The Legal Basis for Employment Claims.....                              | 4  |
| The Employment-at-Will Doctrine .....                                   | 4  |
| Contract-Based Exceptions to the Employment-at-Will Doctrine ....       | 5  |
| 1. Breach of contract.....  | 5  |
| 2. Promissory estoppel .....  | 5  |
| Covenant of Good Faith and Fair Dealing.....                            | 6  |
| Tort Claims Arising from the Employment Relationship .....              | 6  |
| 1. Public policy .....  | 6  |
| 2. Invasion of privacy .....  | 6  |
| 3. Defamation.....  | 7  |
| 4. Intentional and negligent infliction of emotional distress .....     | 8  |
| Selected Bases for Employment Litigation .....                          | 8  |
| 1. Employment anti-discrimination laws.....                             | 8  |
| 2. Other federal statutory protections .....                            | 14 |
| The Hiring Process .....  | 16 |
| Job Applications.....   | 16 |
| 1. Questions prohibited by employment<br>anti-discrimination laws ..... | 16 |
| 2. Items to include in applications .....                               | 16 |
| Interviewing.....   | 18 |
| Hiring Documentation .....  | 19 |
| Written Personnel Policies, Handbooks, and Other Materials .....        | 20 |
| 1. Disclaimers and at-will statements .....                             | 20 |
| 2. Benefits disclaimers.....  | 21 |
| 3. The Family and Medical Leave Act materials .....                     | 21 |
| 4. Non-union grievance and arbitration procedures .....                 | 21 |
| 5. Guidelines for circulating information .....                         | 21 |
| 6. The information superhighway.....                                    | 22 |

---

|   |    |
|---|----|
| 7. Required postings .....  | 23 |
| Accommodating Claimed Disabilities Under the ADA .....                          | 24 |
| Investigating Reports of Sexual and Other Illegal<br>Workplace Harassment ..... | 27 |
| Employee Discipline and Discharges .....  | 31 |
| Taking Disciplinary Action Against Employees .....                              | 31 |
| 1. Language .....   | 31 |
| 2. Format .....   | 31 |
| 3. Investigation .....  | 31 |
| 4. Evenhanded administration .....  | 32 |
| 5. Documentation.....   | 33 |
| Dealing with Discharges.....  | 33 |
| 1. Senior management approval .....   | 33 |
| 2. The need for a business-related rationale.....                               | 33 |
| 3. Pre-termination review of the personnel file .....                           | 33 |
| 4. Communicating the discharge decision.....                                    | 34 |
| 5. Exit interviews .....  | 34 |
| 6. Severance agreements and releases.....                                       | 34 |
| 7. Other “housekeeping” matters .....   | 35 |
| Post-discharge procedures.....  | 36 |
| 1. Employee access to personnel files .....                                     | 36 |
| 2. Handling reference requests .....  | 36 |
| Managing Personnel Documents .....  | 37 |
| Conclusion .....  | 39 |
| About the Author .....  | 40 |

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## INTRODUCTION

Worthy goals and good intentions are no longer sufficient to shield not-for-profit organizations from the employment claims that beset other enterprises. Organizations are being sued with greater frequency for wrongful discharge, sexual harassment, or for failure to comply with the Family and Medical Leave Act.

The good news is that careful planning and proper training can help not-for-profit organizations effectively manage the increasing number of employment claims. This handbook begins with a description of the most frequently encountered claims and concludes with a discussion of strategies to lessen or foreclose liability at each stage of the employment relationship, from hiring to termination.

*Good EPL loss prevention measures are like preventive medicine: They can effectively inoculate an organization against potentially devastating claims by reducing the likelihood of their occurrence in the first place.*

The loss prevention strategies discussed in this handbook can benefit the majority of organizations, whether large or small. However, the handbook should not be used as a substitute for legal counseling. An employment law attorney or human resources professional can assist in developing policies and procedures tailored to individual organizations and to the laws of the states and localities in which they operate.

Chubb is pleased to share the information in this handbook with you. If you already have a program in place to help your organization manage its employment practices, we hope that our handbook will serve as a practical resource. If not, then it's never too soon—or too late—to begin thinking about protecting your organization from the effects of an employment-related lawsuit or allegation. Let our handbook be the basis for laying the foundation for a strong loss prevention program that will meet your individual needs.

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# THE LEGAL BASIS FOR EMPLOYMENT CLAIMS

## The Employment-at-Will Doctrine

Many claims are brought because organizations are not aware of the many federal, state, and local laws governing the employment relationship. Learning the legal basis for employment claims is the first step in planning effective loss prevention strategies.

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Traditionally, in the absence of a contract for a specific duration, both employers and employees were free to terminate the employment relationship at any time. Employers did not need cause to terminate employees, and employees did not need cause to quit.

Over the years, legislatures and courts developed numerous exceptions to the employment-at-will doctrine. Employees today have more claims against their employers primarily because there are more avenues for pursuing remedies to perceived unfair treatment. This is true not only in discharge situations but also with respect to hiring, promotion, discipline, and other employment-related decisions.

Even employees covered by union contracts, although not working “at-will,” can take advantage of federal, state, and local employment legislation and many state common law (non-statutory) claims unrelated to their collectively bargained agreements. The following discussion focuses on the various exceptions to the employment-at-will doctrine and other claims common in employment litigation.

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## Contract-Based Exceptions to the Employment-at-Will Doctrine

**1. Breach of contract.** If an employer expressly agrees, orally or in writing, to hire an employee for a specific period of time, to discharge only for just cause, or to abide by progressive disciplinary procedures, that agreement will usually be enforceable. Under certain circumstances, employers may be liable for breach of contract based on informal writings, employee handbooks, or even on oral statements made to employees or prospective employees.

**2. Promissory estoppel.** The doctrine of promissory estoppel is a vehicle used, in certain jurisdictions, to enforce promises in the absence of a contract. Promissory estoppel claims are often brought in the same lawsuit with breach of contract allegations, as an alternative theory of liability.

To recover on a promissory estoppel claim, an employee must prove that the employer made an unambiguous promise, that the employer reasonably expected the employee to rely on the promise, and that the employee in fact relied on the promise. The employee must also prove that the reliance was detrimental and that an injustice can be avoided only by enforcement of the promise.

The classic promissory estoppel situation arises when an employee or prospective employee quits another job, relocates, or declines another employment opportunity in return for the employer's promise, usually a promise of job security. The doctrine has been applied so broadly, however, that employers may be bound by a wide variety of communications to employees, including policy statements, employee handbooks, or statements made by company representatives during job interviews.

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## Covenant of Good Faith and Fair Dealing

Some states have adopted an “implied covenant” of good faith and fair dealing in the employment relationship. This covenant, first recognized in certain commercial transactions, has been used by some courts to impose an obligation on employers not to discharge unfairly. Depending upon the jurisdiction, claims for breach of the covenant of good faith and fair dealing may be brought in contract, or as claims for personal injury (tort claims), or both.

## Tort Claims Arising from the Employment Relationship

Tort claims (for personal injury to the employee) are common in workplace litigation. They are often brought along with contract claims because they may permit employees to seek compensatory damages for physical and emotional harm not available in contract actions, as well as punitive damages.

**1. Public policy.** Most states now recognize a claim for discharge in violation of public policy. These claims can give rise to contract or tort damages, depending on the jurisdiction. They frequently arise when employees claim they are terminated for exercising their statutory rights, performing statutory duties, or engaging in an activity that public policy dictates should be protected.

Although *public policy* cannot be precisely defined, examples of recognized public policy violations include cases in which employees are fired for refusing to commit a crime for the employer, refusing to commit perjury to protect the employer, or for “whistleblowing” to law enforcement or regulatory authorities. Courts also have recognized public policy claims based upon termination for serving jury duty or pursuing workers’ compensation claims.

**2. Invasion of privacy.** There are four different categories of invasion of privacy. They are (1) unreasonable intrusion upon the seclusion of another;

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(2) appropriation of another's name or likeness; (3) unreasonable publicity given to another's private life; and (4) publicity that unreasonably places another in a false light before the public.

In the employment context, invasion-of-privacy claims most often involve the "unreasonable intrusion" category. To prove this type of invasion of privacy, employees must show that the employer intentionally intruded upon their solitude, seclusion, or private affairs or concerns and that the intrusion would be highly offensive to a reasonable person. Employer drug testing programs, searches of employees' belongings or vehicles, eavesdropping, monitoring of electronic communications, wiretapping, surveillance, and similar activities are often the subject of invasion-of-privacy claims.

**3. Defamation.** Employees also sue their employers or former employers for defamation, alleging that the employers made derogatory statements about them to co-workers, third parties, or prospective employers in response to reference requests.

To prevail on a claim of defamation, the employee must establish (1) that the employer intentionally made a false and defamatory statement of fact about him or her; (2) that the statement was made to a third party by the employer; (3) that the third party understood the defamatory meaning; and (4) that either the statement caused him or her injury or was of a type for which the law requires no proof of injury. When the defamatory publication is made orally, it is considered to be slander. If the publication is in writing, the claim is for libel.

An employer is generally not liable when an employee repeats a defamatory statement made by the employer only to the employee. Some courts, however, have held that the employer is responsible if there is reason to believe that the employee will, at some point, be compelled to repeat the defamatory statement. This doctrine of compelled self-publication has been applied when a job applicant is forced to reveal that he or she was discharged by a prior organization for theft, embezzlement, or other wrongful conduct.

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**4. *Intentional and negligent infliction of emotional distress.*** To establish a claim for intentional infliction of emotional distress, the employer must intentionally engage in “extreme and outrageous conduct.” The most widely accepted definition of extreme and outrageous conduct is that it be “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community.” Given this definition, most courts have found that termination alone does not establish this tort.

In addition to proving outrageous conduct, employees seeking to recover for intentional infliction of emotional distress must suffer distress that is reasonable and serious.

Like intentional infliction of emotional distress claims, negligent infliction claims require employees to sustain severe emotional injury. In addition, some states require that the employees be placed in some physical peril of which they were aware before this claim can be brought. Other states do not recognize this claim at all in the employment context.

## **Selected Bases for Employment Litigation**

### **1. *Employment anti-discrimination laws***

- **Title VII of the Civil Rights Act of 1964** prohibits discrimination by employers because of race, color, religion, sex (including pregnancy), or national origin. Title VII is probably the best-known anti-discrimination statute and is a frequent source of claims. It applies to employers with 15 or more employees.

Most claims under Title VII are established through the use of two major theories. The first theory, known as “disparate treatment,” makes it unlawful for employers to treat certain individuals differently from others based on their protected status or traits.

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The second theory, known as “disparate impact,” applies when employment practices that appear neutral actually operate more harshly on one protected group than another, and cannot be justified by business necessity. Disparate impact cases often are used to challenge education requirements and other neutral hiring criteria. The disparate impact analysis has also been used to challenge excessively subjective promotion practices. Employees can raise claims under either or both theories.

As a result of amendments to Title VII made by the Civil Rights Act of 1991, victims of unlawful discrimination may recover not only the “make whole” relief formerly available, such as back pay, front pay, lost benefits, reinstatement, and reasonable attorneys’ fees but also, under certain circumstances, may recover both compensatory and punitive damages.

The total amount of certain types of compensatory and punitive damages available to victims of sex, disability, religious, and national origin discrimination is limited based upon the size of the organization being sued. A jury trial is also made available for disparate treatment claims. Before Title VII lawsuits are filed, however, employees complaining of unlawful discrimination must lodge a charge of discrimination with either the Equal Employment Opportunity Commission (EEOC) or an equivalent state agency if one exists.

Sexual harassment is a form of sex discrimination prohibited by Title VII. Until 1998, the courts recognized two basic types of sexual harassment: (1) harassment that creates an offensive or hostile working environment (hostile environment), and (2) harassment in which a supervisor demands sexual favors as a condition of employment or in return for certain benefits (*quid pro quo*).

In two 1998 decisions the U.S. Supreme Court significantly changed the law relating to an employer’s liability for sexual harassment by supervisors.

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When a supervisor's harassment of a subordinate results in an adverse, tangible job action (such as termination, demotion, failure to promote, or other decision involving a significant change in employment status, responsibilities, or benefits), the employer is held strictly liable. However, in instances where a supervisor's harassment is unaccompanied by any tangible adverse employment action, an employer may raise the following affirmative defense to liability: (1) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and (2) the employee unreasonably failed to take advantage of the employer's preventative or corrective opportunities.

The Court's recent decisions dictate, now more than ever, that organizations establish and implement preventative and remedial anti-harassment measures. This includes establishing, disseminating, and enforcing a written anti-harassment policy that: (1) prohibits workplace harassment; (2) provides a complaint procedure designed to encourage employees to raise complaints; (3) allows employees to bypass an offending supervisor in registering a complaint; and (4) prohibits retaliation against anyone who raises a complaint of harassment. All complaints must be thoroughly investigated and appropriate remedial action taken if harassing conduct is found to have occurred. Organizations also should train their workforces on harassment prevention.

The law also provides remedies for other types of illegal workplace harassment, such as harassment based upon race, color, national origin, religion, age, and disability. Generally, the same standards are applied to these claims as to sexual harassment claims. An anti-harassment policy must be broader than sexual harassment and must cover all potential types of harassment based upon protected traits or characteristics.

- **The Equal Pay Act (EPA)** prohibits employers from paying employees of one sex less than employees of the opposite sex for equal work on jobs which require substantially equal skill, effort, and responsibility, and which are performed under the same or similar working conditions.

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To correct an unlawful wage differential between the sexes, employers are not permitted to reduce the wage rates of any employee. The statute also mandates equal pay at equal rates. Accordingly, employers cannot pay men and women the same total amount, but require women to work longer at a lower rate for that amount. The EPA does not prohibit wage differentials which result from a bona fide seniority or merit system, or from a system which measures earnings by quantity or quality of production. It also does not prohibit wage differentials based upon factors other than sex.

- **The Americans with Disabilities Act (ADA)** prohibits employers from discriminating against otherwise qualified individuals with disabilities because of their disabilities. Individuals who have a history of disability, who are regarded as being disabled, or who associate with disabled individuals are also covered.

Employees protected from discrimination are those who, with or without reasonable accommodation, are able to perform the essential functions of a given job. The law covers employers with 15 or more employees.

The ADA requires employers to make “reasonable accommodations” to individuals with disabilities of which they are aware, unless an accommodation would pose an “undue hardship” to the employer’s business. Undue hardship is generally defined as an action requiring significant difficulty or expense, taking into account the employer’s size and resources.

The disparate treatment theory and a modified disparate impact theory are applicable to the ADA. The remedies available under the ADA are the same as those under Title VII. The requirement that individuals file an administrative charge with the EEOC or an equivalent state agency before filing a lawsuit also applies.

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- **The Age Discrimination in Employment Act (ADEA)** prohibits employers with 20 or more employees from discriminating against persons age 40 or older because of their age. Most ADEA claims are brought under the disparate treatment theory. Thus far a few courts have accepted the disparate impact theory for age claims. The issue is being considered by the U.S. Supreme Court.

Remedies available under the ADEA consist primarily of back pay, lost benefits, reasonable attorneys' fees, reinstatement or, under limited circumstances, front pay. A jury trial is available. If the employer's violation was "willful," victims may also recover liquidated (double) damages. A violation is willful if the employer knew that its conduct violated the ADEA, or showed reckless disregard for whether its conduct was prohibited. Administrative filing requirements also apply to ADEA claims.

- **The Civil Rights Act of 1866, Section 1981** provides that "[a]ll persons within the jurisdiction of the United States shall have the same right—to make and enforce contracts—as is enjoyed by white citizens." The right to make and enforce contracts includes the right to enter into and enforce employment contracts and to be free from discriminatory employment practices in recruiting, hiring, compensation, assignment, promotion, layoff, and discharge. Section 1981, however, applies only to decisions based on race and color. There is a right to unlimited compensatory and punitive damages and a jury trial. There is no requirement that a charge of discrimination be filed with the EEOC before a suit is brought.

Certain federal laws and executive orders apply to employers who have contracts or subcontracts with or receive financial assistance from the federal government.

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- **Title VI of the Civil Rights Act of 1964** prohibits discrimination on the basis of race, color, or national origin in programs or activities receiving federal financial assistance.
  - **Executive Order 11246** prohibits discrimination by federal contractors and subcontractors because of race, color, religion, sex, or national origin and requires affirmative action to ensure equal opportunity for minority group members and women.
  - **The Rehabilitation Act of 1973** prohibits employers with federal contracts and programs receiving federal financial assistance from discriminating against disabled individuals and requires affirmative action to advance qualified individuals with disabilities.
  - **Title IX of the Education Amendments of 1972** prohibits employment discrimination on the basis of sex in educational programs or activities that receive federal assistance.
  - **The Vietnam Era Veterans' Readjustment Assistance Act of 1974** prohibits job discrimination and requires affirmative action to employ and advance Vietnam-era veterans and qualified categories of veterans.

Most states, and many local governments, have laws prohibiting discrimination in employment on many of the same grounds as the federal statutes. The remedies available to alleged victims may differ from those provided under federal law, and employees frequently bring claims premised on both state and federal laws. Moreover, small employers with too few employees to be subject to federal anti-discrimination laws may be covered by state statutes. Some state and local governments also protect individuals from discrimination on additional bases, such as marital status, sexual orientation, political beliefs, or personal appearance.

State and federal whistleblower protection legislation generally protects employees to whom these laws apply from discipline, termination, or

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retaliation for reporting the illegal conduct of their employers to appropriate enforcement or regulatory authorities or for testifying in enforcement proceedings.

## **2. Other federal statutory protections**

- **The Older Workers' Benefit Protection Act (OWBPA)** in part restricts an employer's ability to settle actual or threatened age discrimination claims or to secure releases under the ADEA. Most significantly, if an employee has not filed an EEOC charge of discrimination or a lawsuit under the ADEA, a waiver of ADEA rights or claims will not be effective unless the employee is given at least 21 days to consider it and the ability to revoke the agreement for seven days after execution. When exit incentive programs are offered to a group or class of employees, this consideration period is extended to 45 days, and other requirements apply. All waivers of ADEA claims must be in writing, must specifically refer to the ADEA, and be supported by consideration. Employees must also be advised in writing to consult an attorney before signing any release agreement.
  
- **The Family and Medical Leave Act (FMLA)** requires covered employers to provide up to 12 weeks of unpaid, job-protected leave to eligible employees for certain medical and family reasons. Employees are eligible for FMLA leave if they have worked for a covered employer for at least 12 months and have worked for the employer at least 1,250 hours in the 12 months immediately preceding the leave. Finally, the employees must be located at a U.S. work site that, when combined with all of the employer's other work sites within 75 miles, has 50 or more employees. Employers cannot interfere with employee rights under the FMLA, and cannot discriminate against an employee for taking FMLA leave. Some state and local governments have their own family and medical leave laws.

Employees may bring a private civil action under the FMLA. Remedies for violations of the Act include back pay, liquidated

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(double) damages, attorneys' fees and costs, and equitable relief such as reinstatement or front pay. Courts have held that damages for emotional distress and punitive damages are not available. A jury trial is available for FMLA claims.

- **The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA)** protects uniform service members from employment discrimination based upon their military status. USERRA protects covered persons from denial of initial employment, reemployment, or employment benefits because of their military service.
  
- **Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA)** requires that employers with 20 or more employees allow most terminated employees, their spouses, and their dependants to continue their group health insurance coverage for a specified period of time after the date of their terminations. COBRA requirements are triggered when a “qualifying event” causes a loss of group insurance coverage. A qualifying event includes discharges except when the result of the employee’s “gross misconduct,” voluntary terminations, reduction in hours, or the death of a covered employee. Gross misconduct is not defined but clearly contemplates a higher level of misconduct than traditional “just cause,” and should be conservatively construed.
  
- **The Employee Polygraphic Protection Act of 1988**, with few exceptions, prohibits most private employers from requiring employees or prospective employees to take any lie detector examinations and from making any employment-related decision based on the results of such examination or from the employee’s refusal to take an examination.

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# THE HIRING PROCESS

## Job Applications

Many organizations overlook job applications both as a source of potential liability and as the first in a series of documents that can assist them in avoiding liability. Organizations must be aware of the legal impact of application questions and tailor their forms accordingly.

*A prospective employee's initial contacts with an organization can lay the groundwork for an employment practices claim later on.*

**1. Questions prohibited by employment anti-discrimination laws.** Federal and state anti-discrimination laws limit the types of questions that can be asked on job applications. As a general rule, employment applications should not directly or indirectly seek information about an applicant's race, color, religion, age, sex, national origin, or other protected status or traits.

Although Title VII does not expressly prohibit the use of "suspect questions" in job applications, many state or local laws do. For example, some states prohibit seemingly innocuous questions such as the date of graduation from high school, marital status, or type of military discharge, as well as inquiries into those organizations or clubs to which an applicant belongs.

The ADA prohibits disability-related inquiries and poses special challenges in interviewing, which are discussed below.

**2. Items to include in applications.** Just as there are certain topics that should not be addressed in job applications, there are a number of items that should be included.

Every job application for a non-union position should state that, if the applicant is hired, employment will be "at-will," meaning that the employee will not have a contract for a specific duration and can be terminated at any time for any reason, with or without cause. There should also be a statement

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that this employment-at-will relationship can be changed only by a written agreement signed by both the employee and a designated officer of the organization.

Applications should contain an authorization allowing the organization to check references and, if relevant to the position, conviction records. The authorization should also include a statement releasing all persons from liability resulting from supplying or using the information sought. The authorization and release will help protect against defamation and invasion of privacy liability if a former employer gives a negative reference or divulges sensitive personal information.

Organizations that use a third party to obtain background check reports for employment purposes must comply with the authorization, consent, and disclosure requirements of the Fair Credit Reporting Act (FCRA). Before obtaining such reports, an organization must provide the applicant or employee with a clear and conspicuous disclosure that the consumer report may be obtained and also must obtain written authorization from the employee or applicant. This disclosure consent must be provided as a stand-alone document. Before the organization takes any adverse action (such as failure to hire) based on information in the consumer report, it must provide the applicant or employee with a copy of the report and a summary of the individual's rights under the FCRA. After an adverse action is taken, the FCRA requires the organization to make several additional disclosures to the affected applicant or employee.

The applicant should be required to verify that the information provided in the application is true and agree that providing false information may result in rejection of the application or dismissal at any time if the applicant is hired.

Finally, the application should include a statement that the organization is an equal opportunity employer.

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## Interviewing

The interviewing process can be a breeding ground for employment claims if staff members unfamiliar with the nuances of federal, state, and local employment laws are involved. Inappropriate, offensive, or unlawful questions can create unnecessary liability. The ADA in particular restricts the types of questions an organization may ask an applicant. Training is the key.

- Applicants should not be asked, directly or indirectly, about their protected traits or status. The same general questions should be asked of both sexes. Women should not be asked about their marital status, family plans, child care arrangements, or whether their spouses will relocate with them.
- Under the ADA, an organization may not ask disability-related questions and may not conduct medical examinations until after a conditional offer of employment has been made to the applicant. The fact that an individual has an apparent disability is not a basis for refusing to interview or hire the individual.
- Under the ADA, applicants cannot be asked if they have filed for workers' compensation or have ever been injured on the job until after a conditional offer of employment has been made.
- Applicants cannot be asked about lawful drug use if it is likely to elicit information about a disability.
- Applicants generally cannot be asked whether they will need reasonable accommodations to perform a job. However, when an organization could reasonably believe that an applicant will need a reasonable accommodation to perform the functions of a job, it may ask limited questions. The organization then can ask if the applicant needs a reasonable accommodation and the type of accommodation needed to perform the functions of the job.

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- Applicants can be told about uniform attendance or overtime requirements and asked if they can meet those requirements.
  - Applicants can be asked about current illegal use of drugs because an individual who uses illegal drugs is not protected by the ADA.
  - Applicants can be asked if they are of sufficient age and have proper documentation to work.
  - Questions about non-job-related, personal matters should be avoided in the interviewing process.
  - Individuals conducting interviews should not make any representations or promises about job security, length of employment, or grounds warranting termination. Applicants raising questions on these topics should be referred to the organization's employee handbook or other official human resources policies or procedures.
  - Applicants should not be promised exemption from work rules or the organization's policies and procedures.

### **Hiring Documentation**

Securing the proper documents is important to ensure that only qualified employees are hired and that they are legally entitled to work. The following documents should be secured from each applicant:

- A completed and signed employment application should be obtained. This ensures that applicants have agreed to the authorizations, releases, and disclaimers in the application. Résumés should not be accepted unless accompanied by a signed application.
- Organizations should secure documentation that any applicant under the age of 18 years meets the requirements to work established by the Department of Labor and state law.

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The following documents should be secured from each employee at the time of hiring:

- A completed I-9 form should be secured for each employee, containing proof of the employee's eligibility to work in the United States. These forms should be kept in separate files and available for inspection by the Immigration and Naturalization Service.
  
- Organizations should also obtain employee signatures on handbook receipts and on agreements the organization wishes to enforce, such as non-compete, confidentiality, trade secret, or arbitration agreements. While the employee's actual signature will be most persuasive before the EEOC or a jury, electronic signatures may be used if routinely accepted in the organization and valid in those jurisdictions in which it operates.

### **Written Personnel Policies, Handbooks, and Other Materials**

Written personnel policies and handbooks can alert employees to an organization's rules and procedures. They also can be a source of misunderstanding and potential liability if not properly prepared. Further, circulating improper materials such as jokes or cartoons that are sexually explicit or demeaning to certain groups of employees may create morale problems and violate employment discrimination laws.

***1. Disclaimers and at-will statements.*** All (non-union) employee handbooks and organization policies should state that they are not contracts or conditions of employment and that the policy or handbook can be modified, interpreted, or eliminated at the organization's sole discretion. Handbooks should state that the employee's relationship with the organization will be at-will and that either the organization or the employee can terminate it at any time, with or without notice. This "disclaimer" statement should also provide that the employee's at-will status can be changed only by a written document signed by both the employee and a designated officer of the organization.

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**2. *Benefits disclaimers.*** Any description of benefits prepared by the organization should state that the actual coverage described in the official insurance policy or summary plan description will prevail if there is a conflict in terms. Benefit booklets should also state that the benefits are continually reviewed and may be changed or terminated at any time at the organization's sole discretion.

**3. *The Family and Medical Leave Act materials.*** Employees must be notified concerning their rights under the FMLA, if applicable, and when FMLA rights might be used. Covered organizations must not only post a general notice explaining the FMLA's provisions but also give specific notice to all employees taking the leave, specifying their rights and obligations. Similar state or local laws may also contain these requirements.

**4. *Non-union grievance and arbitration procedures.*** Many organizations have concluded that resolving disputes "inhouse" through internal grievance procedures is an efficient, cost-effective alternative to intervention by administrative agencies or the courts. These procedures can include a number of steps to ensure a fair review of the grievance, frequently culminating either in a review by a designated officer of the organization or by a peer review panel. Some organizations also permit or require their employees to pursue employment claims in arbitration before sponsors, such as the American Arbitration Association.

**5. *Guidelines for circulating information***

- All employees should be aware of the organization's policy against sexual and other illegal workplace harassment, such as harassment based on race, color, national origin, religion, age, disability, or other protected status or traits. The policy should be in writing and circulated periodically.
  
- Employees should be given copies of all applicable policies and work rules, and some record should be kept to establish that the employees

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have received them. This may be done by way of a receipt or, if not possible, by listing those who have received the materials.

- The organization must speak with one voice. Individual supervisors or managers should not issue policies or procedures requiring that terminations be for cause, that a particular procedure will be followed before termination, or that progressive discipline is required prior to the termination of employees.
- If more than one supervisor or manager evaluates an employee, the evaluations should be summarized in one overall rating. This overall rating can then be given to the employee and will not send mixed signals if individual evaluations should differ.
- No writing should comment on an employee's race, color, sex, age, religion, national origin, disability, or other protected status or actions. For example, taking FMLA leave cannot be the basis for any negative evaluation.
- No jokes, calendars, pictures, cartoons, or other documents that could be viewed as being demeaning to a person's race, color, sex, age, religion, national origin, disability, or other protected status or trait should be permitted.
- Any graffiti in working areas or rest rooms should be removed as soon as possible. Employees should be reminded that such graffiti is unprofessional and could give rise to workplace harassment claims.

**6. *The information superhighway.*** Most organizations use e-mail, voice mail, or the Internet on a regular basis. Although these systems have obvious benefits, their casual use or abuse may also foster employment claims.

Organizations should adopt written policies regarding the use of the organization's electronic communications. These policies should inform employees that they have no legitimate expectation of privacy in e-mail and

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other electronic communications; preserve the organization's right to monitor or review all electronic communications; limit the use of electronic communications for personal reasons; and prohibit the use of unprofessional, threatening, harassing, or discriminatory language.

Further, the use of the Internet for personal reasons or to access unprofessional, racist or sexually explicit materials should be expressly prohibited. Finally, organizations should require truly confidential communications to be sent via non-electronic channels.

**7. Required postings.** The following materials must be posted in areas where they can be seen by employees:

- The U.S. Department of Labor federal minimum wage poster.
- The federal Employee Polygraph Protection Act poster.
- The federal Family and Medical Leave Act poster.
- The federal Occupational Safety and Health Act poster.
- The federal Equal Employment Opportunity poster, which includes commentary on Title VII, the ADA, the ADEA, and several laws or orders governing federal contractors, subcontractors, and recipients of federal financial assistance.
- Any required state or local anti-discrimination agency posters.
- Any required state workers' compensation posters.

The federal posters required based on an organization's industry, number of employees, and locations may be found on the U.S. Department of Labor Web site.

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## ACCOMMODATING CLAIMED DISABILITIES UNDER THE ADA

*People with disabilities offer an extraordinary pool of talent and resourcefulness and deserve every opportunity to contribute to an organization's success.*

One of the most difficult problems presented by the ADA is the reasonable accommodation of claimed disabilities. The ADA requires an organization to make a reasonable accommodation to an “otherwise qualified individual with a disability.” An individual with a disability is “otherwise qualified” if the person

is qualified for the position except that he or she needs a reasonable accommodation to perform the job’s essential functions. The following inquiries should be made by organizations as a starting point in this analysis:

- Has the applicant or employee sought an accommodation? The employer’s duty is to reasonably accommodate the known disability of an otherwise qualified individual.
- Does the applicant or employee have a current disability under the ADA? A disability for these purposes is a physical or mental impairment that substantially limits one or more major life activities of the individual employee. Only individuals with current disabilities are entitled to accommodation.
- What accommodation has the applicant or employee requested? The accommodation process must involve an interactive dialogue between the disabled individual and the employer. Whether an accommodation is reasonable depends on the individual, the disability, and the specific job.
- What are the purposes and essential functions of the job involved? Essential functions are fundamental to a position as opposed to being marginal. A job function may be essential because the position exists to perform this function, there are a limited number of people to

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perform the function, or the function is so specialized that the incumbent in the position was hired for the ability to perform it.

- Written job descriptions prepared by the organization before advertising or interviewing for the job are evidence of the essential functions of the position. Are essential job functions designated in existing job descriptions?
- Will the accommodation sought enable the individual to perform the essential functions of the job?
- Does the accommodation requested pose an undue hardship for the organization? Undue hardship under the ADA means an action requiring significant difficulty or expense. If an undue hardship is claimed, what evidence supports this conclusion? Consider, for example, the cost, financial resources of the facility and organization, and any collective bargaining agreement provisions affected.
- Are other accommodations available that are effective but would not pose an undue hardship for the organization? The fact that a particular accommodation poses an undue hardship does not end the inquiry. It means only that the organization need not provide that accommodation.
- Does the accommodation proposed by the applicant or employee lower performance standards? The reasonable accommodation requirement does not compel the organization to set lower performance standards for disabled individuals.
- Are there several alternative accommodations that are both reasonable and effective? The organization can select the easier or the least expensive accommodation as long as it is effective.

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- Have experts or other community or governmental resources been consulted in an attempt to find a reasonable accommodation?
  
  - Has the search for a reasonable accommodation and discussions with the applicant or employee been documented so that the organization can defend itself in later administrative proceedings or litigation, if no reasonable accommodation is found?

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## INVESTIGATING REPORTS OF SEXUAL AND OTHER ILLEGAL WORKPLACE HARASSMENT

Sexual harassment claims have become an epidemic in American business, extending even into the boardroom. Increased information on the subject has caused claims to increase rather than decrease. Today, plaintiffs in sexual harassment cases are more sophisticated, armed with psychological experts, and seeking broader remedies, including compensatory and punitive damages. Proper investigative techniques for workplace harassment claims are of the utmost importance and may foreclose liability altogether.

*Proper handling of a sensitive employment complaint is critical to preventing it from becoming a potentially devastating lawsuit.*

- Reports of sexual and other illegal workplace harassment should be taken seriously and investigated as quickly as possible.
- All complaints of workplace harassment must be investigated, even if the alleged victims request that they not be.
- Decide who should handle the investigation—human resources representatives, management, or in-house or outside counsel. Bear in mind that the written record of the investigation will likely be evidence in any administrative or judicial proceeding that results. Attempting to cloak investigation materials in legal privileges so they need not be produced may not be in the organization’s best interest.
- Management cannot promise the accuser anonymity or confidentiality if the complaint is to be properly investigated. Frequently, the specifics of the complaint (time, place, statements made, etc.) must be revealed in order to fully investigate it. However, information should be revealed only on a “need-to-know” basis. Advise all participants of the need to keep the matter confidential.

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- The organization should adopt policies requiring that all employees and managers cooperate in the investigation. The complaining party must give full details and not refuse to discuss the matter or require the organization to deal only with his or her attorney. Managers or coworkers who hinder, interfere, or refuse to cooperate with the investigation should be subject to disciplinary action.
  
  - Reports of alleged workplace harassment should be put in writing. The best method of investigation is to have the claimed victim of harassment put the complaint in writing and sign it. If this is not possible, a disinterested investigator assigned by the organization should prepare a statement of the complaint.
  
  - The statement, whether prepared by the claimed victim or the investigator, should contain dates, times, places, a detailed description of the harassing conduct, and the names of possible witnesses. The alleged victim should also be asked about the relief he or she seeks (such as having the misconduct stopped, a transfer, etc.).
  
  - Before any action is taken against an alleged harasser, the organization should gather all facts, obtain signed witness statements, and attempt to determine the truthfulness of each witness, based on his or her demeanor, credibility, and the statements of other witnesses. The accused employee should be given an opportunity to respond to the charges. The investigator should distinguish between hearsay, rumor, and firsthand information. The investigator must also determine whether the accuser will stand behind his or her allegations, because a written complaint may not be sufficient if the alleged harasser later challenges the decision in court.
  
  - The alleged harasser should be advised that no retaliation against the claimed victim will be tolerated.

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- Neither the alleged harasser nor the claimed victim is entitled to have attorneys present during the investigation or to review witness statements taken as part of the investigation.
  - The claimed victim and the alleged harasser should be informed of the results of the investigation, no matter what the outcome. If harassment is established, the harasser should be disciplined. Appropriate discipline can range from a written warning to additional training, transfer, demotion, or discharge. More than one type of action may be necessary to halt ongoing harassment, discipline the harasser, and prevent a recurrence. Either the claimed victim or the alleged harasser can bring legal action against the organization if the investigation is not properly handled.
  - If the results of the investigation are inconclusive, the alleged harasser should be reminded of the workplace harassment policy and advised that, if harassment had been found, discipline would have occurred. However, neither the claim nor the investigation materials should be placed in either party's personnel files.
  - If the investigation reveals that no harassment has occurred, both parties should be reminded of the workplace harassment policy and its purpose. No notation of the claim or investigation should be made in either party's personnel files.
  - If the complaining employee is off work or on leave, he or she should be encouraged to return as soon as possible. This will keep the employee productive and reduce potential damages. However, returning the claimed victim to work may require restrictions on the alleged harasser, especially if the investigation has not been completed.
  - If harassment is established, the victim should be advised in writing to immediately report any renewed harassment or retaliation.

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- Follow-up inquiries should be made by the organization to ensure that the remedy was effective in stopping the harassment and that no retaliation has taken place against the victim or witnesses.
  
  - Regardless of the outcome, the records of the investigation should be preserved in a separate file so that the investigation's propriety and effectiveness can be established if either the claimed victim or alleged harasser should subsequently challenge it in court or before a governmental agency. Documents reflecting the discipline given should be placed in the harasser's file if the claim is established.

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# EMPLOYEE DISCIPLINE AND DISCHARGES

## Taking Disciplinary Action Against Employees

The preparation of a written record of employee misconduct and counseling is critical. Governmental agencies, courts, and juries expect that employers will have a “paper trail” of documentation supporting discipline and discharge decisions. Without this documentation, the employee may be able to argue that the discipline was unfair or that the claimed misconduct was fabricated by unscrupulous managers.

*Creating a solid defense can be critical to an organization's survival against an EPL lawsuit. In deciding an organization's innocence or guilt, a court looks for, among other things, an evenhanded, well-documented approach to employee discipline and terminations.*

**1. Language.** Reprimands and memoranda regarding counseling for poor job performance or misconduct should be written in clear, concise language and not contain abusive, inflammatory, or derogatory remarks. For example, referring to an employee as a “good-for-nothing who sabotaged the business” reflects negatively on the author and does not accurately explain what the employee did. Also, avoid business or technical jargon and acronyms, which may cloud the meaning of the documents so that third parties cannot understand them.

**2. Format.** Discipline and counseling records should be dated and signed by the supervisor involved. These documents should also be reviewed with the employee concerned. Employees should be asked to sign these records, not to acknowledge that they agree, but to indicate that they have reviewed the documents. If the employee refuses to sign, that fact should be noted and witnessed by the supervisor on the disciplinary record.

**3. Investigation.** A manager should conduct an investigation prior to disciplining an employee to verify that the facts warrant the discipline proposed.

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No manager should attempt to polygraph an employee without prior approval from those responsible for human resources matters. If polygraph tests are to be given to employees (such as those suspected of embezzlement), the detailed requirements of the Employee Polygraph Protection Act and the laws of those states that also regulate or prohibit polygraph testing must be followed.

In situations in which the misconduct involves a complex fact pattern or serious misconduct (such as potentially illegal activity), the employee may be suspended pending a thorough investigation. This will allow the organization to interview witnesses, review necessary documents, and make an informed decision.

Managers should not threaten the employee with criminal prosecution in order to secure the employee's admission of wrongdoing, resignation, or other concessions.

**4. *Evenhanded administration.*** Managers should enforce workplace rules and procedures consistently and evenhandedly. Determining the proper discipline for employees requires the manager to consider not only the offense but also the discipline imposed in other similar situations. For example, if members of different ethnic groups or races are involved in fights, they must be disciplined in a similar manner, based upon the facts. One employee should not receive a written warning when another is discharged. Degrees of involvement can, of course, be considered. If one employee was clearly the aggressor, he or she can be disciplined more severely than an employee who was the victim and tried to withdraw from the altercation. Similarly, if one employee is a "repeat offender," more severe discipline may be warranted.

Organizations may wish to restrict the level of discipline that supervisors and managers can dole out, or they may require prior approval from upper-level management or an employee responsible for human resources matters.

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**5. Documentation.** After the investigation has concluded, the grounds for any discipline should be recorded and corrective measures outlined. Employees should be given an opportunity to respond to the discipline or explain their conduct. If employees wish to respond to discipline in writing, they should be permitted to do so. The response will commit the employee to a version of the event that will be difficult to change later and will also give the employee a feeling of being treated fairly. Further, the response may correct errors in the investigation or put the employee's conduct in the proper perspective.

## **Dealing with Discharges**

Discharges are the most frequent source of lawsuits and organization liability. The following procedures should be considered when discharge is a possible remedy for misconduct or poor performance.

**1. Senior management approval.** No employee should be discharged without the prior approval of senior management. This procedure will prevent front-line supervisors from improperly terminating employees in the heat of anger or due to their ignorance of employment laws.

**2. The need for a business-related rationale.** The fact that employees are "at-will" does not mean that there should not be business-related reasons for their discharges. Employees can raise discrimination claims, regardless of at-will status. Administrative agencies, judges, and juries all assume that employers act for a reason. If the organization cannot provide a reasonable explanation for termination, these fact finders may determine that improper reasons motivated it.

**3. Pre-termination review of the personnel file.** Prior to an employee's discharge for misconduct, poor performance, or other business-related reasons, a knowledgeable individual should review the personnel file and the soundness of the decision. This review can provide a variety of benefits. It can confirm that there is a "paper trail" supporting the termination. A review can also reveal "smoking gun" documents that could create a problem

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for the organization in litigation, such as documents making negative references about an employee's race, sex, age, religion, or disability. Finally, a pre-termination review may prevent the organization from discharging an employee on a "significant day" such as the employee's birthday, just before a holiday, or when the employee or a member of his or her family is having health or other problems. Because terminations are always stressful, employees who are discharged at a time when they are already subject to significant stress are more likely to respond by filing a lawsuit.

**4. *Communicating the discharge decision.*** Discharges should never be made in the "heat of the moment," when emotions are running high and the parties may make statements they later regret, particularly if litigation occurs. Once a reasoned decision to discharge an employee is made, the termination itself should be communicated to the employee in a calm, businesslike manner. Organizations may wish to have one knowledgeable person communicate all discharge decisions to employees. This person will lack emotional involvement in the decision and should also be able to advise the employee about pay, benefits, and other severance issues.

**5. *Exit interviews.*** Exit interviews are useful, regardless of the reason for the employee's departure from the organization. They can resolve a number of items, including the completion of termination forms, the return of organization property, and the communication of additional benefit information. The exit interview may also present an opportunity to identify employees likely to bring suit or become violent in the future. These interviews can be combined with the discharge conference mentioned above.

**6. *Severance agreements and releases.*** Some organizations have reacted to increased employment litigation by attempting to secure releases from employees who are either discharged or resign under disciplinary pressure, particularly if they believe an employee may bring a lawsuit against them.

Releases of employment claims must be supported by "consideration." Consideration is something of value that must be more than the employee is

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already entitled to as a result of the termination. Releases must also be knowing and voluntary, which essentially requires that employees understand what they are giving up and not be forced to sign without adequate review. Employees should be given time to consider severance documents and releases and to consult with financial and legal advisors.

If the right to bring age discrimination claims under the ADEA is to be released, the strict requirements of the OWBPA (discussed on page 14) must be followed.

**7. Other “housekeeping” matters.** Employees should be sent the appropriate notices for continuation of health insurance coverage, if applicable, under COBRA, preferably by registered mail. Discharged employees should be given their final paychecks, including accrued vacation pay, at the time of discharge or as otherwise required by state or local law.

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## Post-Discharge Procedures

**1. *Employee access to personnel files.*** Many terminated employees request copies of their personnel files. A former employee's right to review or copy his or her personnel files depends on state law. In some states, employees and former employees have a statutory right to review or receive copies of their personnel files. In those states where disclosure is not required, whether to make a voluntary disclosure is a management decision. A well-documented file, supporting the discharge decision, may discourage future litigation. On the other hand, a file without a "paper trail" may persuade former employees or their legal counsel that lawsuits will be successful. Whatever policy is adopted, it must be uniformly followed.

**2. *Handling reference requests.*** The organization must decide how it will handle reference requests for discharged employees. Responses that include information about misconduct or poor performance may invite defamation or invasion-of-privacy lawsuits. To minimize potential liability, many organizations have adopted a "name, rank, and serial number" policy, providing only the dates of employment, title, job duties and, perhaps, salary. These organizations will not respond to questions about performance or divulge the reasons for the employee's departure. Whether more extensive information is given, however, is an organization's business decision and must be uniformly followed.

Only a single individual or small group should be authorized to respond to reference requests. They should not respond to telephone inquiries. Even written requests should not be considered unless accompanied by written authorizations from the former employees. In addition, those responding should keep written records of all requests received and information given in response.

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## MANAGING PERSONNEL DOCUMENTS

Dealing with government agencies, attorneys, or other third parties requires special attention. Handling official documents also requires extreme care. Missteps can create liability even when the organization may have initially violated no employment law. The following guidelines are recommended:

*It is advisable to solicit the guidance of an experienced attorney when handling potentially sensitive employment documents.*

- Personnel and medical information should be kept confidential and made available only to those within the organization who have business-related reasons to see the information. Medical information should be kept separately from other personnel documents.
- Any telephone calls or correspondence from federal or state anti-discrimination agencies or the Department of Labor should be referred to a designated officer or legal counsel for response. Managers or supervisors should not attempt to respond to such inquiries on their own.
- A designated officer or legal counsel should immediately be notified if representatives of government agencies, such as the Occupational Safety and Health Administration (OSHA), the EEOC, or the Department of Labor, visit the organization.
- No inspections or interviews of employees by government agencies should be permitted without approval of a designated officer or legal counsel. Typically, representatives of government agencies will not inform organization representatives of their rights or that any statements taken can be used against the organization in later legal or administrative proceedings.

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- Copies of any documents or statements ultimately given to government agencies, such as the EEOC, OSHA, or the Department of Labor, should be kept in a separate file so that they can be retrieved at a later date, if necessary.
  - Charges of discrimination from government agencies or lawsuits should be marked with the date of receipt and the name of the employee who received them and forwarded immediately to a designated officer of the organization.
  - No personnel or work records relating to the employee concerned should be destroyed after a charge of discrimination has been received from a government agency. Lawsuits should be handled in the same way. Materials that may be relevant to the charge or lawsuit should be segregated in a separate file so that they will not be inadvertently destroyed because of document retention policies. Managers should notify a designated officer of the organization of the documents' existence.
  - Managers should not discuss charges of discrimination with the employees bringing them. Even well-intentioned conversations with the employee may lead to a feeling that management is “retaliating” and to the filing of additional charges of discrimination with the government agency.
  - Responding to information requests or “demand” letters from attorneys representing employees or former employees requires knowledge of employment laws and litigation strategy. Thus, only designated officers or legal counsel should prepare the organization's response. Those responding must weigh the deterrent value of a thorough retort citing pertinent details against the possibility that it will amount only to an advance disclosure of the organization's case. Some employees or former employees are determined to litigate and may only change their stories if fully advised of the facts.

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## **CONCLUSION**

This handbook can serve as a starting point in planning strategies to help avoid or manage employment-related lawsuits or allegations. However, the advice of human resources professionals and attorneys should be sought in developing policies and procedures that will meet your organization's particular needs and goals.

Your approach should strike a balance between the need to help employees feel confident and secure with the need to avoid fostering employment-related claims due to unrealistic or inaccurate statements. Careful planning can harmonize these sometimes divergent goals and lead to a better-managed, more productive organization.

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## ABOUT THE AUTHOR

John B. Lewis is a partner in the Cleveland, Ohio, office of Baker & Hostetler LLP. He has counseled and represented employers in a wide variety of employment litigation and appellate matters involving state and federal employment discrimination laws, the Family and Medical Leave Act, the Civil Rights Acts, the Employee Retirement Income Security Act, wrongful discharge, individual employment contract, and work-related tort claims.

Mr. Lewis is a frequent speaker at seminars regarding the prevention of employment lawsuits and author on employment law topics including workplace harassment, electronic communications, and workplace defamation law. He has been listed in *Who's Who in American Law* and *The Best Lawyers in America*. He has also been named an "Ohio Super Lawyer."





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