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A World Class Standard for Crisis Management in the Workplace:
Implementing the American National Standard on Disaster/Emergency Management and Business Continuity Programs (NFPA 1600)

The Role of the Chief Compliance Officer:
Integrating Employment and Labor Law Compliance into the Corporate Compliance Initiative and Learning the New Language of Compliance

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IMPORTANT NOTICE

This publication is not a do-it-yourself guide to resolving employment disputes or handling employment litigation. Nonetheless, employers involved in ongoing disputes and litigation will find the information extremely useful in understanding the issues raised and their legal context. This white paper is not a substitute for experienced legal counsel and does not provide legal advice or attempt to address the numerous factual issues which inevitably arise in any employment-related dispute.

A World Class Standard for Crisis Management in the Workplace:

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I. The Need for Workplace Crisis Management

The public sector is mobilizing for the "unthinkable." On March 15, 2005, the Department of Homeland Security (DHS) issued a confidential report entitled "National Planning Scenarios." Plague. Nerve gas. Category 5 hurricanes. These and a dozen other scenarios are profiled in a strategic initiative designed to assess and improve national preparedness for emergencies. State and local governments have been ordered to evaluate their emergency preparedness plans in light of these foreseeable risks, and to identify areas of significant risk. From its ghastly details to its ominous release on the Ides of March, everything about this report underscores the urgent need to plan for catastrophic events as well as a full range of hazards.[1]

Although the DHS report is directed at state and local governments, the DHS is relying on all Americans to engage in emergency preparedness. In his introduction to the DHS report, Admiral James Loy, Acting Secretary for the DHS, expressed this sentiment: "September 11, 2001, confirmed that all Americans share responsibility for homeland security. Federal, State, local, tribal, *private sector*, and non-government entities across the Nation need to prepare together for major events that will exceed the capabilities of any single entity."[2] And so the question inevitably arises: What is the private sector doing to prepare for man-made or natural disasters? The shocking answer: **virtually nothing.**[3]

This utter lack of preparation is all the more astounding when one considers that the private sector owns 85% of the nation's critical infrastructure, providing the essential services that underpin American society.[4] Moreover, America's businesses are the backbone of the nation's economy; small businesses alone account for more than 99% of all companies with employees, employ 50% of all private sector workers and provide nearly 45% of the nation's payroll.[5] Unless a terrorist's target is a military or other secure government facility, civilians will be the most likely "first responders" to natural or man-made disaster.[6] Businesses are threatened with extinction if they fail to prepare for the next attack on their employees and other vital assets.

The dismal state of private sector emergency preparedness has 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 now the "National Preparedness Standard" for the private sector. The roadmap for establishing an emergency preparedness plan is contained in NFPA 1600. NFPA 1600 sets forth a comprehensive process for devising and implementing a crisis management plan.[7] NFPA 1600 itself can be downloaded at www.nfpa.org, or at the Department of Homeland Security website, www.ready.gov/business. Compliance with NFPA 1600 is voluntary at this time, but as discussed below, employers have very good reasons to take NFPA 1600 seriously. While NFPA 1600 is a voluntary standard, it is increasingly becoming the benchmark against which preparedness is measured.

Everything has changed since 9/11. What was unforeseeable is now the contemplated. The public and the media are ready to judge any natural and man-made disaster with a new set of standards. The recent explosion at a Texas oil refinery illustrates the intense scrutiny that will befall a company following a tragic accident. The explosion on March 23, 2005, killed 15 workers and injured over 100. Teams of investigators from national and state agencies have descended on the scene to assess the damage to both the workers and to the health and safety of the people who live in nearby communities. The refinery will be challenged to have its side of the story heard amid the clamor to second guess what should have been foreseen.

Although catastrophic events set the stage for the emergence of a National Preparedness Standard in the private sector, the real

1 The DHS report was requested by a Presidential Directive, the Homeland Security Presidential Directive 8 (HSPD-8). HSPD-8 establishes policies of the United States to prevent and respond to threatened or actual domestic terrorist attacks, major disasters, and other emergencies by requiring a national domestic all-hazards preparedness goal.

2 See *Draft National Preparedness Goal,* Mar. 2005, at 1 (emphasis added), *available at* http://www.ojp.usdoj.gov/odp/assessments/hspd8.htm (log-in required).

3 9-11 Commission Hearing, Nov. 19, 2003, *available at* http://www.counterterrorismtraining.gov/pubs/05.html.

4 The 9-11 Commission Report, Ch. 12.4, at 398, *available at* http://www.counterterrorismtraining.gov/pubs/05.html.

5 www.ready.gov/business.

6 The 9-11 Commission Report, Ch. 12.4, at 398 *available at* http://www.counterterrorismtraining.gov/pubs/05.html.

7 The "plain English" version of the NFPA 1600 can be found at http://www.praxiom.com.

significance of NFPA 1600 may lie in its applicability to more pedestrian dangers in the workplace. In the aftermath of an industrial accident such as the Texas oil refinery explosion, it is not a great stretch to imagine that NFPA 1600 will be held up by the plaintiffs' bar and employee advocates as the governing standard for emergency preparedness. It is this broader context that may provide a fertile breeding ground for litigation surrounding an employer's duty of care to its employees and the public.

When the Twin Towers collapsed so too did conventional thinking about crisis management. Before 9/11, a fire drill may have been the extent of an employer's emergency preparedness plan. Today, events that were previously "unthinkable" have not only been identified, they have actually taken place. And each of those events has in turn changed the collective perception as to what constitutes a safe workplace. And so, the message to employers in 2005? The familiar Boy Scout motto, with a twist: **"Be Prepared. Be Very Prepared."**

II. The Development of a National Private Sector Preparedness Standard

The development of a National Private Sector Preparedness Standard has its roots in hearings held before the National Commission on Terrorist Attacks Upon the United States (the 9/11 Commission). The Commission was charged with preparing a full and complete account of the circumstances surrounding the September 11, 2001, terrorist attacks. The Commission was also tasked with providing recommendations designed to guard against future attacks. The Commission held public hearings to allow open dialogue about the Commission's goals and priorities. Twelve hearings were held between March 31, 2003 and June 17, 2004. On July 22, 2004, the Commission released its findings in "The 9/11 Commission Report".

Testimony elicited at the fifth public hearing on November 13, 2003, turned the spotlight on private sector preparedness. As previously noted, it was determined that an astounding 85% of vital infrastructure in the United States is privately held.[8] Critical infrastructure and key resources are both physical and cyber-based and span all sectors of the economy; they also provide the essential services that underpin American society. This revelation led to concern about the stability of the economy in the wake of an attack on the private sector.

In order to address this substantial deficiency, the Commission retained the American National Standards Institute (ANSI) to develop a consensus on a "National Standard for Preparedness" for the private sector. ANSI consulted over 2,000 safety, security and business continuity experts. In April 2004, ANSI recommended to the Commission that NFPA 1600, as amended in 2004, be voluntarily recognized as the National Preparedness Standard.

NFPA 1600 itself is not new. It has existed in essentially the same form since 1991.[9] Until the 9/11 Commission hearings, it is safe to say that NFPA 1600 was a relatively obscure set of guidelines designed for emergencies and business continuation needs associated with classic workplace hazards. Knowledge of NFPA 1600 was primarily limited to specialists in risk management and safety. Arguably, NFPA 1600 would never have become the standard for emergency preparedness without tragedies the magnitude of 9/11, the 1995 Oklahoma City bombing, Hurricane Andrew, and the foreboding 1993 World Trade Center bombings. But the cumulative impact of national disasters has left its indelible mark on the duty to provide a safe workplace. Also our very human need for answers has catapulted NFPA 1600 into the national floodlight as a "response" to the threat of terrorism.

In 2004 NFPA 1600 quickly gained widespread acceptance as the standard for national emergency preparedness. On May 19, 2004, former DHS Secretary Tom Ridge praised NFPA 1600 and urged its adoption as The National Preparedness Standard. In June 2004, the 9/11 Commission formally adopted NFPA 1600 as the National Preparedness Standard.

Although the Standard is "voluntary," the 9/11 Commission intentionally used language that would force private employers to comply with NFPA 1600. First, the Commission encouraged the insurance and credit-rating industries to rate companies based on NFPA 1600 compliance. Second, the Commission used language that expressly states non-compliance with NFPA 1600 may be a breach of an employer's legal duty of care in the workplace. In the words of the Commission,

8 Homeland Security Presidential Directive (HSPD) 7: Critical Infrastructure Identification, Prioritization, and Protection; December 17, 2003, *available at http://*www.whitehouse.gov/news/releases/2003/12/20031217-5.html.

9 NFPA 1600 was updated in 2004 to incorporate more contemporary language and to include more business continuity materials.

NFPA 1600 should be the legal standard of care that employers owe to their employees in emergency situations:

"We endorse the American National Standards Institute's recommended standard for private preparedness. We were encouraged by Secretary Tom Ridge's praise of the standard, and urge the Department of Homeland Security to promote its adoption. We also encourage the insurance and credit-rating industries to look closely at a company's compliance with the ANSI standard in assessing its insurability and creditworthiness. **We believe that compliance with the standard should define the standard of care owed by a company to its employees and the public for legal purposes.** Private-sector preparedness is not a luxury; it is a cost of doing business in the post-9/11 world. It is ignored at a tremendous potential cost in lives, money, and national security."[10]

Congress was quick to act. Even before the 9/11 Commission released its final report on July 22, 2004, H.R. 10 was introduced in the House of Representatives on July 14, 2004, as the "Private Sector Preparedness Act of 2004." The reins were then taken up by the Senate in the form of S. 2845 and on December 17, 2004, The Intelligence Reform and Terrorism Prevention Act of 2004 ("Intelligence Act") was passed into law. The relevance of the Intelligence Act to emergency preparedness can be found in Section 7305. This section expresses the "Sense of Congress" that the Department of Homeland Security should promote adoption of voluntary national preparedness standards for the private sector. Significantly, Congress repeats the findings of the 9/11 Commission and adopts them as their own. The "Sense of Congress" clearly leaves room for other standards, but ones similar to NFPA 1600. The standard is "voluntary," but the expectation is that employers will take NFPA 1600 into consideration in the development of crisis management planning. For example, in 2005, Ontario, Canada adopted NFPA 1600 under its Emergency Management Act for the Province of Ontario as a voluntary standard, but it will become mandatory at the end of 2006.

III. The Legal Requirements & Guidelines for Preparation

A. Putting NFPA 1600 in Context

Certainly, employers and workplace safety regulation are no strangers to each other. Federal and state laws impose a statutory duty on employers to provide a safe work environment. Negligence theories also create common law duties of care in the employment arena. What has changed in 2005 is the evolution of a new set of expectations about an employer's responsibilities before, during and after emergency situations.

To fully appreciate the applicability of NFPA 1600 to workplace emergency situations, it is helpful to examine other employment principles that govern workplace safety. In this context, NFPA 1600 emerges as a natural outgrowth of heightened concern over employee and public safety in a world of increasingly foreseeable dangers.[11]

The following overview also illustrates how "recommendations" can evolve into legal requirements. "Guidelines" and "models" seem to be suggestions rather than legal requirements. However, a guideline or model can become a de facto regulation, and deviation therefrom may expose an employer to liability. The more the guidelines and models are commonly used, the more they create a community expectation of care. Moreover, regulatory agencies with the power to issue citations can put pressure upon employers to act in an abundance of caution. The U.S. Department of Labor issues regulations and guidelines that over time essentially define the standard of care for employers. Accordingly, employers should consider measuring the adequacy of their emergency preparedness plans against this backdrop of changing expectations.

B. Federal OSHA Concerns

The Federal Occupational Safety and Health Act ("Fed-OSH Act" or "the Act") contains a general duty clause which requires employers to provide their employees with a place of employment "free from recognized hazards that are causing or are likely to cause death or serious physical harm to… employees."[12] The Occupational Safety and Health Administration (Fed-OSHA) relies on this General Duty Clause to motivate employ-

10 The 9/11 Commission Report, July 22, 2004; Ch. 12.4, at 398 (emphasis added), *available at* http://www.counterterrorismtraining.gov/pubs/05.html.
11 For an extensive review of an employer's obligations to manage workplace violence, see THE NATIONAL EMPLOYER,® Chapter 29 (2005).
12 29 U.S.C. § 654(a)(1).

ers to take steps to prevent injury to employees. Fed-OSHA has indicated that it will continue to issue citations for workplace violence under the General Duty Clause where criminal activity endangers workers.

In 2001, Fed-OHSA revised its booklet entitled "How to Plan for Workplace Emergencies and Evacuations."[13] The publication addresses various types of workplace emergencies, including civil disturbances and workplace violence resulting in bodily harm and trauma.

Fed-OSHA encourages employers to brainstorm worst-case scenarios for their business. Once potential emergencies are identified, an employer is in an appropriate position to determine, in advance and with logic, how to appropriately protect itself and its employees from harm or further harm. Proper considerations include determining how to alert employees to an emergency, developing evacuation policies, procedures and routes, accounting for employees, planning for rescue operations, providing medical assistance and training employees.

C. California OSHA Requirements

California adds another layer of protection for employees. In California, every employer must establish an Injury and Illness Prevention (IIP) Program designed to ensure the safety and security of employees.[14] The IIP Program must be in writing and it must be effective.

Over the last decade, prevention and response plans to address workplace violence have become the subject of guidelines. On March 30, 1995, the California Department of Industrial Relations, Division of Occupational Safety and Health (DOSH) adopted revised guidelines for workplace security (Guidelines). The DOSH Guidelines suggest that every employer perform an initial assessment to identify workplace security factors that may contribute to the risk of violence in the workplace. The Guidelines stress that employers must consider each type of workplace violence and adapt the IIP Program to address their vulnerability to the particular risks associated with their workplace.

More recently, the issue of safety planning has been addressed in the context of multiemployer work sites. On January 1, 2000, DOSH's standards on the enforcement of employer safety responsibilities on multiemployer work sites became effective. California Labor Code section 6400(b) provides that at multiemployer worksites, citations may be issued to any of the following: the employer whose employees were exposed to the hazard, the employer who actually created the hazard, the employer who was responsible for safety and health conditions at the worksite, or the employer who was responsible for correcting the hazard.

D. Beyond OSHA Concerns

An employer's legal duty to exercise reasonable care in providing a safe work environment is nothing new. As shown above, this is legislated by both our federal and many state governments in the form of occupational health and safety laws.

Corporate responsibility law may also increase reliance on NFPA 1600. The Sarbanes Oxley Act of 2002 has been interpreted to require publicly-traded businesses to disclose operating conditions, including safety failures that may significantly impact value. Compliance with NFPA 1600 may enable corporations to quickly identify and effectively manage safety operational risks. Alternatively, failure to implement a NFPA 1600 compliant plan may represent a lack of controls sufficient to require public reporting.

E. Negligence — Legal Issues on the Horizon

Employers have also been held liable for acts of workplace violence based on negligence theories, including negligent hiring, negligent training, negligent supervision, negligent retention, and negligent recommendation or misrepresentation. Many defenses including workers' compensation preemption apply to these theories, but they are well established in case law.[15] Some courts have also suggested that common-law imposes upon all employers the duty to maintain a safe workplace — including the specific duty to maintain a workplace where employees are free from assaults by coworkers or third parties. When this standard is applied to non-employees it clearly falls outside the reach of workers' compensation preemption and constitutes a viable cause of action. Accordingly, the ability to allege a duty of care to the public is consistent with existing case law and directly relevant to whether NFPA 1600 is

13 OSHA Publication No. 3088, available from the U.S. Department of Labor, Occupational Safety and Health Administration.
14 Cal. Code Regs. tit. 8, § 3203.
15 *See Terror and Violence in the Workplace*, Chapter 29, The National Employer® (2005).

the standard for measuring such a duty.

Negligent failure to plan is a natural extension of liability stemming from an employer's duty to provide a safe workplace. In the wake of an emergency, an employer will inevitably be asked (1) whether reasonable precautions were undertaken to prevent the situation from occurring and (2) whether the response adequately protected and ameliorated the consequences to employees. An employer that can show effective planning for a crisis will be in a much better position to defend itself against a cause of action for negligent failure to plan.

As discussed above, an employer can be considered negligent if reasonable steps are not taken to eliminate or minimize reasonably foreseeable risks in the workplace. Following 9/11, and factoring in the heretofore unfathomable "scenarios" recently identified by the Department of Homeland Security, the range of possible hazards has undoubtedly broadened. Employers may now be reasonably expected to have anticipated and prepared for such newly foreseeable risks.

Two recent cases illustrate this point. *In Re September 11 Litigation*[16] addressed the issue of whether the World Trade Center defendants owed a duty to the occupants to create and implement adequate fire safety measures, even in the case of a fire caused by hijackers. The issue turned on the element of "foreseeability." Defendants argued that they could not reasonably foresee the fire hazard caused by hijacked airplanes targeted at the Twin Towers. The court disagreed.

Turning first to the scope of defendants' duty of care to the occupants, the court examined the defendants' relationship to the plaintiffs, whether the plaintiffs were within a zone of foreseeable harm, and whether the harm was within the class of reasonably foreseeable hazards that the duty exists to prevent. The court found that in order to be foreseeable, the precise manner in which the harm was inflicted need not be perfectly predicted. The court concluded that an individual may be liable even though the harm may have been brought about in an unexpected way.

A California appellate case also addressed the issue of foreseeability in light of changing expectations. *Kadish v. Jewish Community Centers of Greater Los Angeles,*[17] involved a shooting at a Jewish Community Center (JCC) summer camp that injured a child. The parents sued the JCC for negligence, claiming that the camp failed to provide a safe and secure camping environment. Prior to the shooting, many Jewish organizations had received threats and were warned about potential violence against their members. The organization had received vague threats of violence, but did not adopt any security measures.

The lower court dismissed the case, and the appellate court affirmed. The court found that the organization had no duty to prevent the crime that occurred. There had been no prior incidents at the organization that would have made the shooting spree foreseeable. The court recognized, however, that the range of foreseeable risks is expanding more rapidly than ever since the events of 9/11: "In closing, we note that events… have instilled public fear of criminal acts never before imagined. The Twin Towers in New York City were destroyed in a matter of minutes with great loss of life. The United States Department of Homeland Security issues warnings of possible future terrorist activities. And snipers pick off people who are going about their daily routines. In this day and age, new threats are often imagined…"[18]

Cases such as these increase the likelihood for future claims of negligent failure to plan.

F. Will NFPA 1600 Become Mandatory?

It is not unlikely that compliance with NFPA 1600 will become mandatory. NFPA 1600 has widespread acceptance as the governing standard for crisis preparedness. It was readily endorsed by Congress as a voluntary standard. Canada too has embraced NFPA 1600 as the governing standard for crisis preparedness. In 2005, NFPA 1600 was adopted under the Emergency Management Act for the Province of Ontario as a voluntary standard, but it will become mandatory at the end of 2006.[19]

Further driving compliance with NFPA 1600 is the fact that other widely adopted and practiced voluntary standards can and do set a baseline for the duty of care. Moreover, there is growing judicial recognition that the range of foreseeable risks is widening. These factors suggest that NFPA 1600 will evolve into a mandatory standard for crisis preparedness in the workplace.

16 280 F. Supp. 2d 279 (S.D.N.Y. 2003).
17 112 Cal. App. 4th 711, 5 Cal. Rptr. 3d 394 (2003), *rev. dismissed*, 18 Cal. Rptr. 3d 411 (2004).
18 *Kadish*, 112 Cal. App. 4th at 728, 5 Cal. Rptr. 3d at 407.
19 This Act applies to the public sector only.

Starting in 2004 in obscurity, NFPA 1600 has taken on an entirely new sense of identity and importance. The drive for compliance with NFPA 1600 has taken off. The NFPA is holding workshops to promote NFPA 1600; eleven of them scheduled throughout 2005.[20] In 2001, one prescient consultant observed: "If you are in the business of providing emergency, disaster, or business continuity planning or services, you better get to know '1600' soon."[21]

IV. An Overview of NFPA 1600

Getting to know NFPA 1600 begins with the understanding that NFPA 1600 provides a *process* for preparedness, and that compliance does not hinge on rigid adherence to a narrowly defined set of requirements. Flexibility is warranted given that vastly different types of preparedness are needed, varying by industry and the hazards faced. Throughout the overview, keep in mind that NFPA 1600 can be adapted to meet the particular needs of an organization.

A. Key Elements of NFPA 1600

Four Aspects of Program Management: a Policy, a Coordinator, a Committee, and an Assessment

There are two general components to NFPA 1600: Program Management and Program Elements. Program Management requires an entity to have a documented program that includes:

(1) the development of an executive policy (including vision, mission statement, and enabling authority);

(2) the appointment of a program coordinator authorized to administer and keep the program current;

(3) the assembly of an advisory committee to provide input to or assist in the coordination of the preparation, implementation, evaluation, and revision of the program; and

(4) the establishment of performance objectives for the program elements.[22]

Program Management broadly defines the contours of an effective emergency preparedness plan.

Four Phases of Emergency Management: Mitigation, Preparedness, Response, and Recovery

This section describes the phases of disaster/emergency management as (1) mitigation, (2) preparedness, (3) response, and (4) recovery.[23] Each of the elements listed in Chapter 5 is applicable to every phase of emergency management.[24] However, it is anticipated that the scope of these elements will vary depending on the impact of the hazards affecting the entity.[25]

B. Summary of Required or Recommended Elements under NFPA 1600

1. Laws and Authorities

This element requires that the emergency program comply with applicable legislation, regulations, directives, policies, and industry codes of practice. It also directs the entity to develop a strategy for addressing revisions to laws and regulations.

2. Hazard Identification, Risk Assessment and Impact Analysis

This section directs an entity to identify hazards and their likelihood of occurring. It also requires the entity to assess the vulnerability of people, property, the environment, and the entity itself to the identified hazards. At a minimum, the entity must consider natural and human-caused events (both accidental and intentional). An analysis must be conducted to determine the detrimental impact of such hazards.

3. Hazard Mitigation

This section directs an entity to develop and implement a plan for responding to long-term and short-term emergencies. The mitigation strategy must consider eleven points set forth in 5.4.3, including relocation, removal, elimination, and segregation of the hazard.

4. Resource Management

This section addresses the need to inventory corporate resources such as personnel and equipment, and to evaluate the time frames within which they will be needed. It also directs the entity to consider resource capability shortfalls and assess the steps necessary to overcome any shortfalls.

20 To register for the NFPA workshops, go online to www.nfpa.org or call 1-800-344-3555.
21 Steven C. Davis, *NFPA 1600 – Why You Should Get To Know It (www.DavisLogic.com)* (2001).
22 NFPA 1600, Chs. 4, 4.1-4.4, *available at* http://www.nfpa.org/assets/files/PDF/NFPA1600.pdf.
23 NFPA 1600, Chs. 5, 5.1.2, *available at* http://www.nfpa.org/assets/files/PDF/NFPA1600.pdf.
24 *Id.* Chs. 5, 5.2-5.15.2.
25 *Id.* Ch. 5.1.1

5. Mutual Aid

This section addresses the need for communication and cooperation between companies. The goal is to allow an entity to recover as quickly and efficiently as possible by enlisting the aid of temporary resources.

6.- 8. Planning

These sections underscore the need for effective planning. These provisions provide a detailed checklist for developing response plans, mitigation plans, recovery plans, and continuity plans.

9. Direction, Control and Coordination

This section directs an entity to develop the capability to direct, control and coordinate response and recovery operations. This must include an incident management system and specification of organizational roles, titles and responsibilities for each incident management function.

10. Communications and Warning

This section addresses the need to establish and regularly maintain communications systems and procedures. This requirement includes regular testing of the systems. A key component of communications is the inter-operability of multiple responding organizations and personnel.

11. Operations and Procedures

This section requires the establishment of procedures, including life safety, incident stabilization, and property conservation. This entails a situation analysis that includes a damage assessment and the identification of resources needed to support response and recovery operations.

12. Logistics and Facilities

This section pertains to the logistical capabilities of an organization, and the need to establish procedures for accounting for services, personnel, resources, etc.

13. Training

This section requires an assessment of training needs, and the development and implementation of a training/educational curriculum. The objective of the training is to create awareness and enhance the skills required to develop, implement, maintain, and execute the program.

This section also requires an entity to maintain training records. This may provide tangible measurement of an entity's concern for employee safety.

14. Exercises, Evaluations, and Corrective Actions

These provisions discuss the need to continually evaluate program plans, procedures, and capabilities.

15. Crisis Communication and Public Information

This section identifies the need to develop procedures to disseminate and respond to requests for information before, during, and after a disaster occurs. This section directs an entity to establish and maintain disaster/emergency public information capabilities.

16. Finance and Administration

In the days and weeks following a disaster, financial and administrative procedures will be disrupted. This section addresses the need to establish procedures to ensure fiscal viability.

NFPA Annex

NFPA 1600 also contains valuable explanatory information and reference material. Annex "A" is the explanatory information, numbered to correspond with the applicable text paragraphs. Annex "B-E" lists organizations, resources, programs, and informational references.[26]

C. Conclusions About NFPA

Private sector employers should undertake a strategic initiative to review NFPA 1600 and to determine its applicability. Many employers can reshape their current programs to mirror the structure of NFPA 1600. Most importantly, employers should use NFPA 1600 as a process checklist for developing an effective crisis management plan.

V. Developing a Plan: Best Practices

The primary purpose of an emergency preparedness plan is to minimize harm to employees and organizations.[27] First and foremost, the purpose of the plan is to save lives and reduce harm to people and property. Nonetheless, the very existence of

26 Praxiom Research Group Limited (Canada): Publication, NFPA 1600 Plain English Definitions; www.praxiom.com
27 A checklist for developing and maintaining a crisis management plan is attached as Appendix A.

a plan can be used as a shield in lawsuits alleging that the organization has failed to take steps to address emergency situations. Even more importantly, if adopted and followed, a plan can be used as a sword in lawsuits alleging that the company failed to comply with its own procedures and policies. With this in mind, employers are encouraged to make frank assessments of their emergency preparedness, and turn to NFPA 1600 for guidance on devising and implementing a solid plan for prevention and recovery. Ironically, NFPA 1600 may in the long run provide more of a defense to litigation than an incentive for plaintiffs to contend that employers are negligent by not adopting a NFPA 1600 compliant plan. Finally, employers have an answer to the issue of national preparedness. If the plan complies with the general provisions of the standard, such efforts very likely will meet the duty of care that a post-9/11 court may find to exist.

The government has established a website providing employers with a plan that is NFPA 1600 compliant.[28] At that website, an employer can download a Sample Emergency Plan prepared by the DHS.[29] The plan outlines common sense measures that businesses can take to start getting ready. It provides practical steps and easy-to-use templates to help your business plan for emergency situations. These recommendations reflect NFPA 1600. It also provides useful links to resources providing more detailed business continuity and disaster preparedness information.

For greater insight into this topic, Bruce T. Blythe has written an excellent book entitled *Blindsided: A Manager's Guide to Catastrophic Incidents in the Workplace*. Mr. Blythe is a recognized expert in the field of crisis management. The book offers practical solutions and provides a sample plan for emergency preparedness.

28 www.ready.gov/business
29 The Sample Emergency Plan is attached as Appendix B and can be downloaded from www.ready.gov/business.

The Role of the Chief Compliance Officer:

Integrating Employment and Labor Law Compliance into the Corporate Compliance Initiative and Learning the New Language of Compliance

I. Introduction

Although no one ever said that it was easy being a corporate officer or sitting on the Board of Directors, the challenges associated with those positions have grown exponentially in the past few years. One need only look to Bert Roberts and the 11 other former Board members of WorldCom for evidence that they are now operating under increased scrutiny from investors, the government and the public at large. WorldCom, of course, collapsed in 2002 after it was revealed that the company engaged in an $11 billion accounting fraud to inflate earnings and hide expenses. On March 24, Roberts, a former Chairman of the company, agreed to pay $4.5 million out of his own pocket to settle a class action lawsuit brought by WorldCom's investors alleging that the Board members should have been aware in advance of the fraud that undid WorldCom in 2002. The 12 former members of the Board have agreed to pay $24.75 million in total to settle all of their suits. Insurers for the 12 Board members have also agreed to pay an additional $36 million. If that wasn't bad enough, Roberts and the other Board members still face the prospect of defending themselves against other civil suits relating to WorldCom's collapse.[1]

It was anticipated that in the wake of the much-publicized Enron scandal that there would be less news about corporate ethics. After all, the federal government and several states were implementing new reforms that were intended to ensure corporate compliance. Presumably, corporations seeking to avoid bad publicity, fines, or other sanctions, would implement precaution after precaution in order to avoid the stigma associated with becoming the next Enron. Indeed, common sense seemed to suggest that issues regarding corporate compliance would slowly mature and become routine.

To the surprise of many, the demand for corporate compliance continues to grow as new disclosures rock corporate America. Newspaper headlines appear on a daily basis reporting class action settlements for corporate malfeasance, criminal trials of several high-level officers for fraud, and the promulgation of legislation addressing corporate ethics appear in the newspaper on the daily basis. It is no wonder that publications, such as the Chicago Tribune, have kept "Scandal Scorecards," which have become box scores documenting the most recent missiles fired at corporate America.[2]

The corporate scandals involving Enron, Andersen, WorldCom, Tyco, ImClone, and Xerox have caused investors around the world to lose confidence in corporate America. 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 and to have auditors confirm the accuracy of the company's report. In addition, the Securities and Exchange Commission, the New York Stock Exchange, and the National Association of Securities Dealers have created new standards requiring internal processes designed to comply with those set forth under Sarbanes Oxley. Several states have followed with their own set of requirements often reaching privately-held businesses rather than just those traded publicly.

Individual liability is now a reality for corporate officers. Kenneth Lay, former CEO of Enron, and Richard Scrushy, former CEO of HealthSouth, are also facing criminal charges based upon their activities as corporate officers. New laws, like Sarbanes Oxley, have created additional grounds for individual corporate officer liability. Individual liability also extends to labor and employment law, as supervisors can be held personally accountable under the FMLA, FLSA, and state harassment laws, such as California's FEHA.

1 Erin McClam, *Final World Com Ex-Director Settles Suit*, Assoc. Press, Mar. 24, 2005, *available at* http://news.findlaw.com/ap/f/66/03-22-2005/667600134be67776.html.
2 James Toedtman, *Scandal Scorecard*, Chicago Tribune, July 13, 2004.

In response to these developments, companies have taken extra caution in reacting to allegations of impropriety as illustrated in a recent article in the New York Times.[3] For example, Wal-Mart forced its vice chairman and director, Thomas Coughlin to resign over questions relating to his knowledge of corporate gift card and expense account abuses. At Boeing, its CEO was dismissed as a result of his extramarital affair with another executive at the company. Bank of America, which has paid almost $1 billion in fines this past year, discharged a highly regarded bond analyst after he compiled a research report on the casino and lodging industry as a joke. Clearly, corporate America's sensitivity to ethical issues is reaching new heights.

Indeed, the business community has undergone profound changes as companies have been severely damaged through failed legal compliance. In the wake of these events, companies are recognizing that compliance programs are essential in today's climate. Beyond that, many companies are realizing that simply complying with the bare minimum legal requirements does not effectively protect the company from civil or criminal liability. Consequently, companies are fully embracing compliance as a necessary tool, not just to satisfy legal obligations, but also to enhance the value of the company.

Generally, the "compliance movement" has been emanating from two centers within the company—the CEO and the Board of Directors Audit Committee. Typically, corporate compliance programs have primarily been filtered down from those two centers to the CFO and now the Chief Compliance Officer (CCO), or Chief Risk Officer (CRO). Even though these departments have played a larger role in spearheading the compliance movement, every corner of a company will be impacted by this compliance movement, including human resources and corporate counsel responsible for employment and labor law concerns. Indeed, HR and corporate counsel have traditionally had a huge role in a company's compliance program, but now the driving force is increasingly coming from a different source—the CCO.

The number of organizations utilizing CCOs or another high level corporate officer for risk management has grown exponentially in recent years as companies recognize that effective compliance programs are expected by investors and the general public as evidence of a commitment to ethical and compliant business practices. One need only look to the publication Compliance Week and its front page Profiles In Governance section to witness the emergence of the CCO. Increasingly the CCO is becoming the lead person responsible for managing a company's corporate compliance program to ensure that the company acts in accordance with its code of conduct. The CCO is also accountable for overseeing the company's regulatory compliance efforts. The CCO is often charged with overseeing each department of the company, as each department submits regular reports to the CCO regarding the department's compliance status.

While the CCO has become a prominent figure at many organizations, few companies are turning to HR to lead their compliance efforts. Of the past five corporate governance and compliance executives featured in Compliance Weekly's "Profiles in Governance" section, none have had backgrounds as HR Directors. More frequently, companies are utilizing CCOs with backgrounds in other fields—risk management, finance, and other areas of the law outside of employment and labor law. The typical CCO has also taken the lead role in formulating the company's code of conduct, while HR has often had a limited role with respect to the code of conduct. Unlike HR, corporate counsel has been required to take more of a lead role in ensuring that compliance efforts are effective in light of the new government regulations. However, the role of corporate counsel in a company's compliance efforts regarding employment and labor law could be substantially expanded.

A. The Corporate Compliance Evolution Revolution

The compliance revolution started in the areas of financial management and corporate governance. However, it is only a matter of time before it reaches the shores of HR. The cover story in the January 2005 issue of HR Magazine underscores both the current isolation of HR and the inevitability of its inclusion and measurement in mainstream corporate compliance systems. "Why Wall Street Is Blind to the Value of HR" reports that investment bankers and analysts have focused on short term costs and doubted the metrics for measuring HR practices. The author of the article reports that "change is coming" regarding

3 Landon Thomas, Jr., *On Wall Street, A Rise In Dismissals Over Ethics*, N.Y. TIMES, Mar. 29, 2005.

the way HR and HR compliance is valued by Wall Street. He explains that a growing portion of investors are refusing to fund "any firm—including those on Wall Street—that does not have demonstrable, high quality HR practices."

Companies that ignore or minimize HR's and corporate counsel's roles in the compliance framework regarding employment and labor laws are making a near fatal mistake. Imagine that an employee is accused of impermissibly sharing his employer's trade secrets. In this situation, HR would be responsible for: (1) administering the policy by ensuring that employees are aware of the policy and its requirements; (2) investigating whether such a violation did in fact occur; (3) providing discipline for the employee if there was a violation; and (4) ensuring that the policy is applied consistently and even-handedly. Meanwhile, contemplate the impact of a national class action for race discrimination or class-wide claims of maintaining an unlawful glass ceiling. These are not hypothetical or rare events, but actions that are being filed in courts across the country.[4]

It is essential that corporate counsel with expertise in employment and labor law lend a hand in any effective compliance effort. Corporate counsel must take an active lead in ensuring that all legal requirements are being addressed. In addition, counsel should be a resource for investigations of non-compliance. Counsel should also be involved in decisions about performing assessments of the company's compliance programs, as it is critical that the company turn to counsel for advice when public communications about the program are being developed.

As both departments touch upon virtually every aspect of an organization's operation, HR and corporate counsel have a natural role in the compliance movement. CCOs often have general authority over other individuals who, in addition to performing their regular duties for the company, are members of a designated compliance staff. Appointing representatives from different departments within an organization to a compliance committee — including employees from areas such as human resources, finance, legal, corporate communications, risk management, internal audit, ethics, and operating unit management — is a cost-effective method of supporting a company-wide infrastructure of compliance. Clearly, each department has a role in assisting the CCO in implementing the company's compliance program as it relates to their individual area of extended knowledge.

At this point in time, HR departments have one of two choices to make. They can resist the corporate compliance movement and wait for the day when they are required to become key players in the company's compliance efforts. Those that choose this route risk falling behind other company departments that have operated effective compliance functions for years. Moreover, they forfeit any right of leadership in shaping the compliance program.

Alternatively, HR can embrace the compliance revolution and accept the organization's need for centralized control and accountability. By taking a proactive position in the compliance movement, HR will be able to preemptively avoid future compliance headaches and inspire added confidence at the CEO and CCO-level. Currently, the vast majority of compliance tasks within an organization deal with employees. The number of laws, regulations, and requirements faced by the corporation is usually greatest in the HR field (excepting certain highly regulated industries such as pharmaceutical manufacturers). Clearly HR or corporate counsel expert in employment and labor law are contenders for the chief compliance officer position.[5]

II. The Keys to Implementing a Successful Compliance Program

The compliance movement presents a golden opportunity for HR and corporate counsel to highlight its importance to, and visibility within, the organization. However, HR and corporate counsel must understand, embrace, and implement the language of the C-level executives. In light of the fact that the compliance movement is still in its infancy stage, it is particularly important that these departments choose to take an active role in promoting compliance policies:

(1) learn the nomenclature of the compliance world—in particular, the governing standards set forth by the Federal Sentencing Guidelines;

(2) apply this nomenclature to their compliance programs; and

4 *See Employment Class Actions: A Tool In Transition*, THE NATIONAL EMPLOYER®, Chapter 9 (2005).
5 *Q&A With Chief Compliance, Ethics Officer At Ryder,* COMPLIANCE WEEK, July 27, 2004.

(3) use the company's code of conduct to strengthen existing human resource policies.

A. Learn the Language of Compliance Through OCEG

One of the challenges facing employers seeking to implement compliance functions, or expanding such measures, is the present need for a common language to emerge with regard to the world of compliance measures. However, the Open Compliance and Ethics Group (OCEG) provides employers with a structured approach, common language, and objective best practice model that are applicable to organizations of all shapes and sizes. OCEG is a not-for-profit organization formed by a group of business leaders from a wide range of industries for the purpose of creating compliance and ethics guidelines for employers to use in building compliance and ethics programs. In furtherance of its mission, OCEG put together guidelines for employers in developing, operating, evaluating, and improving an effective compliance and ethics program. OCEG incorporates existing standards under the Federal Sentencing Guidelines (FSGs), the Committee of Sponsoring Organizations (COSO) framework, and at least a dozen other frameworks that address internal control, risk management, and quality management.

The OCEG guidelines can be of great use to corporate counsel, human resources personnel, and management. For example, corporate counsel and HR may rely on the guidelines as a checklist to compare with the company's actual policies and practices. Corporate counsel and HR can also use the guidelines as a roadmap for improving the company's employment and labor law compliance program. The guidelines may also be used to educate managers on the types of compliance questions and expectations they may face in directing their respective departments.

1. Corporate Compliance Adds to an Organization's Value

OCEG provides an objective method for companies, investors, and insurers to measure an organization's success in implementing a compliance and ethics program.

In recent years, several studies have provided empirical evidence linking the effectiveness of corporate governance with stock market responses. Over the period of 1996 through 2004, McKinsey & Company conducted opinion surveys on whether institutional investors would pay for good corporate governance. According to those surveys, 80% of those who responded indicated that they would pay a premium for well-governed companies.[6] In another study, based upon the five year cumulative returns of Fortune Magazine's annual survey of "Most Admired" firms, it was demonstrated that the "most admired firms" had an average return of 125%, while the "least admired firms" returned 80%.[7] *Business Week* also conducted a study in which it enlisted institutional investors and experts to assist in differentiating between boards with good governance and bad governance. Its research demonstrated that the companies with the highest rankings had the highest returns.[8] Several other studies indicate that there is a strong correlation between good corporate governance and financially successful organizations.

Conversely, companies that have had compliance failures have paid the price. Studies have shown that of 50 American companies to have experienced at least some publicly known form of failed corporate governance in the last several years (such as HealthSouth, Martha Stewart Omnimedia, Time Warner, and WorldCom), not one of them experienced an increase in share price over the period where the corporate governance failure was observed.[9] For about 2/3 of the companies that experienced a corporate governance failure there was a dramatic share drop of at least 30%, while the others all experienced decreases that were far less severe.[10]

2. OCEG's Guidelines

OCEG's guidelines are designed to address the full lifecycle of planning, implementing, managing, evaluating, and improving integrated compliance and ethics programs. In short, the OCEG framework focuses on four processes: (1) developing an ethical culture; (2) planning a compliance and ethics program; (3) responding to compliance risks through the staffing, implementation, and management of the compliance and ethics program, and (4) evaluating the effectiveness of the compliance and ethics program. OCEG developed these guidelines with the intent to make them flexible to satisfy the individualized needs and desires of various employers. While the original proposed framework was cumbersome, a two-year review and revision process resulted in a more practical and functional framework.

6 Burgman, Ronald, *Corporate Governance: Firm and Market Performance*, Open Compliance and Ethics Group, at 8 (2004).
7 *Id.* at 10.
8 *Id.* at 10-11.
9 Burgman, Ronald, *Corporate Governance Failures: What Went Wrong?*, Open Compliance and Ethics Group, pp. 4-6 (2004).
10 *Id.* at 4-5.

This has been adopted by OCEG and now sets the stage for the full development of twelve subject-matter specific domains governing the entirety of corporate compliance.

(a) Culture

The first of the key components, culture, addressed the need for an organization to identify and evolve an internal environment that allows the compliance program to thrive. This includes understanding and addressing not only the ethical culture, but also the entity's approach to governance, risk, corporate values, and corporate vision. While many practicing HR and legal professionals have difficulty quantifying the importance of something as abstract as "culture," it is at the core of any compliance process. Cultural values are set by the top leadership and work their way throughout the organization. HR and legal professionals were instrumental in changing the culture surrounding issues such as sexual harassment in the workplace and the prevention of workplace violence. Several of the most deeply-held values present in the workplace are reflected in laws, regulations, and policies that govern relationships between employees. Accordingly, while there may be few boxes for HR and legal to check under the "cultural" portion of the OCEG Framework, this is a vital area of concern in the overall compliance program.

(b) Planning

Planning involves establishing the compliance program's scope and objectives. An organization should identify and evaluate the risks stemming from internal and external events that may result in noncompliance or unethical conduct. Once those risks are analyzed, the organization can develop a strategy to mitigate or eliminate those possibilities. HR and legal have vital roles in this process. To forfeit these responsibilities to others who are less knowledgeable about the workplace is a form of HR malpractice. The wage and hour epidemic of class actions is a good example of a failure by many organizations to "identify and evaluate the risks stemming from internal and external events."[11] Very recent developments increasing the likelihood of class certifications in employment law litigation bear directly on the risk planning that should be taking place within corporate America. Clearly, HR and corporate counsel have a critical role at the planning table—a role that promises to become increasingly important as the workforce becomes more diverse.

(c) Responding

By establishing policies, procedures, and controls to manage the compliance program, companies may implement an effective response mechanism. Organizations may utilize internal investigation programs, hotlines for assistance with compliance issues, various communication networks, and other resources to create a robust response program. This is prime territory for HR and corporate counsel to deal directly with employment and labor law challenges. In OCEG's Employment and Labor Law Domain as much as 80% of the legal requirements, core practices and advanced practices will take place within this portion of OCEG's framework. Moreover, this is the part of the framework that allows the best comparisons between areas of compliance. For example all training requirements will be listed under "Responding" covering all of the various laws and regulations applying to the organization. Knowing the vast scope of training required and how the need is being met, provides an enormous advantage to those who have responsibility for avoiding duplication and increasing efficiency.

(d) Evaluating

Evaluating the compliance program is essential to its success. An organization should conduct ongoing monitoring of its compliance program, and have routine periodic assessments of the design of the program as well as its effectiveness. By making efforts to continually improve the compliance function, an organization can reduce incidents of noncompliance and foster ethical conduct.

In sum, OCEG provides a great opportunity for employers to institute effective compliance programs. OCEG is one of the only organizations to recognize the need for a common language and structure between areas of specialized compliance. With the framework now completed, the task of building detailed guidelines in each of twelve Domains has begun. One of these Domains is Employment and Labor Law, which is in turn being divided into as many as fourteen subtopics. In each of these areas legal requirements are being listed, external requirements

11 *See* Daily Lab. Report (BNA), Mar. 22, 2002.

catalogued (such as those of the NYSE), core practices identified, and advanced practices described. When this process is completed OCEG will have provided organizations with tools to finally measure their compliance efforts. Much more detailed information is available directly from OCEG regarding their mission, their resources, and their technology.[12]

B. The Role of the Federal Sentencing Guidelines in Building Compliance Programs

While the Federal Sentencing Guidelines (FSGs) have garnered much attention with respect to their application to criminal law, they are also of immediate concern to employers, as they direct employers to institute effective compliance programs to prevent violations of law. In fact, the FSGs are becoming the measuring stick against which companies compare their compliance programs. This has more to do with their timing and governmental status than their Congressional mandate. The Federal Sentencing Guidelines include a process for legal compliance. This process could apply to civil, criminal or regulatory law. The process is not especially original or unique, but the fact that it comes from a governmental agency has caused the compliance world to use the structure in building compliance programs. It is a little bit like using the scientific method for experiments throughout all the different branches of science. The FSGs reflect a methodology that does generate a reasonable level of compliance. Accordingly, it has become a standard both by example and as a requirement for mitigating civil and criminal liability and damages.

The United States Sentencing Commission, which was established in 1984, promulgated the FSGs for the purpose of creating a uniform sentencing in the sentencing of federal law offenders. In 1991, the Sentencing Commission promulgated the organizational FSGs in order to create incentives for corporations to institute effective compliance programs or modify already existing programs. The Sentencing Commission noted that the promulgation of organizational sentencing guidelines marked the federal government's first attempt to articulate broad-based compliance standards. One of the primary reasons for the enactment of the FSGs for organizations was that the federal government lacked a clear corporate crime sentencing and enforcement policy. As a result, judges were having great difficulty in finding meaningful ways to sentence corporations. Empirical research conducted by the Sentencing Commission on corporate sentencing practices demonstrated that corporate sentencing was in disarray because nearly identical cases were treated differently. In addition, average fines were found to be less than the cost corporations had to pay to obey the law. As a result, the Sentencing Commission widened the scope of the FSGs to include organizational standards. In 2004, the Sentencing Guidelines were amended to require that all employees, including high-level personnel, receive periodic training pertaining to their organization's ethics and compliance standards.

The FSGs apply to "all organizations, whether publicly or privately held, and of whatever nature, such as corporations, partnerships, labor unions, pension funds, trusts, nonprofit entities, and governmental units."[13] Under the FSGs employers can be held liable for their employees' illegal conduct. The FSGs provide seven minimum requirements of an effective compliance program. Like the scientific method's application across multiple branches of knowledge, this is the description of a process that can cover all forms of compliance. The seven requirements are:

- Assignment of high level personnel to oversee the compliance function.
- Written standards and procedures.
- Due care in the delegation of discretionary authority.
- Effective communication of standards and training.
- Monitoring, auditing, and reporting.
- Enforcement, [recordkeeping], and discipline.
- Response, prevention, and modification.

Indeed, the FSGs are applicable to civil proceedings. Courts and regulatory agencies have utilized the FSGs to establish expected standards of conduct for employers, and to determine the appropriate sanction for failing to meet those standards. Moreover, the Commentary to the FSGs note that effective ethics and compliance programs go beyond the deterrence of criminal conduct to "facilitate compliance with all applicable

12 *See* Open Compliance and Ethics Group information at www.oceg.org.
13 United States Sentencing Commission, An Overview Of The Organizational Guidelines (2004).

laws."[14] If employers take proactive steps to prevent unethical and illegal conduct through an effective ethics and compliance program (such as training and auditing company policies), employers can substantially mitigate potential fines and punishment for criminal violations:

The potential fine range for a criminal conviction can be significantly reduced — in some cases up to 95% — if an organization can demonstrate that it had put in place an effective compliance and ethics program and that the criminal violation represented an aberration within an otherwise law-abiding community.[15]

On the other hand, the absence of effective ethics and compliance programs can be used to increase fines and punishment.

In January 2005, the United States Supreme Court set aside part of the FSGs in a case concerning pronounced sentences for drug offenses.[16] However, the Court did not address the guidelines' corporate application in its opinion. In fact, the Court noted that judges may consider, but not be bound by, the FSGs. The decision does not affect the applicability of the FSGs with regard to the proper standards of employer compliance efforts and the appropriate sanctions for failing to meet those standards. Thus, employers looking to stay out of court would be well advised to follow the seven requirements of the FSGs.

In light of the FSGs, the need for maintaining effective compliance procedures is all the more evident.

C. Use the Company's Code of Conduct to Address HR Policies

As a result of the compliance requirements stemming from the FSGs, Sarbanes Oxley, and other similar governing statutes and regulations, employers must institute effective compliance and ethics policies and procedures. Codes of conduct can assist employers in fulfilling that obligation by identifying the important compliance issues that employees confront and explaining how employees are to properly address those compliance issues.

While codes of conduct are not explicitly required under Sarbanes Oxley, the implication is clear that they are now necessary for publicly-traded companies. Section 406 of Sarbanes Oxley requires publicly-traded companies to disclose whether they have a code of ethics for their principal officers (and an explanation if the company does not have such a code). Furthermore, pursuant to Section 301 of Sarbanes Oxley, audit committees of publicly-held companies are required to establish procedures for receiving, and responding to complaints about accounting, internal accounting controls, and auditing matters. In fact, stock exchanges now mandate codes of conduct as a corporate governance requirement.

Many organizations adopted their code of conduct with special attention placed on corporate governance issues and legal compliance in financial reporting, insider trading, and antitrust. While these are critical areas of compliance, they do not include the vast areas of legal compliance typically handled by HR. Recently, Littler surveyed several hundred codes of conduct and found the average code had only a few sentences on equal employment opportunity issues. Virtually all of the organizations sampled had detailed policies and procedures dealing with personnel issues, but a strange silence was present when reviewing the many codes of conduct to determined core values dealing with prohibited harassment and discrimination. In at least one litigation handled by this author, plaintiff's counsel argued to the trier of fact that the lack of such values in the corporate code of conduct showed a low priority for the enforcement of state and federal antidiscrimination laws.

While it is not an emergency that codes of conduct be reviewed with an appreciation of core HR values, it is a highly recommended undertaking. The code of conduct should be a master set of values that guide the entire organization. Specific policies and procedures do not need to be included, but they should comfortably flow from the values within the code of conduct. Recently Littler and Shearman & Sterling undertook the development of a comprehensive code of conduct on-line learning program for ELT. Vignettes were developed to teach and display key learning points associated with the many different codes of conduct in use. While appropriate weight was given to key topics such as insider trading, financial reporting, anti-trust requirement, and corporate governance, more than half of the vignettes focused on HR-related issues that displayed the importance of ethics and legal compliance. Without serious doubt, the vast majority of day to day ethical dilemmas and legal com-

14 U.S. Sentencing Guidelines, § 8B2.1 cmt. background.
15 *Id.* (emphasis added).

pliance challenges encountered in the workplace deal with employment and labor law. Hiring, evaluations, promotions, discipline, terminations, and relationships between employees all are governed by values and laws associated with the HR function. In making a code of conduct a meaningful document for employees, it is essential that it be presented in the context of day to day workplace issues.[17]

To facilitate the above suggestions, HR should take a more active role in educating employees on their employer's code of conduct. To ensure the effectiveness of the compliance program, HR must do much more than simply distribute its code of conduct to its employees. In fact, the FSGs specifically reference the need to proactively communicate the organization's compliance and ethics programs by "conducting effective training programs." Accordingly, HR should provide training to employees that includes the basics of the company's code of conduct and compliance program and directions as to how employees can recognize and respond to ethical dilemmas. Whether this is done in live training session or through high quality interactive on-line training, basic values will have the most meaning if explained in the context of day to day challenges that actually confront employees.

III. Effective Compliance Policies and Programs Are a Legal Necessity: Case Studies from Employment and Labor Law

Recent case law demonstrates that compliance measures implemented at the HR-level can shield a company from liability altogether or limit the potential damages available to plaintiffs. Effective employment law compliance measures must include routine self-audits of the company's labor and employment law policies and adequate employment law training to employees.

A. Equal Employment Opportunity Policies

Under federal Title VII law, an employer can avoid harassment liability under the *Faragher/Ellerth* defense by showing that (1) it "exercised reasonable care to prevent and correct promptly" any harassing behavior, and (2) the employee "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."

By contrast, the California Supreme Court in *Department of Health Services v. Superior Court*,[18] held that employers face strict liability for harassment by supervisors under FEHA. However, for purposes of limiting damages under FEHA, an employer may plead and prove that it took appropriate steps to prevent and address harassment, but that the employee unreasonably failed to take advantage of these protections. Therefore, under both federal and state law, an employer who proactively provides harassment training and institutes an effective harassment policy may protect itself from liability or substantial damages.

One need not look far to find instances where a company's failure to maintain an effective harassment policy has resulted in substantial costs. In *EEOC v. Consolidated Freightways Corp.*,[19] the St. Louis District Office of the EEOC filed a Title VII lawsuit alleging Consolidated Freightways, formerly one of the largest freight carriers in North America, subjected black employees at its Kansas City, Missouri facility to a hostile work environment because of their race. The affected employees were a loading dock supervisor and 11 dockworkers. The harassment included the presence of nooses and racist graffiti in the workplace, physical assaults of African-American workers by Caucasian coworkers, threats of violence toward African-American workers, vandalism of African-American employees' property, and disparate discipline of African-American employees. According to the EEOC, the company conducted no investigation into the matter even though it was aware of the allegations. The parties settled the case in January 2005 for a total of $2.75 million.

Similarly, in November 2004, retailer Abercrombie & Fitch Stores, Inc. agreed to a $50 million consent decree to settle three lawsuits alleging that the company sought to promote a "certain look," that was largely all-white, both in its advertisements and its workforce.[20] In addition to paying $50 million, Abercrombie and Fitch agreed to implement major changes in its hiring, promotion, job assignment, and marketing practices. The reforms will include regularly reviewed benchmarks for hiring and promotion of women, Latinos, African-Americans, and Asian-Americans, a prohibition on targeting fraternities, sororities, or specific colleges for recruitment purposes, and several other changes aimed at promoting diversity within the company.

In July 2004, the Boeing Co. agreed to pay $72.5 million to

16 *United States v. Booker*, 125 S. Ct. 738 (2005).
17 *See* Employment Law Learning Technologies (ELT) at www.elt-inc.com/index.html.
18 31 Cal. 4th 1026 (2003).
19 No. 4:02-CV-00519 (W.D. Mo. Jan. 21, 2005).
20 Daily Lab. Rep. (BNA), Nov. 17, 2004.

settle a class action lawsuit whereby approximately 29,000 female employees claimed they suffered discrimination in pay, promotions, overtime, assignments, bonuses, and other conditions of employment.[21] This settlement marked the end of a four year-plus legal battle. In addition to the large monetary amount, the Boeing Co. must now undergo an extensive review of its company policies to determine whether there exists an illegal disparate impact on female employees. The particular policies that the Boeing Co. must review, and revise if necessary, are: job descriptions, salary levels, performance evaluation processes, employee compensation policies and procedures, internal complaint procedures, hourly overtime policies, and promotion, interview, and testing processes.[22] The costly settlements in these cases clearly demonstrate the importance of continued review of internal policies and procedures.

IV. The Importance of Employment and Labor Law Audits, Including Compliance with Wage and Hour Requirement

As demonstrated above, self-audits of labor and employment policies to identify potential problems before claims are filed limit the risk of future litigation. In particular, self-audits can eliminate the possibility of future wage and hour class action lawsuits. In June 2004, Longs Drugs Store Corp. agreed to pay $11 million to resolve two law suits alleging that it violated California's wage and hour laws by failing to pay overtime earned by store managers in approximately 400 locations across the state.[23] The plaintiffs built their case against Longs using a provision in California law that managers who are exempt from wage and hour protections can receive overtime pay if they spend more than 50% of their time performing nonexempt duties. The named plaintiffs in the Longs case each declared that they routinely worked more than 10 hours of overtime per week without being paid, and that they spent more than half of their time performing non-managerial tasks such as stocking shelves or running a cash register. In support of their allegations, the attorneys for the plaintiffs submitted more than 200 declarations by Longs' managers. In settling the matter, Longs denied liability, but settled in order to avoid protracted litigation. This case illustrates the importance of conducting regular self-audits to ensure compliance with the state and federal laws. Regular audits could have prevented the two Longs suits from ever being filed.

Abercrombie & Fitch, whose $50 million settlement over EEOC policies was discussed above, also faced difficulties on the wage and hour front.[24] The California state Division of Labor Standards Enforcement alleged that Abercrombie's requirement that its employees buy Abercrombie clothes, albeit at a discount, without reimbursement reduced the employees' pay below the state's minimum wage requirement. Under the settlement, Abercrombie agreed not to compel or coerce any California worker to buy and wear its clothes, nor to discourage, penalize, or discriminate against any worker for wearing a non-Abercrombie item to work. As demonstrated in both instances, routine wage and hour audits, as part of an effective compliance function, can protect the company from litigation.

V. The Compliance Opportunities Associated with California's New Training Requirement (AB 1825)

On September 29, 2004, California Governor Arnold Schwarzenegger signed into law AB 1825 — the nation's most comprehensive compliance statute. By January 1, 2006, every California employer with more than 50 employees must provide at least two hours of "sexual harassment" training and education to all supervisory employees. AB 1825 showcases the importance and breadth of HR compliance and provides HR and legal with an excellent model for compliance initiatives in general.

A. The Basics of the Bill

- By January 1, 2006, employers must provide two hours of sexual harassment training and education to all supervisory employees employed as of July 1, 2005.
- Applies only to organizations that regularly employ 50 or more employees or regularly "receive the services of" 50 or more persons. (This presumably means independent contractors are included in the 50+ number.)
- Employers that already provided such training to a supervisory employee in 2003 would be exempt from this initial requirement.
- After January 1, 2006, employers must provide sexual

21 *Beck v. Boeing Co.*, No. C00-0301P (W.D. Wash.) (consent decree signed July 16, 2004).
22 Daily Lab. Rep. (BNA), July 19, 2004.
23 Daily Lab. Rep. (BNA), June 11, 2004.
24 Daily Lab. Rep. (BNA), June 25, 2003.

harassment training and education to each supervisory employee once every two years, and to each new supervisory employee within six months of their assumption of a supervisory position.

- A "supervisor" is any individual having the authority "to hire, transfer, suspend, law off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend that action… if the exercise of that authority is not of a merely routine or clerical nature, but requires the use of independent judgment." It is better to be cautious/overbroad in the designation of supervisors. Just because someone does not have the "manager" in his/her title does not mean that she/he does not practically meet the legal definition of a supervisor. Managing an assistant, for example, may be enough to be a supervisor.
- The training must be of a *high quality* and conducted via "classroom or *other effective interactive training*" (including effective on-line training) and include the following topics:
  - Information and practical guidance regarding federal and state statutory laws about sexual harassment.
  - Information about the correction of sexual harassment and the remedies available to victims of sexual harassment.
  - Practical examples aimed at instructing supervisors in the prevention of harassment, discrimination and retaliation.

Failure to comply with AB 1825 does not render an employer automatically liable. Plaintiffs will argue, however, that not meeting the new training mandates is evidence of an employer's failure to take all reasonable steps to prevent harassment and supports a punitive damages award.

Likewise, complying with AB 1825 is not an automatic shield from liability for sexual harassment.

B. The Lessons of AB 1825 Parallel the Opportunities and Mistakes Associated with Many Corporate Compliance Programs

There is a common misconception that compliance simply means "follow the law." It's much more than that. Indeed, companies that structure their compliance programs on meeting statutory requirements may inadvertently place themselves at greater risk. The following five "mistakes" illustrate how an effective compliance program entails much more than a narrow focus on the mandates of AB 1825 (or similar such laws). Yet, laws such as AB 1825 provide a mandate and allocation of corporate resources that can be used wisely to create an effective compliance program. The challenge is to avoid the classic mistakes.

Mistake #1: We're Only Providing "Sexual Harassment" Training Because That's All AB 1825 Requires.

AB 1825 is not just about sexual harassment. It requires training on discrimination and retaliation. Moreover, it specifically leaves in place all existing requirements to train on other unlawful forms of harassment and discrimination (such as age, race, and religion). There is a serious danger that AB 1825's focus on "sexual harassment" if taken literally may actually set employer training back ten years — to the early 1990's.[25] During those years, employer-training efforts focused on sexual harassment prevention as an outgrowth of the case law following the confirmation hearings involving Supreme Court Justice Clarence Thomas. The obsession with "sex" left uncovered the serious problems associated with other forms of unlawful harassment. Racial harassment, harassment based on age, national origin or disability, and harassment associated with one's religious beliefs were not only illegal, but very significant workplace challenges.

In 1999 the EEOC issued guidance reprimanding the employer community for its failure to broaden training to cover the full range of prohibited harassment.

> [V]icarious liability applies to harassment by supervisors based on race, color, sex (whether or not of a sexual nature), religion, national origin, protected activity, age, or disability. Thus, employers should establish anti-harass-

25 We expect the California Legislature will amend AB 1825 to clarify that training on all protected categories is mandated, not just sexual harassment.

ment policies and complaint procedures covering all forms of unlawful harassment.

* * *

An employer should ensure that its supervisors and managers understand their responsibilities under the organization's antiharassment policy and complaint procedure. Periodic training of those individuals can help achieve that result. Such training should explain the types of conduct that violate the employer's anti-harassment policy; the seriousness of the policy; the responsibilities of supervisors and managers when they learn of alleged harassment; and the prohibition against retaliation.[26]

Gradually, employers responded with increasingly effective training identifying harassment and showing how it could be associated with several prohibited categories, not just sex. California's "sexual harassment" law, however, could set back employers' overall legal compliance efforts should they focus narrowly on the mandates of the statute to the exclusion of other forms of unlawful harassment, discrimination and retaliation. It is a serious mistake to interpret the California law so narrowly that an employer does not pay attention to broader forms of harassment and discrimination prevention.

Comprehensive unlawful harassment training is so important that an employer may actually face a greater risk of liability and damages, including punitive damages, having conducted only sexual harassment training than no training at all. What would you think if you were a juror in a race, age, religion, national origin, disability, or sexual orientation harassment case, where the employer had conducted extensive sex harassment training but no training on these other protected categories? You can be sure that plaintiff's counsel in such a case will remind the jury (again and again) that the employer must not have found these concerns "important" as it intentionally chose not to train in these areas. This impression could be devastating. Clearly, adding thirty minutes to the training and integrating the full range of protected categories is the **highly preferred** way of meeting the legal requirements and making a difference!

Applying this lesson more broadly, specific training requirements should be evaluated to determine the areas of greatest organizational risk. Broadening the program may produce a significant ROI benefiting the organization. For example, the State of Washington has for several years provided comprehensive mandatory training in as many as fifteen areas of employment and labor law to its managers. They report that this undertaking alone is responsible for a 37% decline in settlement costs and attorney fees apart from the value of having a better workplace.[27]

Mistake #2: We're Providing Specialized Training Only to Our Supervisors in California Because AB 1825 Does Not Apply In Other States.

California occasionally experiments with employment practices that are outside the national mainstream. Other times California's practices are indicative of national trends. While AB 1825 is unfortunately limited to only one form of unlawful harassment, it is putting into statute an employer practice that should have been well established. For responsible employers such education for its managers has long been required. Nonetheless, AB 1825 (not unlike the seatbelt laws) makes a definitive statement specifying a deadline and a minimum requirement for compliance. To apply this statute solely to employees in California, would be a major mistake for many multi-state employers.

First, the California statute makes explicit what has been an EEOC requirement for several years under federal law. Indeed, as presented above, such training needs to cover all prohibited forms of harassment and discrimination. Clearly this is a national concern, if not a core value that organizations may elect to apply internationally.

A second reason that the training policy should be applied nationally is the message the organization sends to employees, judges and juries in other states if the training is limited to California. Imagine the following situation:

An employer with multiple locations across the country implements a robust training program for its California supervi-

26 *See EEOC's Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors* (June 18, 1999)..
27 *See Training Really Is The Law: The Rise of Mandatory Training*, THE NATIONAL EMPLOYER®, § 15.1.3, at 954 (2005).

sors. A serious harassment incident arises in the organization's Dallas office. The allegations reference harassing behavior that was directly addressed in the California training program, but Dallas supervisors did not receive the same training. Imagine now that you are the plaintiff's attorney in this case, criticizing the employer's lack of reasonable efforts to prevent and correct workplace harassment. In this instance, a narrowly focused, localized training approach actually creates problems for the employer. Accordingly, one national training policy is highly recommended.

Finally, California now joins Connecticut with a mandatory training statute. It is difficult to believe that other states are far behind. In 2000, Littler predicted that by 2010 mandatory harassment and discrimination training would be statutorily required. The California law is not an aberration; it is part of a long developing trend. It is highly likely that other states will follow and that the California statute will be amended to cover all forms of prohibited harassment and discrimination. On a positive note, we believe there is solid evidence that an effective program covering the full range of protected categories can be presented within the two hours now required for sexual harassment training.

Mistake #3: We're Not Training Employees Because AB 1825 Only Covers Supervisors.

Non-supervisory employees in California and beyond need training for at least five critical reasons:

1. A review of federal case law post the landmark Faragher[28] and Ellerth[29] decisions suggests that both managers and employees must be trained to successfully establish an affirmative defense to harassment claims brought in federal court.

2. California Government Code section 12940(k) requires employers to take "all reasonable steps necessary to prevent discrimination and harassment from occurring." Basic harassment prevention training for all employees is part of a reasonable step, necessary to prevent workplace harassment and discrimination.

3. In *State Department of Health Servs. v. Superior Court,*[30] the California Supreme Court held that the Fair Employment and Housing Act (FEHA) does not allow the federal *Faragher/Ellerth* defense in harassment claims. Instead, California employers may assert a different defense under the FEHA: the doctrine of avoidable consequences. This defense allows an employer to limit damages by proving that it took appropriate steps to prevent and address harassment.

According to *State Dep't of Health Servs.*, to establish the avoidable consequences defense, a California employer must:

- Show that it adopted appropriate anti-harassment policies and communicated essential information to employees.
- Ensure a strict prohibition against retaliation for reporting alleged policy violations.
- Ensure that reporting procedures protect employee confidentiality as much as is practical.
- "Consistently and firmly" enforce anti-harassment policies.

4. None of these factors identified by the Court are limited in scope to supervisors. The Court further stated that in establishing the avoidable consequences defense, potentially relevant evidence includes "anything tending to show that the employer took effective steps" to encourage individuals to report harassment and for the employer to respond effectively. Clearly, this broader directive, in addition to the specific requirements listed above, strongly supports training for both employees and supervisors

5. Recent amendments to the Federal Sentencing Guidelines (FSGs) require ethics and compliance training for all managers and employees.

Mistake #4: We Don't Need to Do Anything Right Now.

The January 1, 2006, deadline for AB 1825 compliance is fast approaching. To ensure a successful program, preparations and training should begin at least five months in advance. Employers must also factor in the typical "slow down" of activity around holiday time.

Preparing a compliance training program typically requires consultation and buy-in from multiple departments – Legal, HR, Employee Relations, Risk Management, IT, etc. To ensure adequate time to finalize licensing arrangements and prepare for implementation, employers must act now!

28 *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998).
29 *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257 (1998).
30 31 Cal. 4th 1026 (2003).

Mistake #5: We Don't Need to Conduct Any Training Because We Employ Fewer than 50 Employees in California.

Although AB 1825 applies to employers with 50 or more employees, the federal unlawful harassment laws apply to employers with 15 employees, and California's unlawful harassment laws apply to employers with as few as five employees. For liability purposes, the company's size is largely irrelevant as small companies that employ between 5 and 50 employees are subject to most of the same laws and accompanying remedies as a company with 5,000 employees. Thus, employers large and small should recognize AB 1825 as a blueprint for reducing risk in a host of different areas. In contrast, small employers that choose not to conduct training based on AB 1825's 50 employee minimum threshold may be technically "compliant," but such short-sightedness is preventing them from taking advantage of a great opportunity not only to significantly reduce their overall risk, but to better their company.

Mistake #6: All Training Must Be Via Live Instruction.

AB 1825 does not require live training. Indeed, some of the most effective training in the world is provided on-line, which demands the involvement of the learner every few seconds. Meanwhile, video or web-based programs that are not interactive, can quickly fall into the "show and go" category. This is neither what the Legislature intended to require nor does it have the positive impact of a well-designed live or on-line learning program. Gone are the days of meeting the training requirement by putting an "x" in the box.

Mistake #7: We're Not Going to Comply with AB 1825 Because There Aren't Any Penalties.

While AB 1825 does not impose any penalty, *per se*, noncompliant employers are at great risk should litigation develop. Such noncompliant employers are much more likely to experience an unlawful harassment incident, to be sued for same, to be found liable, and to be ordered to pay punitive damages. Responsible employers will do their best to be in compliance with legal requirements, including AB 1825. Wisely the Legislature did not make failure to train a separate claim sponsoring litigation when no discrimination or harassment had occurred. Instead, the lack of training will be something that a plaintiff's counsel can fully exploit should litigation otherwise develop. In many respects, this mirrors the current practices in litigation. For the last decade plaintiff's attorneys have effectively made the same argument but without a specific statute. Ironically, this new statute may motivate the few employers who do not train to take this important step, leaving the plaintiff's bar with fewer targets.

VI. A Working Model of Compliance: Applying the Federal Sentencing Guidelines to AB 1825 As An Illustration of the Compliance Process

AB 1825 provides a good example of how the Federal Sentencing Guidelines' seven steps can help employers establish an effective compliance program. While one statute should not be the basis for an entire program, it does provide an illustration of the workability of the compliance model associated with the Federal Sentencing Guidelines.

1. **Assignment of High Level Personnel to Oversee the Compliance Function** HR and/or legal should oversee compliance with AB 1825 and unlawful harassment training in general. This includes reporting compliance to the COO as part of an overall compliance program.
2. **Written Standards and Procedures** Establish the training program – topics and timing. The law requires a minimum two hours of sexual harassment training covering specific topics. For the reasons explained above, by lengthening the training program slightly (a half-hour, for example), employers should be able to cover harassment prevention based on the other categories protected under federal and state law (such as race, age, and disability). Covering these extra topics will help limit workplace disputes and create a stronger defense against liability or damages if litigation arises. A well-designed interactive online program can provide effective overall training on all of these subjects, to all supervisors and employees, at a reasonable price.
3. **Due Care in the Delegation of Discretionary Authority** HR and legal should retain an active leadership role in order to ensure compliance and continuity throughout the organi-

zation. Managers should not be given the discretion to conduct their own training.

4. **Effective Communication of Standards and Training** Decide who will do the training. Regardless of whether the training is conducted with internal or external resources, live or on-line (or a combination thereof), employers must meet the quality standards mandated by the statute. Draw up a training schedule. Even mid-size companies will likely be challenged to ensure that all supervisors receive training by January 1, 2006 and every two years thereafter.

5. **Monitoring, Auditing, and Reporting** Audit the organization's 2003 and 2004 harassment training efforts. Remember that supervisors trained in 2003 and 2004 with programs that meet AB 1825's requirements will not have to be re-trained in 2005. Learning management systems or data tracking systems that come with some high quality e-learning products can help with this process.

6. **Enforcement, Recordkeeping and Discipline** Keep track of which supervisors have taken and completed the training by creating and maintaining physical records, such as sign-in sheets or electronic monitoring. An employer that diligently trains all its supervisors with appropriate content in a timely manner, but cannot produce the physical evidence confirming it has done so, faces the possibility that it will be disbelieved by a jury, court, or administrative fact-finder, and thus reap none of the benefits of its diligence.

7. **Response, Prevention and Modification** Follow-up with supervisors and employees. Solicit feedback, answer questions, and modify the training as needed.

VII. Practical Compliance Recommendations In Preventing Employment Law Class Actions: Eleven First Steps

11. Assess your current compliance efforts and policies.

- Attorney-client privileged?
- Self-audit
- Formal audit
- Coordinate with other compliance assessments

10. Determine who is responsible for the compliance effort and at what levels.

- Expertise
- Authority
- Future job loss or an opportunity? Creation of the CCO position.

9. Review employee compliant processes and their documentation and speed of response.

8. Review and upgrade if necessary your investigation processes (evaluate the HR skills available and any needed upgrading required).

7. Evaluate and upgrade training programs for managers (and consider employees).

- Affirmative defense requirements
  - (1) the employer "exercised reasonable care to prevent and correct promptly" any harassing behavior; and
  - (2) the employee "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."
- Seventh Circuit mandate (*Shaw v. Autozone, Inc.*, 180 F.3d 806, 811-12 (7th Cir. 1999) (holding that training managers on preventing workplace harassment is an essential element of establishing the *Faragher/Ellerth* defense)
- *Kolstad* punitive damage requirements
  - (1) (a) the discrimination was intentional or (b) the employer acted with malice or reckless indifference to the employee's rights; and
  - (2) the employer did not make "good faith efforts" to comply with Title VII

6. Review the hiring and promotion avenues available within your organization.

- Posting?
- Subjective standards?
- Review process

5. Conduct a "protected" statistical evaluation of your workforce.

- Hiring
- Promotion
- Managerial statistics
- Privilege

4. Review each job description and the work actually performed.

- Exempt positions
- Non-exempt positions
- Process of handling change

3. Monitor class action trends and industry developments.

- Breaks, meal periods, bonuses
- Applicable class action
- Industry clusters
- OCEG; trade associations, Littler's ASAPs and publications

2. Evaluate and use technology.

- Time records (the 50% solution)
- OCEG on-line
- ELT
- Compliance Systems
- Hotline Technologies

1. Alternative dispute resolution (mediation and arbitration).

- Federal law (*Green Tree Fin. Corp. v. Randolph*, 244 F.3d 814 (11th Cir. 2001) (holding that an arbitration agreement waiving the right to pursue a class action claim is enforceable)
- California Supreme Court case pending (*Discover Bank v. Superior Court*, 65 P.3d 1285 (Cal. 2003)
- A serious option for potentially reducing or eliminating class actions

Appendix A

NFPA 1600 Preparedness Checklist:

1. Make sure your organization knows about NFPA 1600 and has considered its potential application.

2. Identify a key person as responsible for Crisis Preparedness Planning.

3. Create a multidisciplinary committee to bring together the resources and expertise to create and administer a plan.

4. Revisit your existing plans and match them against the elements of NFPA 1600.

5. Where appropriate use the language of NFPA 1600. If it ever become necessary to show that you are meeting the National Preparedness Standard, the similarity of language will be helpful.

6. Examine the training recommendations within NFPA 1600 and make sure you meet those standards.

7. Evaluate your plan and compliance efforts periodically.

8. Monitor any changes in NFPA 1600 and the evolution of legal requirements and standards surrounding the areas of crisis preparedness. Especially follow any industry or state requirements that might evolve.

9. Evaluate the impact of NFPA 1600 on your insurance coverage and investment potential. Take advantage of your compliance where appropriate.

10. Monitor DHS announcements regarding recommendations or educational offerings associated with Crisis Management. Check *www.ready.gov/business.*

Appendix B

READY.GOV
U.S. Department of Homeland Security

Sample Emergency Plan

Sample Business Continuity and Disaster Preparedness Plan

☐ PLAN TO STAY IN BUSINESS

Business Name

Address

City, State

Telephone Number

If this location is not accessible we will operate from location below:

Business Name

Address

City, State

Telephone Number

The following person is our primary crisis manager and will serve as the company spokesperson in an emergency.

Primary Emergency Contact

Telephone Number

Alternative Number

E-mail

If the person is unable to manage the crisis, the person below will succeed in management:

Secondary Emergency Contact

Telephone Number

Alternative Number

E-mail

☐ EMERGENCY CONTACT INFORMATION

Dial 9-1-1 in an Emergency

Non-Emergency Police/Fire

Insurance Provider

Sample Business Continuity and Disaster Preparedness Plan (cont'd)

☐ BE INFORMED

The following natural and man-made disasters could impact our business.

- o _____
- o _____
- o _____
- o _____

☐ EMERGENCY PLANNING TEAM

The following people will participate in emergency planning and crisis management.

- o _____
- o _____
- o _____
- o _____
- o _____

☐ WE PLAN TO COORDINATE WITH OTHERS

The following people from neighboring businesses and our building management will participate on our emergency planning team.

- o _____
- o _____
- o _____
- o _____
- o _____

☐ OUR CRITICAL OPERATIONS

The following is a prioritized list of our critical operations, staff and procedures we need to recover from a disaster.

Operation☐ ☐	Staff in Charge☐☐ ☐	Action Plan

Sample Business Continuity and Disaster Preparedness Plan (cont'd)

☐ SUPPLIERS AND CONTRACTORS

Company Name: _____

Street Address: _____

City: _____State:_____Zip Code: _____

Phone: _____Fax:_____E-Mail: _____

Contact Name: _____ Account Number: _____

Materials/Service Provided: _____

If this company experiences a disaster, we will obtain supplies/materials from the following:

Company Name: _____

Street Address: _____

City: _____State:_____Zip Code: _____

Phone: _____Fax:_____E-Mail: _____

Contact Name: _____ Account Number: _____

Materials/Service Provided: _____

If this company experiences a disaster, we will obtain supplies/materials from the following:

Company Name: _____

Street Address: _____

City: _____State:_____Zip Code: _____

Phone: _____Fax:_____E-Mail: _____

Contact Name: _____ Account Number: _____

Materials/Service Provided: _____

Sample Business Continuity and Disaster Preparedness Plan (cont'd)

☐ EVACUATION PLAN FOR _____ LOCATION

☐ ☐ ☐ ☐ ☐ ☐ ☐ ☐ (Insert address)

☐ o We have developed these plans in collaboration with neighboring businesses
☐ and building owners to avoid confusion or gridlock.
☐ o We have located, copied and posted building and site maps.
☐ o Exits are clearly marked.
☐ o We will practice evacuation procedures ____ times a year.

If we must leave the workplace quickly:

_____

_____

1. Warning System:_____

We will test the warning system and record results ____ times a year.

2. Assembly Site: _____

3. Assembly Site Manager & Alternate:_____

☐ a. Responsibilities Include:
☐ _____
☐ _____
☐ _____

4. Shut Down Manager & Alternate:_____

☐ a. Responsibilities Include:
☐ _____
☐ _____
☐ _____

5. _____is responsible for issuing all clear.

Sample Business Continuity and Disaster Preparedness Plan (cont'd)

☐ SHELTER-IN-PLACE PLAN FOR _____ LOCATION

(Insert address)

- o We have talked to co-workers about which emergency supplies, if any, the company will provide in the shelter location and which supplies individuals might consider keeping in a portable kit personalized for individual needs.
- o We will practice shelter procedures ____ times a year.

If we must take shelter quickly

_____

_____

1. Warning System:_____

   We will test the warning system and record results ____ times a year.

2. Storm Shelter Location: _____

3. "Seal the Room" Shelter Location:_____

4. Shelter Manager & Alternate:

   a. Responsibilities Include:

   _____

   _____

   _____

5. Shut Down Manager & Alternate:

   a. Responsibilities Include:

   _____

   _____

   _____

6. _____is responsible for issuing all clear.

Sample Business Continuity and Disaster Preparedness Plan (cont'd)

☐ COMMUNICATIONS

We will communicate our emergency plans with co-workers in the following way:

_____

_____

In the event of a disaster we will communicate with employees in the following way:

_____

_____

☐ CYBER SECURITY

To protect our computer hardware, we will:

_____

To protect our computer software, we will:

_____

If our computers are destroyed, we will use back-up computers at the following location:

_____

☐ RECORDS BACK-UP

_____ is responsible for backing up our critical records including payroll and accounting systems.

Back-up records including a copy of this plan, site maps, insurance policies, bank account records and computer back ups are stored onsite _____.

Another set of back-up records is stored at the following off-site location:

_____

If our accounting and payroll records are destroyed, we will provide for continuity in the following ways:

_____

Sample Business Continuity and Disaster Preparedness Plan (cont'd)

☐ EMPLOYEE EMERGENCY CONTACT INFORMATION

The following is a list of our co-workers and their individual emergency contact information:

_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

☐ ANNUAL REVIEW

We will review and update this business continuity and disaster plan in _____.

Appendix C

CHAPTER 14

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

§ 14.1

I. RECENT TRENDS & DEVELOPMENTS

Increasingly, employers are recognizing the potential liabilities and obligations created by the enormous growth and expansion in employment litigation. Virtually every management or corporate decision in the employment area can potentially result in years of litigation, costly damage awards or settlements, and intensive investigation by federal and state agencies. Inaction by corporate management, including the failure to recognize and address potential employment-related inadequacies and problems, can produce similar negative results. The failure to appreciate and recognize potential causes of action for wrongful discharge, employment discrimination, and an assortment of related torts (such as defamation, false imprisonment, etc.) or the failure to comply with the increasing number of federal and state employment laws and regulations (such as wage payment regulations) can produce disastrous results.

The growing trends in employment law mandate that companies take preventive measures to minimize the potential for litigation and employment-related claims. This self-audit is designed to aid employers in evaluating the strengths and weaknesses of their personnel policies and procedures. It is designed to raise important questions regarding labor and employment relations and to identify problem areas. Although some of these issues may already be apparent, this audit serves to focus attention on deficiencies and potential problems that employers may have overlooked but need to address and solve. Of course, there may be items that are not included in this self-audit which are important to your company. Therefore, it is recommended that you incorporate in the audit issues specific to your company.

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 in this chapter 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 use 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."

§ 14.2

II. OVERVIEW: THE LAW OF SELF-AUDITS

There is no law which 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 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 Family and Medial Leave Act (FMLA).[1] As a further example, employee background checks are becoming more regular, and employers must be certain to comply with the required but complicated consent and notice provisions under the Fair Credit Reporting Act (FCRA).[2]

Evaluating and updating job descriptions to determine whether an individual or group of employees are accurately considered exempt or nonexempt under the Fair Labor Standards Act (FLSA)[3] 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.

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[1] 29 U.S.C. § 260 *et seq*. *See also* THE NATIONAL EMPLOYER® Chapter 26.

[2] 15 U.S.C. § 1681 *et seq*. *See also* Chapters 11 and 18 of THE NATIONAL EMPLOYER® and Littler Mendelson's BACKGROUND CHECKS: FOUR STEPS TO BASIC COMPLIANCE WITH FEDERAL & STATE LAW®, available at shop.littler.com.

[3] 29 U.S.C. § 201 *et seq*.; Chapter 21 of THE NATIONAL EMPLOYER®.

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 times, 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.

§ 14.3

III. PRACTICAL RECOMMENDATIONS

§ 14.3.1

A. OUTLINE OF ISSUES & CONCERNS 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 set forth 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 which 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 work site or to all employees, as appropriate, is also important to ensure the benefits of the self-audit are realized throughout the company.

As stated above, it is important to consult with legal counsel before undertaking a comprehensive self-audit to determine the possible applicability of certain legal privileges, as well as general issues of confidentiality and privacy.

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

§ 14.3.1(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, such as 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.

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?

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. 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?
2. 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?
3. 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?
4. 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?
5. 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?

6. To whom are job descriptions available?

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

8. 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. Security provisions?

2. Information provided on a need to know basis?

§ 14.3.1(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. What is the ratio of company employees to Human Resources staff?

3. What is the amount of its annual budget?

4. Obtain a copy of the department's organizational chart or construct a functional chart if none is available.

5. 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?

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.)
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 or prohibiting supervisor to maintain "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.)

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. Are I-9 forms kept in a location separate from other personnel records?

Y. 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?

§ 14.3.1(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. Are these plans consistent with company objectives:
      a) Short term?
      b) Long term?
   3. Are the planning criteria appropriate for determining company needs?
   4. Are workforce forecasts:
      a) Accurate?
      b) Based on effective application of sufficient source data?
   5. Do planners work closely with department heads?
   6. Are tools and aids (charts, etc.) effectively used?
   7. 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?
   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.)

§ 14.3.1(d)

Recruitment & Hiring

A. Requisition:

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

2. Are the means adequate for specifying the requirements of the position to be filled?

3. Is the authority to hire or create positions at the proper level?

B. Recruitment:

1. Are current employees given appropriate consideration?

2. Are recruitment programs planned?

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.)

C. Selection:

1. Which of the following selection methods are used?

a) Preliminary screening?

b) Interview by:

(1) Human Resources department?

(2) Supervisor?

(3) Staff psychologist?

c) Testing:

(1) If so, describe the tests.

(2) 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 Fair Credit Reporting Act and any applicable state law?

(2) Does the company use authorization and disclosure forms that comply with the federal Fair Credit Reporting Act 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.)

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 copy.

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

c) Is the applicant provided a copy?

d) 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?

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

f) 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 federal Fair Credit Reporting Act 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.)

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?

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?
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 are paid by the company versus that paid by the employee?
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?

§ 14.3.1(e)

Orientation, Training & Development

A. Training function:

1. Is the training function adequately planned?
   a) What employee/manager groups receive training?
   b) Is the training budget adequate to provide training to the target groups?
   c) 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?

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 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?

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?

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?

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 mandatory 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-hour law, compensation and employee benefits?

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

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?

§ 14.3.1(f)

Promotions & Transfers

A. When are employees eligible for promotion?

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

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?

§ 14.3.1(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.)
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 Americans with Disabilities Act (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 Americans with Disabilities Act, 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 nonessential 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.)

§ 14.3.1(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 do 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 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?
3. 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?

J. 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?

K. Overtime work:

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

   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?

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?

§ 14.3.1(i)

Compensation

A. What is the company's minimum 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?

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/her final wages?

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

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.) 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? 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 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?

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?

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

QQ. Are wage surveys performed? 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? (If so, obtain copy if in writing.)
2. Does the company have any kind of profit-sharing 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? 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 bonus 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?

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

g) Is a checklist or guide provided for evaluation purposes? (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 in order 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?
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?

§ 14.3.1(j)

Fringe Benefits

A. Which of the following fringe benefits does the company offer? (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?
   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?

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 healthcare plans maintained by the company?

5. Does the company offer continued healthcare 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 healthcare coverage to their spouses and dependent children?

G. Does the company have a pension or retirement plan? (If so, describe.)

H. Does the company have a savings plan? (If so, describe.)

I. Does the company have a stock purchase plan? (If so, describe.)

J. Does the company have paid 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? 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?

§ 14.3.1(k)

Safety & Health

A. Does the company have a safety program? If so:

1. Who directs it?
2. How is it implemented?
3. Are there written safety regulations?
4. Obtain copies of all written program materials.

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

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? (If so, obtain copy if in writing.)

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?

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 OSHA and parallel state programs?

§ 14.3.1(l)

Communication

A. Are company personnel policies in writing? (If so, obtain copies.)

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? If not, identify problem area(s).

M. Does the company have an employee handbook? 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?

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?

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

§ 14.3.1(m)

Discipline, Termination & Leaves of Absence

A. Discipline:

1. Has the company published rules of conduct? If so:
   a) How are employees informed of them? Obtain 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 it 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? (Obtain copy.)
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?
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 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?

§ 14.3.1(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. For how long?
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. Obtain a copy of any union contract(s).
8. Are there any side agreements, oral or written?
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. Are either of the following provisions contained in the contract(s)?
    a) Union shop clause?
    b) Checkoff 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 it used?
3. Have any groups attempted to organize?
4. If so, which groups and how frequently?
5. Have 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?

§ 14.3.2

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. The limitations of this chapter make it impossible to comprehensively raise every issue and, therefore, employers should include all other issues of specific importance to them in their self-audit. Nonetheless, the short-term effort of conducting such an audit yields important long-term gains by identifying problems the employer needs 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 must 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.

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