

I. Complying with Wage and Hour Laws

Federal and state wage and hour laws present many compliance pitfalls for unwary employers, and the number of FLSA claims has sharply increased in the first few years of the new century. For example, in 2001, the courts saw more collective actions brought under the federal Fair Labor Standards Act than class action claims under federal and state employment discrimination laws. This dramatic increase in wage and hour litigation has not been limited to claims involving alleged misclassification of non-exempt employees. Hourly employees increasingly are bringing claims against employers, alleging that they were not properly compensated for overtime work.

It is vital that employers understand the wage and hour rules and how they apply to their workforce. Even if an employer does not have enough employees to create a risk of a collective action, misclassifying only one employee could result in tens of thousands of dollars in liability. Simply put, plaintiffs' lawyers have become wise to the frequent misclassification of employees for wage and hour purposes and realize the potential for significant liability in such claims, even if they involve only one or two employees. Although potential liability cannot be completely eliminated, exposure can be greatly reduced through focused compliance efforts.

These materials will provide a general overview of the wage and hour rules, with specific emphasis on the most often misunderstood and misapplied provisions. In addition, we will highlight those areas created or changed by the U.S. Department of Labor's recently issued overtime regulations.

A. Overview of State and Federal Wage and Hour Laws

Pennsylvania employers are responsible for complying with a variety of both federal and state wage and hour laws. Many of the federal and state wage and hour laws overlap and have

similar, if not identical, requirements. Unfortunately, the differences between the federal and state laws continue to grow, creating additional complexity and uncertainty to an already confusing area of law. In this section, we will list and briefly describe the principal federal and state wage and hour laws.

1. Fair Labor Standards Act

Originally passed in 1938, the Fair Labor Standards Act ("FLSA") and its regulations establish federal standards for minimum wages, overtime pay, recordkeeping and child labor. In the private sector, the FLSA applies to only those employers that are engaged in interstate commerce and have certain minimum gross volumes of business. Regardless of their dollar volume of business, however, the FLSA automatically covers federal, state, and local government agencies. Thus, the FLSA applies to each conservation district. The FLSA's requirements will be discussed in detail below.

2. The Pennsylvania Minimum Wage Act

The Pennsylvania Minimum Wage Act ("MWA") is the state law companion to the FLSA. The MWA also establishes minimum wage, overtime compensation, and recordkeeping requirements. Smaller private Pennsylvania firms that are exempt from the FLSA will almost certainly be covered by the MWA. The MWA applies to any individual employed by an employer in the Commonwealth of Pennsylvania.

The MWA provides that the minimum wage required by state law shall be the same as that mandated by the federal FLSA. Under very limited circumstances, the Act does permit reduced rates for certain learners and students (at wages not less than 85% of the minimum wage rate), as well as for certain handicapped workers.

As mentioned above, most of the MWA's overtime compensation requirements are identical to the requirements of the FLSA. Certain recent changes to the FLSA, however, have not been made to the MWA, including the creation of the computer professional exemption and the 2004 FLSA white collar exemption regulations. For example, an employee may be exempt from the FLSA's overtime compensation requirement as an exempt computer professional. Nevertheless, because the MWA does contain a computer professional exemption, the employer still may be obligated to pay the employee overtime compensation under state law. We will discuss in detail each of the primary areas where federal and state law differ in the sections that follow.

3. Equal Pay Act

The Equal Pay Act of 1963 ("EPA"), an amendment to the FLSA, requires "equal pay for equal work" for men and women. The EPA prohibits employers from discriminating on the basis of sex in paying wages. Where male and female employees for the same employer and at the same establishment perform work requiring equal skill, effort, and responsibility, and under similar working conditions, it is a violation of the EPA to pay female employees lower wages, unless the wage differential is due to (1) a seniority system; (2) a merit system; (3) a production system which measures earnings by quality or quantity of work; or (4) a differential which is based on a factor other than sex (e.g., shift differential).

4. Pennsylvania Wage Payment and Collection Law

The Pennsylvania Wage Payment and Collection Law ("WPCL") is the state statute designed to enforce the payment of agreed upon wages and fringe benefits in Pennsylvania. The WPCL does not establish an entitlement to wages, but only provides a means to recover wages that are due under the "contract" of employment. In addition, the WPCL (1) establishes

deadlines for the payment of wages and fringe benefits that are earned; (2) defines the types of deductions which may be withheld from the wages of employees; (3) requires certain notices to be provided to new hires; (4) regulates payment of wages upon the termination of employment; (5) and contains a comprehensive enforcement scheme. Under the WPCL, "wages" include all earnings, regardless of the method by which they are calculated. Fringe benefits include payments to ERISA plans, severance pay, vacation pay, holiday pay, guaranteed pay, reimbursement for expenses, union dues, and other amounts paid pursuant to an agreement between the employer and employee.

Regular Paydays. Employers in Pennsylvania must pay all non-overtime wages, other than fringe benefits and wage settlements, to employees on "regular" paydays that are designated in advance by the employer. This payday may be established by a written contract, the standards of the industry, or, if neither of these are applicable, within 15 days from the end of the pay period. Once the payday is established, the employer may not deviate from it without advance notice to employees. However, overtime wages may be considered as wages earned in the next succeeding pay period and may be paid at the same time as wages earned in that latter period.

Payment for fringe benefits, wage supplements, or deducted union dues must be made within 10 days after such funds are required to be paid to the trust fund, employee, or union or within 60 days after a proper claim is filed by the employee in situations where no time for payment is specified.

Under the WPCL, employers must notify new hires as to the amount of wages to be paid and the time and place of payment. Notice of these items may be accomplished either individually or through posting in a conspicuous place at the job site.

Wage Deductions. The law and its regulations permit deductions from pay as required by law for the convenience of the employee. The following deductions are permitted under the WPCL:

- (a) Contributions to and recovery of overpayments under employee welfare and pension plans subject to the Federal Welfare and Pension Plans Disclosure Act;
- (b) Contributions authorized in writing by employees or under a collective bargaining agreement to employee welfare and pension plans not subject to the Federal Welfare and Pension Plans Disclosure Act;
- (c) Deductions authorized in writing for the recovery of overpayments to employee welfare and pension plans not subject to the Federal Welfare and Pension Plans Disclosure Act;
- (d) Deductions authorized in writing by employees or under a collective bargaining agreement for payments into the following:
 - (i) Employer operated thrift plans; and
 - (ii) Stock option or stock purchase plans to buy securities of the employing or an affiliated corporation at market price or less provided such securities are listed on a stock exchange or are marketable over the counter;
- (e) Deductions authorized in writing for payments into employee personal savings accounts;
- (f) Contributions authorized in writing by the employee for charitable purposes;
- (g) Contributions authorized in writing by the employee for local area development activities;
- (h) Deductions provided by law;
- (i) Labor organization dues, assessments, and initiation fees;
- (j) Deductions for repayment to the employer of bona fide loans provided the employee authorizes such deductions in writing;
- (k) Deductions for purchases or replacements by the employee from the employer of goods, services, rent, or similar items provided such

deductions are authorized by the employee in writing or are authorized in a collective bargaining agreement; and

- (l) Such other deductions authorized in writing by employees and as deemed proper by the Department of Labor and Industry.

Termination From Employment. In the event an employee is separated from employment for any reason prior to the regular payday, the employer must pay any outstanding wages to the employee no later than the next regular payday. Moreover, the employer must make the final payment by certified mail if so requested by the employee.

Non-Waiver Provision. Employees cannot waive their rights under the WPCL in the absence of a bona fide dispute between the employee and the employer over entitlement to wages. The WPCL specifically provides that no provision of the law can be waived by a private agreement.

5. Direct Deposit

The Pennsylvania Electronic Funds Transfer Systems Act permits direct deposit of wages, salaries, and commissions to an employee's account in a bank, credit union, or other financial institution only if an employee has made a written request for this form of wage payment. Any agreement for direct deposit of wages must be reduced to writing, must set forth the terms and conditions under which the fund transfers are to be made, and must explain the method by which the employee may withdraw his/her request for direct deposit. The Act also prohibits the direct transfer of any earnings to an account unless the party authorizing the transfer has received a separate written record of the transfer at or prior to the time it is made.

B. Exemptions under the Fair Labor Standards Act

All employees covered by the FLSA are entitled to one and one-half of their regular hourly rate for all hours worked in excess of 40 in any work week, unless the employer can

prove that the employee qualifies for one of the overtime exemptions. Congress established exemptions from the minimum wage and overtime requirements of the FLSA to provide some flexibility for employers when compensating certain types of employees.

When determining whether an employee may properly be classified as exempt from overtime requirements, employers must keep in mind that non-exempt treatment is the "default" status under the FLSA and MWA. To establish an exemption, the employer bears the burden of proving that the employee qualifies for the exemption. Courts and the Department of Labor interpret the exemptions narrowly, and close calls generally go the employee in a claim for overtime compensation. An employer may treat an employee as non-exempt and pay him/her overtime compensation, even if the employee could qualify for exempt status. The reverse is not true; an employer may not treat an employee as exempt if the employee does not meet the requirements of any of the exemptions.

The FLSA minimum wage and overtime exemptions are divided into two general categories: industry-specific exemptions and the "white collar" exemptions that apply to any employer, regardless of industry. Because none of the industry-specific exemptions apply to the employees of conservation districts, we will spend the remainder of this section discussing the "white collar" exemptions and their application to conservation district employees.

1. White Collar Exemptions

The FLSA contains exemptions to the Act's overtime and minimum wage requirements for "bona fide" executive, professional, and administrative employees, and for certain computer professionals. To meet the requirements of these so called "white collar" exemptions, an employer must prove that both (1) the employee is paid on a salary basis and (2) meets the duties test for the exemption at issue.

2. Payment on a Salary Basis

For an employee to be exempt from the FLSA under any of the white collar exemptions, the employee generally must be paid on a "salary basis." This seemingly obvious element of the FLSA has caused substantial confusion. Failure to satisfy the salary basis requirement converts otherwise exempt employees to non-exempt and subjects the employer to potential backpay liability.

Under the FLSA, an employee's receipt of a weekly salary is not necessarily synonymous with payment on a salary basis. Payment on a salary basis requires employers to pay exempt employees a pre-determined sum of money regardless of the quality of work performed or the actual number of hours worked, subject to a few limited exceptions.

For example, an employer may not reduce the salary of an exempt employee for partial-day absences from work, unless the partial-day absence was covered by the Family and Medical Leave Act. Thus, if an otherwise exempt manager takes two hours off for a doctor's appointment or a haircut, his/her salary cannot be reduced to reflect that absence. Such an adjustment violates the "salary basis" requirement and may result in a loss of exemption for that employee.

An employer may make deductions from an exempt employee's salary without violating the salary basis rule only in the following limited circumstances:

- Deductions may be made when the employee is absent from work for a day or more for personal reasons, other than sickness or accident (partial-day absences must not result in a deduction).
- Deductions may be made for absences of one day or more caused by sickness or disability if the deduction is in accordance with a "bona fide sickness or disability plan." For example, if an employer has a bona fide sick leave program, and an

exempt employee has exhausted all sick days, deductions can be made for additional full day absences from work due to sickness.¹

- Employees on approved FMLA leave need not be paid for full or partial-day absences.
- An employer is not required to pay the full salary in the employee's initial or terminal week of employment. Instead, the employer may pay a proportionate part of an employee's full salary for the time actually worked in said weeks.
- Deductions may be made unpaid suspensions of one or more full days imposed in good faith for infractions of workplace conduct rules pursuant to a written policy applicable to all employees.
- Deductions may be made for penalties imposed for infractions of "safety rules of major significance."

In addition to these limited permissible deductions, an exempt employee need not be paid for any workweek in which he/she performs no work. To qualify for no pay in a workweek, the employer must ensure that the employee performs no work whatsoever, including work from home such as checking e-mails or calling into the office to check messages. For certain employees, completely prohibiting work in a workweek may be practically impossible.

Keep in mind that paying an employee on a salary basis does not, by itself, qualify the employee as "exempt!" To be exempt, the employee's compensation must meet the salary basis test, and the employee must meet one of the duties test. Paying an employee on a salary basis only gets an employer half-way to meeting an exemption. The duties test often is the more onerous half of the exemption determination.

¹ Note, however, that an employer can still implement partial-day deductions from an employee's leave allowance without jeopardizing salary status so long as the partial-day deductions are not taken out of an employee's pay. For example, if a salaried employee is given ten days of sick leave per year, the employer will not destroy the exemption status merely by docking the sick leave allotment in 15 minutes increments for partial-day absences. In this situation, the employee's pay is not affected, just how much sick leave remains after a partial-day absence.

3. Executive Employees

"Bona fide" executive employees are exempt from the minimum wage and overtime provisions of the FLSA so long as the following requirements are met:

- (1) The employee must be paid a salary of at least \$455 per week;
- (2) The employee's primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
- (3) The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and
- (4) The employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion, or any other change of status of other employees must be given particular weight.

"Managing" includes duties such as hiring, firing, directing and evaluating employees, setting rates of pay, determining work techniques, and determining appropriate levels of supplies and merchandise. "Two or more employees" means two or more full-time employees or their equivalent, such as one full-time employee and two part-time employees who all together work 80 hours per week. Employees may not be "shared," however, to meet this requirement (i.e., two supervisors cannot both count the same two employees for the purpose of the exemption). It should also be noted that the executive employee does not actually need to be present at the work site for the entire period of time that the other employees are working in order to supervise them.

Often the issue of most significance when determining whether the executive exemption will apply is the employee's "primary duty." For example, a working supervisor may spend a majority of his/her time engaged in non-supervisory work. Nevertheless, the employee is responsible for managing a division of the employer, has the authority to hire and fire, and directs the work of at least two employees. In the majority of such situations, courts have held that the "primary duty" consists of management as opposed to non-supervisory work.

4. Administrative Employees

The administrative exemption generally is used for employees who lack supervisory duties but serve as assistants to those who do possess traditional measures of supervision. For example, an executive assistant, although he/she does not have the primary duties of managing a business or regularly directing employees in the performance of their job, nevertheless may be exempt from the provisions of the FLSA as an administrative employee.

In order to meet the administrative employee exemption, an employee must:

- (1) be paid a salary of at least \$455 per week;
- (2) perform office or non-manual work directly related to management operations; and
- (3) exercise discretion and independent judgment with respect to matters of significance in the performance of these job duties.

Thus, the administrative exemption only will apply where the primary duty is office or non-manual work directly related to management policies or general business operations and requires the exercise of discretion and independent judgment with respect to matters of significance.

Office or non-manual work directly related to management policies or general business operations. The Department of Labor draws a distinction between work that is directly related to management policies or business operations and mere "production work." Although certain work may require the exercise of frequent discretion and independent judgment and may be extremely important to an employer, the administrative exemption will not apply if the work is not directly related to management policies or business operations, as opposed to providing the "product" offered by the employer.

The exercise of discretion and independent judgment with respect to matters of significance. Nearly every employee exercises some degree of discretion and independent judgment in the performance of their daily activities. In order to qualify for the administrative exemption, however, the employee must exercise such discretion and independent judgment with respect to significant management policies or general business operations. An employee performing routine clerical duties is not performing work of substantial importance to the management or operation of the business even though he/she may exercise some measure of discretion in judgment as to the manner in which the employee performs his/her clerical tasks.

It should also be noted that the discretion and independent judgment exercise must be real and substantial. The courts and Department of Labor will look to what the employee actually does, not what duties are listed on a job description, when determining whether this prong of the duties test is met.

5. Professional Employees

"Learned" professional employees are also exempt from the minimum wage and overtime requirements of the FLSA if they meet the following test:

- (1) The employee must be paid a salary of at least \$455 per week;
- (2) The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;
- (3) The advanced knowledge must be in a field of science or learning; and
- (4) The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

As with all white collar exemptions, whether an individual satisfies the requirements of the professional exemption is dependent upon the facts of the given case. It is a misconception

to believe that an individual's title or degree is determinative of his/her professional status under the FLSA. For example, salaried registered nurses traditionally are considered exempt as learned professionals. Of course, if a registered nurse serves primarily in a clerical capacity, his/her work duties would not require the possession of an advanced degree or the exercise of discretion and independent judgment. In such a case, the nursing degree would be irrelevant in determining exempt status.

Likewise, the extent to which a position requires post-high school education can be dispositive with respect to the professional exemption. For example, with respect to dental hygienists, the Department of Labor's Wage and Hour Division interpreted the regulations to exempt those hygienists who complete "4 academic years of pre-professional and professional study in an accredited university or college recognized by the Commission on Accreditation of Dental and Dental Auxiliary Educational Programs of the American Dental Association." Wage & Hour Div. Admin. Op. (Nov. 10, 1975). In a subsequent opinion, the Wage and Hour Division rejected an exemption request for dental hygienists who complete only a two-year course of professional study. Wage & Hour Div. Admin. Op. (Mar. 5, 1976). Again, the Wage and Hour Division stressed that "four academic years of pre-professional and professional study in an accredited university or college" is required for the professional exemption. *Id.*

6. Computer-Related Professionals

The Small Business Job Protection Act of 1996 codified prior Department of Labor interpretations and included an exemption for computer-related professionals. To qualify for the computer professional exemption, the following tests must be met:

- (1) The employee must be compensated either on a salary or fee basis (as defined in the regulations) at a rate not less than \$455 per week or, if compensated on an hourly basis, at a rate not less than \$27.63 an hour;

- (2) The employee must be employed as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer field performing the duties described below;
- (3) The employee's primary duty must consist of:
 - (a) the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications;
 - (b) The design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
 - (c) The design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or
 - (d) A combination of the aforementioned duties, the performance of which requires the same level of skills.

As noted above, the Pennsylvania Minimum Wage Act and its regulations contains no companion to the federal computer professional exemption. Thus, an otherwise exempt computer professional still may be entitled to overtime compensation under the state law. If an employer has a computer professional that meets the federal exemption, the employer should examine whether the employee also qualifies for another white collar exemption, such as the administrative or professional exemption, that is also recognized by state law. If the employee in question would not qualify for any other exemption, the employer may be liable for unpaid overtime compensation under the state MWA.

7. Independent Contractors

Coverage under both the FLSA and MWA is afforded only to "employees" of a covered employer. The protections of the FLSA and MWA do not apply to true independent contractors. *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947). When determining FLSA coverage, courts look to the "economic reality" of the situation rather than traditional common law

concepts of employee or independent contractor. To establish that an employment relationship exists, the individual must show that, based upon the totality of the situation, he/she is economically dependent on the alleged employer. *E.g., Amiable v. Long & Scott Farms*, 20 F.3d 434 (11th Cir. 1994); *Harbert v. Healthcare Servs. Group, Inc.*, 173 F. Supp. 2d 1101 (D. Colo. 2001). Relevant factors in the economic reality analysis include:

- the degree of control exercised by the alleged employer over the work performed;
- the alleged employee's opportunity for profit or loss depending upon his managerial skill;
- the alleged employee's investment in equipment or materials;
- whether the service rendered requires a special skill;
- the degree of permanence of the working relationship;
- whether the service rendered is an integral part of the alleged employer's business.

Donovan v. DialAmerica Mktg., Inc., 757 F.2d 1376 (3d Cir. 1985).

Generally, the FLSA applies a very narrow definition of independent contractor. Again, close calls generally result in a finding that the individual is an employee, not an independent contractor.

C. The New FLSA White Collar Exemption Regulations

On August 23, 2004, after much debate, criticism, misinformation, and political posturing, the new FLSA white collar overtime regulations took effect. When initially proposed in March 2003, the regulations were an ambitious attempt to modernize and update the rules concerning the white collar overtime exemptions, rules which had not been seriously updated for almost 30 years. The proposed new regulations, however, created a political firestorm, with both Houses of Congress voting to prohibit the proposed rules from taking effect.

Between March 2003 and June 2003, the Department of Labor received over 75,000 comments to the proposed rules, the vast majority of which were form letters generated by union members, most of whom were not even affected by the proposed regulations. On April 20, 2004, the Department of Labor issued its final rules. In the final regulations, the Department of Labor significantly retreated from where it originally had intended to go. The final regulations were not as "employer friendly" as the original proposed regulations, and the overall changes, discussed in detail below, were relatively minor. In this section, we will discuss the regulations' changes and their effect on employers' obligations under both federal and state law.

1. Increased Minimum Salary Requirement

Perhaps the most significant change in the new regulations is the increase in the minimum salary level that an employee must earn in order to be exempt. Under the former regulations, an employee needed to earn a salary of only \$250 per week to meet the white collar exemptions' minimum salary requirements. For a little perspective, an employee earning the current minimum wage of \$5.15 per hour earns \$206 for a 40 hour week. Under the proposed regulations issued in March 2003, DOL had wanted to increase the salary requirement from \$250 per week to \$425 per week (\$22,100 annually).

The final regulations set the new salary requirement at \$455 per week (\$23,660 annually). This change was intended to allow more employees to remain eligible for overtime, in response to those who believed that the proposed regulations were too severe in restricting overtime compensation to lower paid employees. Thus, any employees earning less than \$455 per week could never be considered exempt, and an individual earning more than \$455 per week salary could potentially be exempt.

As discussed above, the state did not adopt the 2004 FLSA overtime exemption regulations. Nevertheless, certain changes to the federal exemption requirements indirectly apply by implication to the state law. For example, the state minimum salary requirement remains \$250 per week. By complying with the new federal minimum salary requirement, an employee will necessarily comply with the MWA's minimum salary requirement.

2. Highly Compensated Employee Exemption

The new FLSA regulations created an entirely new exemption, the highly compensated employee exemption. To qualify, the employee must perform office or non-manual work and be paid total annual compensation of \$100,000 or more (which must include at least \$455 per week paid on a salary or fee basis), so long as the employee customarily and regularly performs at least one of the duties of an exempt executive, administrative, or professional employee identified in the exemptions' standard tests. This exemption may cover any highly compensated employee who does not fit cleanly within any of the traditional white collar exemptions.

Unfortunately, the state MWA contains no companion highly compensated employee exemption. Thus, unless the employee also meets one of the other white collar exemptions, the employer may be required to pay the employee overtime compensation, even though he/she qualifies for the FLSA exemption.

3. Changes to the Executive Exemption Test

Although the new regulations did not dramatically alter the white collar exemptions' duties tests, the change to the executive exemption test is significant and greatly limits the applicability of the exemption to mid-level supervisors. Specifically, the new regulations added the "authority to hire and fire" requirement to the executive exemption duties test.

Under the old regulations, the authority to hire and fire was simply one factor used when considering whether an employee's primary duty consisted of "managing" a department or division of the employer. Now, to qualify as an exempt executive, an employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion, or any other change of status of other employees must be given particular weight.

Thus, any supervisor who manages and supervises employees, but plays no role in the hiring or firing process, will not qualify for the executive exemption and likely must be paid overtime compensation. Because of this significant change, employers should reevaluate all employees currently classified as exempt executives to ensure compliance with the revised federal law.

4. New Rules for Disciplinary Suspensions

As discussed above, an employer now may deduct from an exempt employee's salary for unpaid disciplinary suspensions of less than a week (in full day increments) imposed in good faith for infractions of workplace conduct rules. Any such suspension must be pursuant to a written policy for all employees, such as a policy prohibiting sexual harassment, or a policy prohibiting workplace violence.

This new provision is a significant change and gives employers far greater flexibility when disciplining exempt employees. Under the prior regulations, if an employer would suspend an exempt employee from work for disciplinary reasons, for periods of less than one full work week, the employer would be violating the salary basis test, jeopardizing the exemption for that individual and others in the same job classification.

5. The Need for an Improper Deduction Policy

Perhaps the most important change for employers created by the new regulations is the so-called "safe harbor." Under the prior rules, if an employer made an improper deduction from an exempt employee's salary, the improper deduction could result in the employer losing the exemption not just for the individual employee who suffered the deduction, but also for all other employees in the same job classification, throughout the employer.

Under the new regulations the impact of an improper deduction is far less severe. The exemption would be lost only for employees in the same classification and working for the same manager responsible for the improper deduction. The new regulations also provide that, if the employer has a clearly communicated policy that (1) prohibits improper pay deductions, (2) includes a complaint mechanism, (3) reimburses employees for any improper deductions, and (4) makes a good faith commitment to comply in the future, the employer will not lose the exemption (unless the employer continues to make improper deductions after receiving employee complaints).

The new regulations create an significant incentive for employers to take advantage of these safe harbor provisions by developing and disseminating to employees a written policy regarding improper docking of pay. This is an opportunity to reduce potential liability in the event of an error in overtime administration. The written policy should then either be distributed to employees at time of hire, published in the employee handbook, or made available on the employer's intranet website. We have attached to these materials a sample Improper Pay Deduction Policy.

D. Wage and Hour Laws in the Real World – Analyzing Certain Jobs Under the Exemption Tests

Understanding the exemption requirements and other aspects of federal and state wage and hour laws is vital when attempting to properly classify employees as exempt or non-exempt. Nevertheless, the real issue is "where the rubber meets the road": applying the exemptions to actual employees and job classifications.

During the next few minutes, we will analyze some relatively common categories of jobs among the many conservation districts and discuss whether the employees in those jobs possibly could be classified as exempt. Of course, the exemption determination will come down to the actual duties performed by the actual employees at the actual districts in question, and a general discussion cannot definitively determine whether the exemption requirements are met. Nevertheless, the following discussion will help give you the tools necessary when analyzing various positions to determine overtime compensation eligibility.

- **Assistant Manager**

- **Office Manager/Administrative Employees**

- **Engineer**
- **Technician/Specialist**
- **Education Coordinator**

E. Wage and Hour Requirements for Non-Exempt Employees

Unfortunately, determining whether an employee qualifies for an overtime exemption is not the only wage and hour issue employers must address. Even after concluding that an employee is not exempt and entitled to overtime compensation, many pitfalls remain before wage and hour law compliance is achieved. The remainder of this section will address common overtime compensation issues and missteps made by employers.

1. What are "Hours Worked?"

The FLSA and MWA generally require that non-exempt employees receive at least the statutory minimum wage for each hour that the employee is "suffered or permitted to work."

"Hours worked" also have great significance in overtime situations, because employees must be paid overtime for all "hours worked" in excess of forty in any given workweek. The mere fact that an employer did not specifically request an employee to work during a particular period (e.g., during lunch break, at home, etc.) does not necessarily mean that the time worked is not compensable. Wage and hour regulations provide as follows:

Work not requested but suffered or permitted is work time. For example, an employee may voluntarily continue to work at the end of the shift. He may be a pieceworker, he may desire to finish an assigned task or he may wish to correct errors, paste work tickets, prepare time reports or other records. The reason is immaterial. The employer knows or has reason to believe that he is continuing to work and the time is working time.

29 C.F.R. § 785.11. Work performed away from the job site, including work performed at home, also constitutes "hours worked." 29 C.F.R. § 785.12. Many of the recent court decisions under the FLSA involve situations where an employer "knew or should have known" that its employees were working but did not pay them for this time.

The Department of Labor's Wage and Hour Division has promulgated detailed regulations regarding the types of activities for which an employee must be compensated and those which are non-compensable. As a general matter, an employee always must be compensated for all time spent performing the "principal duties" of his/her job if the employer knows or has reason to believe that work is being performed. It is when employees engage in "incidental" activities, such as travel time, on-call time, and job-related training, that problems most frequently arise.

a. Preliminary and Finishing Activities

The courts have defined hours worked as all the time an employee "is necessarily required to be on the employer's premises, on duty, or at a prescribed workplace" when the time is spent for the benefit of the employer. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946). Using this test, courts have established that pre-work and post-work activities are compensable if they are an "integral" and "indispensable" part of the employee's principal activities. If the pre-work and post-work time is "insubstantial and insignificant," it falls within the de minimis exception and need not be included as hours worked. *E.g., Reich v. Monfort, Inc.*, 144 F.3d 1329 (10th Cir. 1998).

Example: A chemical worker who must change into special protective clothing on the employer's premises prior to beginning his/her job normally should be compensated for this time. On the other hand, if the employer merely provides a dressing room for its employees' convenience, changing time at the beginning and end of the work day generally is not considered compensable.

b. Waiting or On-Call Time

The same general test applies to determine whether waiting or "on-call" time is compensable. One of the most frequently litigated wage and hour issues in the past several years is undoubtedly the compensability of on-call time for non-exempt employees. Many employers realize significant wage savings by placing certain employees on "standby" or "on-call" status. Wage and hour regulations generally do not limit the number of hours that an employer may require an employee to be on call. However, the regulations do specifically limit the restrictions that an employer may place on an employee who is on call. Failure to observe these restrictions may convert otherwise non-compensable "on-call time" into compensable "hours worked."

With respect to on-call time, the regulations provide:

An employee who is required to remain on call on the employer's premises or so close thereto that he cannot use the time effectively for his own purposes is working while "on call." An employee who is not required to remain on the employer's premises but is merely required to leave word at his home or with company officials where he may be reached is not working while on call.

29 C.F.R. § 785.17 (emphasis added).

The majority of recent cases regarding on-call time deal with the issue of whether an employee who is "on call" is able to "use his time effectively for his own purposes." Employers who place employees "on call" must therefore be careful not to place such restrictions on the employees that the on-call time would be deemed compensable hours worked. "[W]here the conditions placed on the employee's activities are so restricted that the employee cannot use the time effectively for personal pursuits, such time spent on call is compensable." *Dinges v. Sacred Heart St. Mary's Hosp., Inc.*, 164 F.3d 1056 (7th Cir. 1999). Factors courts consider when determining whether an employee is free to engage in personal pursuits include:

- required response time;
- use of a pager to ease restrictions;
- ability to trade on-call shifts;
- excessive geographic limitations;
- personal activities in which employees can engage despite the restrictions; and
- frequency of calls.

Ingram v. County of Bucks, 144 F.3d 265 (3d Cir. 1998).

c. Sleeping Time

An employee who is required to be on duty for less than 24 hours is working even though he/she is permitted to sleep or engage in other personal activities when not busy. Where an employee is required to be on duty for 24 hours or more, the employer and the employee may

agree to exclude regularly scheduled sleeping periods of not more than 8 hours in duration from hours worked, provided adequate sleeping facilities are furnished by the employer, and the employee usually can enjoy an uninterrupted night's sleep. Interruptions to an employee's sleep must be counted as time worked. If interruptions prevent the employee from getting at least five-hours' sleep during the scheduled period, the entire period will be counted as hours worked.

d. Travel Time

The FLSA establishes that, absent a contract or custom to the contrary, ordinary home-to-work and work-to-home travel is not considered worktime and is not compensable. 29 U.S.C. § 254; 29 C.F.R. §§ 785.34-785.35. Conversely, an employee's travel time "as part of his principal activity, such as travel from job site to job site during the workday," is treated as compensable hours worked. 29 C.F.R. § 785.38. The FLSA regulations, therefore, make a distinction between normal daily commuting time, which is generally not compensable, and travel "all in the day's work" during the course of a workday, which is typically compensable.

Travel time spent on special one-day assignments away from work, such as trips to another city, is generally compensable when the trip is taken for the employer's benefit. 29 C.F.R. § 785.37. The FLSA regulations treat travel on one-day trips "as an integral part of the 'principal' activity which the employee was hired to perform on the workday in question." *Id.* In most situations, an employer need not compensate non-exempt employees for all travel time spent on a one-day trip. Typically, an employee will leave his/her home and travel to an airport or train station to take the trip. The regulations treat the time spent commuting to the airport and back as part of the non-compensable "home-to-work" category. *Id.* Thus, even on day trips, an employer generally may deduct from the compensable hours worked the time the employee

would have spent commuting from home-to-work and work-to-home on a typical day. Of course, the usual meal time would also be deductible. *Id.*

Special rules apply to overnight travel for non-exempt employees. Unlike one-day trips, an employer need not compensate employees for all travel time (minus the home-to-work time) on the trip. Instead, employees must be compensated for all hours actually worked on the trip and all travel time that "cuts across the employee's workday." 29 C.F.R. § 785.39. Thus, if the employee typically works from 9 a.m. to 5 p.m., the employee must be compensated for travel time that falls within that time period, even if the travel occurs on a weekend or other day the employee typically does not work. *Id.* Travel time that falls outside the employee's normal working hours on an overnight trip is not compensable. As with one-day trips, regular meal periods need not be counted.

e. Meetings and Training Programs

Attendance at lectures, meetings, and training programs counts as compensable hours worked unless (1) attendance is outside normal working hours, (2) attendance is voluntary, (3) the lecture, meeting, or training is not directly related to the employee's current job assignment, and (4) no work of value to the employer is performed at the lecture, meeting, or training. 29 C.F.R. §§ 785.27-785.31.

f. Meal Periods and Breaks

Rest periods of 5 to 20 minutes are considered compensable hours worked. 29 C.F.R. § 785.18. Meal periods during which an employee is "completely relieved of duty for the purpose of eating regular meals" do not count to hours worked. *Id.* § 785.19. Generally, an employee must be given 30 minutes or more and must be completely relieved of his/her duties for a period to qualify as a bona fide meal period. *Id.*

g. Other Hours Worked Issues

Volunteer Activities. Time spent engaging in work for public charitable purposes at the employer's request, or under the employer's direction or control, or while the employee is required to be on the premises, is working time. However, time spent voluntarily in such activities outside of the employee's normal working hours is not hours worked.

Example: A licensed practical nurse who privately agrees to donate his/her services to care for a sick child outside of his/her normal working hours is not engaged in compensable work even though he/she renders the services at his/her usual workplace. On the other hand, if his/her employer specifically requested that he/she spend some time with several patients during his/her lunch break, the time would be compensable.

Medical Attention. Time spent by employees in waiting for and receiving medical attention is compensable if the following conditions are met:

- medical attention is received during working hours; and
- medical attention is received on the plant premises; or
- the employer directs that medical attention be secured outside of the plant premises.

However, employees need not be paid for time devoted to medical attention if the employee visits a company doctor outside of working hours, even if the purpose of the visit is to receive treatment for an injury that was incurred at work. Of course, an employee who chooses to have a work-related injury treated by an outside physician is not entitled to wages for the time spent receiving medical attention.

Vacation, Holidays, Sick Days, And Other Non-Working Time. Contrary to popular belief, no state or federal law requires private-sector employers to provide paid leave. Likewise, if an employer does provide leave (paid or unpaid), time spent by an employee on such leave

need not be counted as "hours worked" for purposes of determining whether the employee has worked overtime in any given week.

2. Paying Overtime Compensation under Federal and State Law

The FLSA and MWA generally require that non-exempt employees be paid an overtime rate of not less than one and one-half times their "regular rate" for all "hours worked" over 40 hours in any workweek. For payroll purposes, an employer may begin the workweek on any day of the week and any hour of the day, but must be consistent. Employers may not change the starting time of a workweek to evade the overtime requirements of the FLSA.

As a general rule, an employer must consider each work week separately when calculating overtime earnings. If the employer establishes a two-week pay period, it generally may not average the number of hours worked by an employee in both weeks to determine the employee's overtime compensation.

Example: A district pays its hourly employees every other Monday. An employee works 41 hours during the first work week of the pay period and only 8 hours during the second work week. In calculating the employee's earnings, the employer must recognize the one hour of overtime worked during the first week and pay the employee time and one-half for this hour. This 41st hour may not be rolled into the second week for purposes of avoiding overtime pay.

Unless an employee's "hours worked" exceeds 40 hours in a given work week, overtime is unnecessary.

a. "Regular Rate of Pay" Defined

Although the FLSA does not require employers to pay non-exempt employees on an hourly basis, overtime earnings must be calculated on the basis of an employee's "regular hourly rate of pay." An employee's "regular rate" is determined by dividing the total remuneration for employment in a work week by the total number of hours worked. This regular rate must include

all remuneration for employment, including shift differentials, commission payments, and board and lodging. Thus, an employee's regular rate may differ from his/her stated hourly rate of pay.

The regular rate does not include

- payments made by an employer on behalf of an employee to a bona fide profit sharing, thrift, or savings plan;
- irrevocable contributions made by an employer pursuant to a bona fide plan for providing retirement, life, accident, or health insurance;
- pay for time spent on vacation, holiday, illness, layoff, or any other periods when the employee is not at work;
- gifts, Christmas, and special occasion bonuses;
- bonuses paid at the discretion of the employer and not pursuant to any agreement or promise to the employee;
- reimbursements for expenses incurred by an employee while carrying out his/her job;
- "premium pay" in excess of time and one-half the employee's hourly rate for work performed on weekends, holidays and other special occasions. However, if the premium rate is less than time and one-half the employee's hourly rate, the premium must be included in determining the employee's regular rate of pay.

29 U.S.C. § 207(e). Payments in these categories must generally meet a variety of strict requirements set forth in the regulations to qualify for exclusion from the regular rate calculation.

Bonuses. An employer must include non-discretionary bonuses and incentive pay when determining an employee's regular rate. Such bonus payments must be included in the regular rate determination, even if the employee will not receive the bonus until later and even if the regular rate must be retroactively adjusted after the amount of the bonus is determined. In order to qualify for exclusion as a discretionary bonus, the employer must retain complete discretion over the fact and amount of payment. If the employer promises or announces in advance that a bonus will be paid, no such discretion exists.

Bonuses which are announced to employees to induce them to work more steadily or more rapidly or more efficiently or to remain with the firm are regarded as part of the regular rate of pay. Attendance bonuses, individual or group production bonuses, bonuses for quality and accuracy of work, bonuses contingent upon the employee's continuing in employment until the time that payment is to be made and the like are in this category.

29 C.F.R. § 445.211 (c).

Example: (Non-Exempt Hourly Employee/40 Hour Work Week)
A district pays its hourly employees at the rate of \$10.00 per hour. However, each employee is promised a \$5.00 bonus for each week in which he/she has perfect attendance. Because this bonus is not "discretionary," it must be included in the employee's total wage earnings for each week in which it is earned in determining the employee's regular rate of pay. Assuming an employee receives the bonus in a week during which he/she worked 50 hours, his/her "regular rate" would be calculated as follows: $\$500.00$ (straight earnings) + 5.00 (bonus) \div 50 hours worked = $\$10.10$. The employee should be paid an overtime premium equaling one-half times his regular rate ($\$10.10$ per hour) for each of his ten overtime hours. The employee's total weekly earnings may be calculated as follows: $\$500$ (straight earnings) + (10 overtime hours \times $\frac{1}{2} \times \$10.10$ = $\$50.50$) + ($\5.00 bonus) = $\$555.50$ total weekly earnings.

Only bonuses that are completely discretionary and not paid pursuant to any prior agreement or arrangement, such as a holiday bonus, may be excluded from the regular rate computation. 29 C.F.R. §§ 778.211-778.212. Discretionary bonuses that are given on a regular basis may appear to be part of the employee's regular pay and pose problems in the event of an employee complaint and/or a Wage and Hour Division investigation. Thus, discretionary bonuses should be used with caution and only given if the employer has a written policy clearly stating that the bonuses are not guaranteed and may be discontinued at any time. 29 C.F.R. § 778.211(b).

Despite the general exclusion of expense reimbursement from the regular rate calculation, per diem payments to non-exempt employees, such as travel and temporary living expenses,

must be included in the regular rate if the per diem is not reasonably related to expenses incurred by the employee. 29 C.F.R. § 778.217. Thus, employers should ensure that non-exempt employees provide documentation when seeking reimbursement for work-related travel and temporary living expenses.

Different Pay Rates. With respect to employees who receive different pay rates for different types of work, the federal wage and hour regulations provide two permissible methods of calculating the regular rate for overtime purposes. The usual method is to use the weighted average of the two rates to determine the regular rate. 29 C.F.R. § 778.115. The other method is to calculate overtime on the basis of the regular rate for the type of work being performed during the overtime hours. 29 C.F.R. § 778.419. Employers may use this second method to calculate the regular rate only by prior agreement with the employee. *Id.*

Premium Pay Credits. The FLSA allows an employer to credit three specific types of extra compensation against any overtime it owes an employee:

- extra compensation at least one and one-half of the employee's regular rate for hours works in excess of daily or weekly standards (for example, premium pay for hours exceeding 8 or 12 in a day or 35 hours in a week); or
- extra compensation at least one and one-half of the employee's regular rate for work on Saturdays, Sundays, holidays, or other "special days"; or
- "clock pattern" premium pay at least one and one-half of the employee's regular rate where extra compensation is paid for work outside the basic workday or work week (for example, premium pay for work performed outside the normal 8 a.m. to 5 p.m. workday).

29 U.S.C. § 207(h)(2); 29 C.F.R. §§ 778.202-778.204.

If an employer provides premium payments in any of the manners described above, these payments need not be included in the "regular rate" for overtime calculation. In addition, the extra compensation can be credited to any overtime owed the employee. Conversely, any

premium payment that falls outside the three categories described above must be included in the employee's regular rate of pay and cannot be credited to any overtime obligations. 29 C.F.R. § 778.204. Thus, premium pay for "undesirable hours" cannot be counted to overtime and must be included in an employee's regular rate.

b. Compensatory Time

One of the most frequently misunderstood wage and hour concepts is "compensatory time." If an employer's pay period is longer than one week, it may be possible to control the amount of overtime wages paid by granting employees time off in lieu of overtime. Under a time-off plan, an employer gives an employee time off in one work week to offset overtime hours worked in a previous work week. However, such plans are only lawful for private employers if three requirements are met: (1) all compensatory time off must be used during the same pay period in which it is accrued; (2) compensatory time off must be granted at a rate of one and one-half times the number of overtime hours worked; and (3) affected employees should be informed of the plan prior to its implementation.

Example: A district pays its non-exempt employees every other week. One employee is paid \$10.00 an hour and usually receives \$800.00 gross pay at the end of each two week pay period. During the first week of a pay period this employee works 44 hours. In order to avoid additional wage costs due to the four hours of overtime worked, the employer may grant the employee six hours (1 x 4) compensatory time off with pay during the second work week of the pay period. At the end of the pay period, the employee's earnings are calculated as follows:

First Week Straight Time Earnings:	40 x \$10.00 per hour =	\$400.00
First Week Overtime Earnings:	4 x \$15.00 per hour =	\$ 60.00
Second Week Earnings:	34 x \$10.00 per hour =	<u>\$340.00</u>
	TOTAL	<u>\$800.00</u>

Special amendments to the FLSA allow the use of compensatory time off in lieu of overtime compensation for employees of a state, a political subdivision of a state or an interstate

governmental agency. Comp time is earned at a rate of at least 1.5 hours for each hour worked for which overtime otherwise would be paid. In order to employ a comp time system, an agreement or understanding (we suggest a written agreement) must be reached with affected employees or their representative before the work is performed.

Employees involved in public safety, emergency response, or seasonal activities may accrue to a maximum of 480 comp time hours (i.e., 320 straight time hours x 1.5). Others may accrue only to a maximum of 240 hours (i.e., 160 straight time hours x 1.5). Once an employee would exceed these maximums, he/she must either use comp time or receive overtime compensation in lieu of further comp time. Accrued, unused comp time also must be paid upon termination.

F. Strategies for Addressing Ten Common Wage and Hour Issues

1. An employee has quit and refused to return property in her possession but owned by the conservation district. You still have the employee's final paycheck.
2. The district provides all employees with a year-end holiday bonus each year.
3. The district has a certain administrator, employed by the district for a long time, who has always been treated as a salaried exempt employee. Because of this seminar, you become concerned that the employee is misclassified. You know that converting him to non-exempt could create problems with the employee.

4. You currently do not have a comp time program but would like to start one.
5. The district allows employees to take paid vacation leave not yet accrued under its vacation policy. If the employees leaves the district prior to accruing the used vacation, the district deducts the used but unaccrued vacation pay from the employee's final paycheck.
6. The district is aware that a non-exempt employee, who is scheduled to work 8 hours per day, Monday through Friday, is routinely staying late to work and doing work at home, without recording her time.
7. The district routinely allows certain non-exempt employees to "voluntarily" attend certain training seminars conducted by a national association. The district does not compensate the employees for the time spent at the seminars.
8. To reward certain salaried exempt employees for time worked beyond their normal 40 hour work week, the district gives the employees "comp time" by allowing them to take time off in future weeks with pay. To accomplish this, the district requires that the salaried employees keep a time card each week.

9. As an alternative to No. 8, the district pays certain salaried exempt employees an additional straight-time hour rate for all hours worked in excess of 40 in any work week.
10. The district does not pay certain non-exempt employees for any travel time that occurs outside the employees' regular 9 a.m. to 5 p.m. working hours.

II. Minimizing the Risk of Liability During the Employment Relationship

As employment lawyers, one of the most common calls we receive is "Okay, we are ready to terminate an employee and want to know what we should do to avoid a lawsuit." In reality, if an employer only is concerned with liability stemming from a potential discharge at the moment of discharge, significant problems likely arose long ago, any one of which could create potential liability.

To minimize liability associated with disciplining or discharging an employee, employers must begin taking steps to protect themselves before the employee is even hired. If an employer implements necessary employment policies, conducts a proper hiring process, and has effectively managed that employee throughout his/her employment, the employer can greatly reduce the risks typically associated with terminations. In this section, we will briefly discuss what employers should do prior to hiring, during the hiring process, and during the employment relationship to reduce the potential of liability associated with discipline and discharge.

A. Preliminary Steps Before Hire

1. The Need for Establishing Formal Policies

The first step in minimizing risks of employment-related liability is the implementation and maintenance of an employee handbook or manual that contains the employer's formal policies. Simply put, a good handbook is worth its weight in gold. Good, complementary, and complete employment policies and procedures provide the framework for a district-wide culture and consistency, ensure legal compliance, set appropriate employee expectations and standards, and serve as a good resource for supervisors and managers. In addition to reducing risk of liability, strong policies and procedures (which are published and followed) can eliminate a fair share of unnecessary employment-related headaches. To reap the benefits of an effective employee handbook, employers must develop and use the document.

Employee handbooks and other written personnel policies traditionally have been an easy and effective way to communicate with employees. An employer may legitimately expect employees to conduct themselves in accordance with the handbook. Likewise, an employee may reasonably rely on the employer's representations in the handbook.

- Handbooks help ensure that employees understand what their role is and what is expected of them. At a minimum, the handbook should eliminate the global "excuse" of not understanding obligations to the employer. This element of "notice" is particularly important in defending employment decisions which are subject to review and investigation by agencies such as the Equal Employment Opportunity Commission, the Pennsylvania Human Relations Commission, the National Labor Relations Board, or the Department of Labor.
- Handbooks provide guidance to supervisors and managers in handling day-to-day problems.
- Uniform policies reduce the risks of uneven treatment, which is especially important in employment discrimination cases.

Employers must keep in mind, however, that a well-drafted handbook creates two sets of expectations: one for the employer and one for the employees. If expectations are not met or the

employer does not follow its own handbook, it will look suspicious not only to employees but also to government agencies which may be investigating a particular employment practice or decision.

2. Important Employment Policies

That said, what should an effective employee handbook contain? In this next session, we discuss those policies and forms vital for employers.

a. At-Will Employment Acknowledgment

The first thing that an employee handbook should contain is actually not a policy, but rather a disclaimer to protect the employer against possible mischief caused by the handbook itself. As a general rule, all employment in Pennsylvania is presumed to be "at-will," meaning that either party can terminate the relationship at any time for any reason or even for no reason. A handbook certainly should be drafted to ensure that an employee's "at-will" status is not altered. Thankfully, Pennsylvania does not require much effort to ensure that the handbook does not affect the at-will status.

The best synopsis of Pennsylvania case law addressing employee claims that a handbook limits an employer's ability to terminate the employment relationship is this: If you have a good "disclaimer statement" in your handbook, you should be just fine. Disclaimer language should expressly state that the terms of the handbook are not intended to be a contract for employment, but rather that the handbook is a general statement of district policy. The disclaimer also should indicate that unless the employee has an express contract for employment stating otherwise, all employees are employed at-will, meaning that either the district or the employee may terminate the employment relationship at any time, for any reason, with or without notice. Finally, the

disclaimer should also mention that the district may change the terms of the handbook from time to time.

That said, a handbook which clearly disclaims any intent to modify the at-will employment relationship can still create a legal entitlement to a particular benefit. The Pennsylvania Superior Court has held that even when an employee handbook specifically states that the employment relationship is at-will, the employer's communication in the handbook of certain rights may constitute an offer of a contract for employment on those terms, which the employee may accept by continuing to perform the duties of his/her job. *Bauer v. Pottsville Emergency Medical Services, Inc.*, 758 A.2d 1265 (Pa. Super. 2000). In *Bauer*, the employee handbook stated that employees "working at least 36 hours per week for a period of 90 days" would be treated as full-time employees for purposes of certain benefits. The plaintiff, an emergency medical technician, worked at least 36 hours per week for more than 200 days but was not extended certain paid leave benefits or health insurance. The *Bauer* court found that the handbook might created an implied contract which obligated the employer to provide the promised benefits.

The *Bauer* decision is both disturbing and informative for employers. Courts increasingly are likely to hold an employer to a promise or statement made in a handbook, even if the handbook clearly states that it is not a contract. Although this conclusion may trouble some employers, the solution is simple: do not make a promise or statement in the handbook that you cannot live with. A well-drafted handbook should not create the type of unforeseen consequences suffered by the employer in *Bauer*. To avoid the *Bauer* problem, an employer simply needs a well-drafted, regularly utilized handbook that accurately states the employer's intentions.

b. Equal Employment Opportunity Policy

After the at-will employment/"not a contract" disclaimer, the first policy in the handbook should be the employer's Equal Employment Opportunity ("EEO") Policy. By stating at the start of the handbook that the employer does not discriminate with respect to any employment decision on the basis of any protected trait, the employer demonstrates that compliance with federal, state, and local employment discrimination laws is a high priority for the organization.

We suggest an EEO Policy for Pennsylvania employers modeled upon the following:

_____ is an equal employment opportunity employer which does not discriminate on the basis of race, color, religion/creed, sex, disability, marital status, age, pregnancy, national origin, ancestry, possession of a General Education Development Certificate as compared to a high school diploma, veteran status, or any other characteristic protected by applicable federal, state, or local laws or ordinances. This commitment applies to, but is not limited to, decisions made with respect to hiring, placement, compensation, benefits, promotions, demotions, transfers, terminations, layoffs, return from layoffs, administration of benefits, and all other terms and conditions of employment. Likewise, employees are responsible for respecting the rights of their co-workers, as we must all work together to insure continued success.

c. Discriminatory Harassment Policy

In order to facilitate a workplace free from discriminatory harassment and to minimize legal liability under federal and state anti-discrimination laws, employers must develop and communicate policies against discriminatory harassment in the workplace. These policies serve to minimize the frequency of discriminatory harassment in the workplace. Just as importantly, they also may provide a defense against an employer's legal liability if such harassment does occur.

Under applicable agency principles, an employer will only be held liable for co-worker harassment if the employer knew or should have known that the harassment was taking place and

failed to take prompt remedial measures to bring it to an end. However, the United States Supreme Court has ruled that employers are automatically liable for discriminatory harassment committed by supervisors unless the employer can establish an affirmative defense. The defense requires that the employer prove (1) that it exercised reasonable care to prevent and correct promptly any harassing behavior, and (2) that the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise. *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257 (1998); *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998).

Under this standard, employers must have an appropriate anti-discrimination policy in place which provides an adequate reporting and investigation procedure. In addition, anti-harassment training must be provided to supervisors, and employers should consider whether to provide such training to all employees.

Anti-harassment policies should:

- Specifically prohibit sexual harassment.
- Prohibit all other forms of discriminatory harassment.
- Describe the types of conduct which are prohibited.
- Provide an appropriate harassment reporting procedure which allows an employee to choose from a few alternate reporting avenues.
- Indicate that an appropriate investigation will be conducted and that confidentiality will be maintained to the extent possible, but that certain information may need to be disclosed in the course of conducting an adequate investigation.
- Indicate that if a violation is found to have occurred, prompt and appropriate remedial measures will be taken to bring the harassment to an end.
- Indicate that the employer will not tolerate any form of retaliation against any individual for making a report of harassment or participating in an investigation.

- Indicate that if the harassment persists after remedial measures have been taken, the victim must inform management so that appropriate measures can be taken.

The policy should not :

- Fail to mention and prohibit discrimination on the basis of race, religion, national origin, age and/or disability.
- Allow reports to be made to individuals who cannot be relied upon to act upon the information appropriately.
- Indicate that an investigation will be conducted and action will be taken only if the victim requests.
- Require that a formal complaint be made in order for the employer to take any investigative and remedial measures.
- Facilitate unnecessary communication of the allegations or the results of the investigation to individuals not involved.

Employers should consider:

- Training all employees, not just supervisors (and update training periodically).
- Distributing the policy to each employee separately and having each employee acknowledge receipt of the anti-harassment policy.
- Developing a tracking system for repeated complaints against any one individual.
- Limiting those management individuals responsible for receiving complaints to higher level management, and excluding front-line supervisors from the responsibility (front-line supervisors must, however, report any harassment which they personally witness).

d. General Guidelines for Conduct

An effective and uniform guidelines for conduct policy is important because it establishes standards for employees and guidelines for supervisors or managers with respect to workplace conduct. An employer's guidelines for conduct policy may be reviewed by administrative agencies in response to employee complaints about adverse employment decisions. Thus, it should be carefully drafted and uniformly enforced.

In drafting such a policy, employers should be careful to avoid using the terms "for cause" or "just cause" in discussing discharge. These terms imply that an employee cannot be discharged unless there is some reason. The discharge policy should make it clear that at all times employees remain at-will and can be discharged at any time for any or no reason, with or without notice.

Employers also should maintain flexibility in their discipline policies and procedures. If the policy sets forth a list of conduct that will result in discipline, it should be clear that the list is not exclusive and that the employer retains the right to discipline an employee for conduct not specifically enumerated. If the employer has a progressive discipline policy, it should be clear that the employer retains the right to move to any step in the discipline policy, including termination, at any time, with or without notice.

e. Attendance Policy

Employee attendance issues are perhaps the most fertile source of potential liability under the employment laws. While employers generally have the right to insist upon regular and punctual attendance from employees, attendance policies must be properly drafted and applied in order to avoid violation of the FMLA and the ADA. Moreover, consistent enforcement of attendance policies (like any disciplinary action) is necessary to avoid discrimination claims.

Appropriate attendance policies should:

- Clearly and simply define the rules (number of absences allowed, permissible reasons for absence, disciplinary action that will be taken for excessive absenteeism).
- Clearly define a procedure for reporting any absences.
- Provide a method of appropriate documentation of absences.
- Provide a method of providing management with necessary information to determine whether an absence is protected under the FMLA or whether an accommodation might be needed under the ADA.

- Exclude FMLA protected absences from disciplinary action (this may include single-day absences for a chronic condition or partial-day absences for intermittent leave).
- Always be consistently applied.

Attendance policies must not:

- Count all absences, including absences protected under the FMLA.
- Refuse to make exceptions for individuals with a disability under the ADA.
- Allow employee manipulation or abuse.

Employers should consider:

- Developing an appropriate method for documenting absences and determining application of the FMLA and the ADA.
- Requiring employees to complete an explanation of absence form on their first day back to work. The form may require information concerning the reason for the absence, whether any medical care was required, whether the employee had experienced the symptoms in the past, etc.
- Requiring all absences to be reported to the appropriate human resources individual responsible for administering FMLA and ADA issues. Employees should be told that they must speak personally to the human resources representative regarding any period of absence. Information should be obtained from the employee and documented concerning the reason for the leave, the duration of the condition, any medical treatment administered, any anticipated future medical treatment, whether the employee has suffered similar symptoms in the past, etc.
- Implementing an attendance bonus to discourage excessive absenteeism.

f. Drug and Alcohol Policy

Employers are well aware of the obvious dangers to employees and others, both inside and outside the workplace, and to the employer in general from employee use or abuse of drugs and alcohol. Employers, therefore, often are committed to establishing and maintaining an alcohol-free and drug-free workplace. In an effort to attain this goal, an employer may wish to consider implementing a drug and alcohol policy.

At a minimum, a drug and alcohol policy should expressly prohibit the sale, use, or possession of illegal drugs and alcohol while on duty, on the employer's premises, or in the employer's vehicles. Likewise, the policy should also prohibit an employee from reporting for duty while under the influence of alcohol or illegal drugs and define "under the influence." The policy should also set forth the procedure for employees to follow if they are using prescription or over-the-counter drugs that may adversely affect the employee's physical or mental ability to perform work in a safe and productive manner. Finally, the policy should make clear the consequences of a policy violation (i.e., possible disciplinary action, up to and including termination).

If the employer desires to implement drug testing of applicants and/or employees, the drug and alcohol policy should set forth the particulars of its testing program, including at a minimum the types of tests conducted, the triggering reasons for a test, and the drugs for which the employer tests.

g. Solicitation/Distribution

There are federal and state rules regarding solicitation and distribution on an employer's premises. An employer can prohibit solicitation and distribution by non-employees and can prohibit solicitation by employees in work areas only during working time. To avoid possible problems under federal and state law, any solicitation/distribution policy must be applied in a non-discriminatory manner and cannot be used solely to limit union solicitation.

h. Family and Medical Leave Act

The FMLA applies to all employers with 50 or more employees. Any employee who has worked for the employer for at least 12 months, and for 1250 hours in the preceding 12 calendar months at a location with 50 or more employees in a 75-mile radius, is entitled to up to 12 weeks

of unpaid FMLA leave in any 12-month period for a qualifying reason. Qualifying reasons include the birth or placement for adoption of a child, a "serious health condition," or a serious health condition of an immediate family member. It is necessary that covered employers develop appropriate FMLA policies and communicate them to employees.

The Department of Labor's regulations implementing the FMLA specifically require that employees be notified of their rights under the FMLA by workplace postings, and that employers include information concerning FMLA entitlement and employee obligations in any employee handbook or other written guidance to employees concerning employee benefits or leave rights. Thus, covered employers must include an FMLA policy in any employee handbook that is distributed.

The FMLA policy must:

- Set forth the employee's obligation to notify the employer of the need for FMLA leave.
- Indicate the employee eligibility requirements (one year of employment and 1250 hours worked within the preceding 12 months).
- Indicate the method by which the 12-week leave entitlement will be calculated (the rolling 12-month period is suggested).
- Indicate that all accrued paid leave must be taken concurrently with FMLA leave (if appropriate).
- Discuss the employee's obligation to pay their share of health insurance premiums during the leave (if appropriate).
- Specify that the employee is required to provide the appropriate health care provider certification forms and fitness-for-duty information.

The policy must not:

- Fail to adequately inform employees of their rights under the FMLA.
- Fail to indicate the method of calculation for the 12-week FMLA leave entitlement.

- Indicate that employees will be terminated if they are unable to return to work at the expiration of the 12-week FMLA leave entitlement.
- Require a formal FMLA request in situations where the employer has information that an absence may be due to an FMLA qualifying reason.

Employers should consider:

- Requiring employees to use any form of paid leave concurrently with FMLA leave.
- Providing a statement indicating that obtaining outside employment during FMLA leave, or any form of fraud associated with an FMLA leave request, will result in disciplinary action including termination.
- Providing a statement indicating that certain "key employees" may be denied job restoration following FMLA leave under certain conditions.
- Including a provision that all FMLA leave should be unpaid (unless accrued paid leave is substituted).
- Integrating employee absence reports, sick leave requests, and short-term disability applications with FMLA management.
- Providing training to managers and immediate supervisors concerning the FMLA.
- Including a provision informing employees that in situations where intermittent leave is requested, it may be necessary to transfer the employee to a more suitable job.
- If a serious health condition may also constitute a disability under the ADA, advising the employee of the willingness to discuss and consider any reasonable accommodation. This might also be considered in workers' compensation situations. However, it should be made clear that the employee has the right under the FMLA to take the 12 weeks of unpaid leave if so desired (although this may have an impact on the ability to recover workers' compensation benefits).
- Obtaining detailed information from employees whenever they are absent from work unexpectedly or due to illness.

i. Electronic Communications Policy

Employee Internet and e-mail use raises significant legal and human resources issues.

The use of these communication methods by employees creates significant additional risk of

legal liability and may also involve productivity concerns. For these reasons, employers should consider developing an appropriate electronic communications policy. However, employers must be aware that any monitoring or interception of electronic communications must be done in an appropriate manner in order to avoid violation of federal and state wiretap laws or potential liability for invasion of privacy.

An electronic communications policy should:

- Explain that use of the employer's electronic communications systems (e-mail, Internet, etc.) is intended for business use and that the employer provides employee access to these systems in order to enable employees to perform their jobs.
- Prohibit inappropriate use of the systems.
- Prohibit harassing messages.
- Prohibit downloading of inappropriate materials.
- Prohibit use that overburdens the system.
- Prohibit dissemination of confidential information.
- Make specific reference to the employer's policy against discriminatory harassment.
- Make clear that employees should treat electronic communications just like any other formal correspondence.

Employers should not:

- Monitor or intercept electronic communications without informing employees that this may be done or obtaining their consent to such activities (certain exceptions may apply).

Employers should consider:

- Setting boundaries for personal use of the systems.
- Monitoring electronic communications after informing employees that this will be done and obtaining their consent to such monitoring.

- Developing a clear retention/destruction policy with respect to e-mail messages – in the event of litigation, the burden and expense of producing stored e-mail messages can be staggering.

i. Acknowledgment of Receipt

It also is a good practice for employers to retain a signed acknowledgment in an employee's personnel file indicating that the employee has received the handbook. This often is important evidence, particularly in an unemployment compensation matter, that an employee knew or should have known about a work rule that was violated. Likewise, an acknowledge may be key evidence when establishing the affirmative defense in a harassment case.

B. The Hiring Process

The best offense is a good defense. In that regard, perhaps the most pragmatic advice which we can dispense relates to intake procedures. Where potential employee problems can be spotted at the applicant stage, the potential "cost" (again in terms of legal liability and workplace disharmony) can be minimized or eliminated. We suggest that employers undertake a periodic review of their hiring and interview procedures, including but not limited to the following areas.

1. Job Descriptions

Before hiring for any vacant position, an employer should ensure that it has a written job description for that position. The job description should identify all job duties and responsibilities, performance standards for each job task, and a description of physical and mental abilities required for the job. In addition, the description should make clear those job tasks and responsibilities that are considered essential and most important. When determining what constitutes the "essential functions" of a position for the purposes of ADA compliance, the EEOC and courts will give an employer's job description some deference, making this document vital.

2. Advertisements

Responsibility for job advertising should be centralized with one individual or group of staff to ensure consistency and lawful wording. Advertisements must be carefully worded to avoid creating even a suggestion of a contractual or other commitment on behalf of the employer and should contain applicable equal employment opportunity language. All employers should be mindful of the media in which they seek job applicants and should endeavor to obtain the most qualified applicants regardless of race, sex, age, religion, national origin, handicap, or disability.

3. Job Applications

Application forms are often an employer's primary source of information about an applicant and are an excellent tool for avoiding lawsuits. The application form can be used to inform applicants of various employer rules or policies and to require applicants to acknowledge and agree to a number of points. Some important items that should appear on any employment application include:

- a statement regarding at-will employment status;
- an authorization to conduct background checks;
- a release of the employer and others contacted for background and reference checks;
- an acknowledgment that post-offer drug/alcohol testing and medical examinations will be given (if applicable); and
- a guarantee of the accuracy and completeness of the information provided by the applicant.

All such statements should be made in plain English and should be placed over the applicant's signature/date line for appropriate acknowledgment and execution.

Additionally, both the Equal Employment Opportunity Commission and the Pennsylvania Human Relations Commission have developed guidelines with respect to questions which an

employer may legally ask on a job application. The following are the most common illegal or non job-related questions asked on a pre-employment application and at pre-employment interviews:

- marital status and number of dependants;
- childcare arrangements;
- height and weight;
- color of eyes/hair;
- date of birth;
- dates of school attendance; and
- health history or any other disability-related inquiry.

There are other areas of inquiry where an employer must exercise care:

- United States citizenship;
- English language skills;
- availability for work on weekends or holidays;
- educational background;
- military service; and
- conviction record.

4. The Interview Process

An employer should not ask questions at an interview that cannot be asked on the job application. All representatives involved in the interview process should be aware of their obligations under anti-discrimination laws. Any statements indicative of bias may be used as "direct evidence" in a subsequent discrimination lawsuit. Comments about an individual's

appearance or any jokes or innuendoes of a sexual, racial, or religious nature are entirely improper.

Interviews must be conducted in a consistent, standard manner. Employers should try not to ask questions of some applicants and not of others. It is also imperative that employers keep a record of each interview as it takes place and take comprehensive notes during the interview. Each interviewer should be given a standard form to complete during, or immediately after, the interview.

5. Pre-Employment Inquiries Under the ADA

An employer may not conduct a medical examination or make any disability-related inquiries of job applicants. An employer may, however, inquire as to the ability of applicants to perform essential functions of the job with or without an accommodation. If the employer asks whether an applicant can perform the essential functions of the job, with or without a reasonable accommodation, the question should be phrased as a "yes or no" question. Set forth below are specific prohibited disability-related inquiries according to the EEOC's Guidance:

- How many days were you sick last year?
- What prescription drugs are you taking?
- Have you ever collected workers' compensation benefits?
- Have you ever attended drug rehabilitation or AA?

Once a conditional offer of employment has been made, an employer may conduct medical examinations or inquiries. If the employer does so, all conditional employees in the same job class must be given the same medical examination or inquiry. However, if the initial inquiry discloses that the conditional employee may not be able to perform the essential functions of the job with or without a reasonable accommodation, the employer may require

further examination. If an employee uses the results of these inquiries or examination to screen out the conditional employee, the employer must show that the exclusionary criteria are job-related and consistent with business necessity and cannot be remedied with a reasonable accommodation.

Employers should keep all such medical information confidential and in a separate filing cabinet apart from the location of personnel files. Only medical personnel should have access to these files and they should never be used in making personnel decisions unless a reasonable accommodation is needed.

6. Drug Testing

An employer may conduct pre-employment illegal drug testing after a conditional offer of employment has been made. It is very important for an employer to develop strict procedural safeguards in drug testing programs. We recommend compliance with the U.S. Department of Transportation's drug testing guidelines, even where such a program is not mandated.

7. References and Background Checks

One of the most important ways for an employer to ensure that it hires quality people is to conduct background checks and contact an applicant's former employers. Pennsylvania employers should realize that there is a limit on the extent to which a criminal background can be considered. An employer only may consider information concerning a prospective employee's felony or misdemeanor convictions to the extent that they relate to the applicant's suitability for the position for which he/she has applied.

Additionally, the Fair Credit Reporting Act imposes substantial obligations on employers and other agencies who conduct background checks. These obligations typically relate to the employer's and the agency's need to disclose that a background report may be solicited, to obtain

authorization for such a report, and to advise an applicant of any negative treatment of his/her application on the basis of a solicited report. The FCRA's obligations on employers are discussed in a later section.

C. During the Employment Relationship

Of course, establishing effective written policies and conducting a lawful hiring process only create a foundation to reduce employment-related liability risk. The employer's actions during employment is also vital to an overall risk-reduction program. In this section, we will discuss a number of employment issues that often contribute to problems when the termination is made.

1. Performance Evaluations

Performance evaluations are recommended, not only to properly monitor your work force, but to provide any effective defense against employment discrimination or wrongful discharge claims. Performance evaluations can be useful in showing a pattern of unsatisfactory performance that is different from the rest of the work force or inconsistent with the employee's prior performance. Of course, employees should be evaluated fairly. Evidence that an employer "singled out" an employee and prepared an inaccurate performance evaluation can severely jeopardize an employer's defense in employment litigation. In many cases, it is better to use no performance evaluation at all than to rely upon carelessly prepared or inaccurate evaluations. The following rules are useful guidelines in conducting performance evaluations:

1. Performance evaluations should provide employees with notice of work deficiencies;
2. Performance evaluation should measure performance according to objective criteria;
3. Performance ratings should be applied consistently;

4. Performance evaluations should be well documented;
5. Employees should be given an opportunity to review and comment upon their evaluations; and
6. Employees should be provided with an opportunity to correct deficiencies.

2. The Personnel File

Under the Pennsylvania Personnel Files Act, employees are entitled to inspect their personnel files. An "employee" is defined in the law to mean "any person currently employed, laid off with reemployment rights, or on leave of absence." Job applicants are not covered by the law. Similarly, former employees generally have no rights under the law. It should be noted, however, that the Pennsylvania Commonwealth Court has held that a terminated employee may have rights under the law if he/she promptly requests review of the personnel file at the same time as the termination or within a reasonable time immediately following such termination.

a. What Should and Shouldn't Be in a Personnel File?

Under this law, an employee is entitled to review information regarding his/her employment history that is typically kept in a "personnel file." Generally, this includes the following information:

- an application for employment
- wages or salary information
- notices of commendation
- warnings or disciplinary letters or actions taken
- authorizations or payroll deductions for withholding of pay
- fringe benefit information
- leave records
- employment history with the employer

- job title
- employment status changes
- attendance records
- performance evaluations

Any employee medical information should not be kept in the personnel file. Instead, medical information should be kept in a separate, secure, confidential file, with access limited to only those management officials who need the information contained therein. The following information should be placed in the confidential medical file (i.e., not in the personnel file):

- All doctor's notes or excuses
- Any other information received from an employee's doctor
- All FMLA paperwork
- Workers' compensation claim forms and other documentation referencing physical or mental conditions
- Results of any medical examination
- Any medical questionnaires
- Information concerning prescription drug use
- All documents relating to any request for accommodation or the reasonable accommodation process
- Information relating to any claim for disability benefits
- Any information relating to any health insurance claim
- Information referencing alcohol use or past drug addiction (current illegal drug use not included)
- Drug and alcohol testing information

Employees should be permitted access to their confidential medical file upon request. Access to medical information must be provided within 15 days, and the employee is legally entitled to a copy of the documents in his medical file.

b. Employees' Inspection Rights

The law requires employers to make personnel files available at reasonable times for employees to inspect. Personnel files must be made available during regular business hours of the office where such records usually are maintained. However, an employer may require the requesting employee to inspect the records during the employee's free time (e.g., lunch break).

Employers may require that requests for access be made on a written form. In order to assist the employer in responding to an inspection request, an employee may be required to indicate in the written request either the purpose of the inspection or the particular portions of the personnel file that he/she or his/her agent wishes to review.

An employee is entitled to designate an agent (e.g., attorney or union representative) to review the records on his/her behalf. An employee who wishes to designate an agent for inspection purposes may be required to provide a signed authorization designating the individual as agent. The authorization may indicate a specific date or period of time for which authorization is granted. In addition, the authorization should indicate either the purpose for which the inspection is authorized or the particular portions of the employee's personnel file the designated agent is authorized to inspect.

Under the Act, employees are not entitled to receive or review any of the following information:

- records of an employee relating to the investigation of a possible criminal offense;
- letters of reference;

- documents that are being developed or prepared for use in civil, criminal, or grievance procedures;
- certain medical records;
- materials that are used by the employer to plan for future operations; or
- information that is available to the employee under the Fair Credit Reporting Act (e.g., notice of investigative consumer report, etc.)

Employees and their agents are not entitled under the Act to remove personnel files, or any portion thereof, from the location of inspection. Likewise, employees are not entitled to photocopy contents of the files. However, an employee or agent may take notes of any information required to be produced.

An employer may require that any inspection take place in the presence of a designated employer official. Sufficient time must be granted to permit adequate inspection of the file. An employer may limit the number of inspections to once each calendar year by an employee and once each calendar year by the employee's designated agent. However, an employee or designated agent may be entitled to additional inspections upon a showing of "reasonable cause."

3. Notice and Recordkeeping Requirements

Many federal and Pennsylvania employment laws require employers to maintain records concerning specific information and to post certain notices in conspicuous locations. Although we cannot list all recordkeeping and notice requirements in this piece, employers should review their own notice and recordkeeping programs to ensure compliance with these laws.

4. Duty to Accommodate Individuals with Disabilities

Under the Americans With Disabilities Act ("ADA") and Pennsylvania Human Relations Act ("PHRA"), it is unlawful to discriminate against a qualified individual with a disability. Only employees who can perform essential job functions are protected by the ADA/PHRA. To

gain protection of the ADA/PHRA, an employee must be a "qualified individual with a disability" as defined by the Act and subsequent case law. An individual with a disability who meets the skill, experience, education, and other job-related requirements of a position held or desired (i.e., job prerequisites), and who, with or without reasonable accommodation, can perform the essential functions is protected by the law. Where an employee does not meet job-related requirements for a position, he/she may not be protected.

"Disability" is defined by the ADA as (1) a physical or mental impairment that substantially limits one or more major life activities, (2) having a record of such impairment, or (3) being regarded as having such an impairment. Major life activities include the important day-to-day elements of life and have been held to include; caring for oneself, walking, seeing, hearing, speaking, breathing, learning, interacting with others, and working. The determination of whether an individual has a substantial limitation of a major life activity must be made with reference to the effect of prescription drugs or other mitigating measures.

Courts and/or the EEOC have found that the following circumstances or conditions are not disabilities:

- simple physical characteristics, like eye or hair color, height or weight within normal ranges, left-handedness, or stupidity if it is not caused by a mental or psychological disorder;
- poverty;
- pregnancy, although infertility may be a disability;
- prison record;
- drug or alcohol use on the job or in a manner that affects job performance;
- homosexuality or bisexuality; or
- behavioral disorders, like kleptomania, pyromania, voyeurism, transvestism, pedophilia, exhibitionism, or compulsive gambling

If a disability exists and the employer has sufficient notice of a need for accommodation, then both parties have a duty to participate in the interactive process to determine whether a reasonable accommodation can be provided. An employer has sufficient notice if it knows that an employee may need an adjustment or change at work for a reason related to a mental or physical impairment. Employees need not mention the ADA or PHRA or specifically request a "reasonable accommodation" in order to provide adequate notice. Moreover, courts have consistently held that employers may not require a written request for accommodation in order to trigger ADA/PHRA obligations. Accommodation requests may be made by a family member, friend, healthcare professional, or other representative, and the employer's prior knowledge of the employee's condition must be taken into account in determining whether ADA/PHRA obligations have been triggered. On the other hand, courts have also been fairly consistent in holding that an employer's mere knowledge of a condition is not enough and that the employee must take some affirmative steps to make clear that some assistance is needed.

Both parties have an obligation to participate in the interactive process once notice is given. An employee who fails to provide requested information or refuses to discuss potential accommodations is responsible for the breakdown of the interactive process and cannot later claim that the employer unlawfully failed to provide an accommodation. On the other hand, if the employer fails to adequately communicate with the employee or to consider the employee's proposed accommodations, the employer could later be faulted if a reasonable accommodation is not provided.

A reasonable accommodation is any modification or adjustment to a job, an employment practice, or the work environment that makes it possible for an individual with a disability to enjoy an "equal employment opportunity." An "equal employment opportunity" means an

opportunity to attain the same level of performance or to enjoy equal benefits and privileges of employment as are available to similarly-situated employees without a disability.

After obtaining necessary information from the employee and/or the employee's healthcare provider, employers should typically consider reasonable accommodations in the following order:

- (1) Is there any reasonable accommodation which would enable the employee to regularly perform the essential functions of the current position (i.e., elimination of marginal functions, change in schedule, modifications to the manner in which the work is performed, assistance devices, etc.)?
- (2) Can the employee perform the essential functions of any available vacant position for which they are qualified, with or without a reasonable accommodation?
- (3) Would a leave of absence of a reasonable duration allow the employee to perform the essential functions of the job or any vacant position for which they are qualified?

The obligation to provide a reasonable accommodation does have limits, and employers need not provide an accommodation that would impose an undue hardship. "Generalized conclusions will not suffice to support a claim of undue hardship. Instead undue hardship must be based upon an individualized assessment of current circumstances that show that a specific reasonable accommodation would cause significant difficulty or expense." EEOC Guidance on Reasonable Accommodation and Undue Hardship, Questions 42-46.

If there is no reasonable accommodation which would enable the employee to perform the essential functions of the job, then the employee is not a "qualified individual" and is not entitled to protection under the ADA/PHRA. Thus, in order to prove a claim under the ADA/PHRA, a plaintiff must demonstrate that he can perform the essential functions of the position held with or without a reasonable accommodation. In this respect, the employer's

reasonable accommodation obligation is incorporated into the analysis of whether the employee is otherwise qualified.

5. Discipline Issues

Disciplining employees can be the most difficult aspect of any supervisor or manager's job. Not surprising, employee discipline often leads to disputes, which occasionally end up in court. This section will offer guidance for the employee discipline process.

a. Managing Employees

For many supervisors, discipline is synonymous with punishment — a method of exerting control and power over employees. In a more productive sense, however, discipline refers to those actions you can take to help employees correct and improve their performance. Beneficial as proper discipline is, however, it extends certain risks to the supervisor, most notably, the risk of liability. Many supervisors, wary of the legal implications of disciplinary action, feel immobile when confronted by performance problems and enact disciplinary measures only reluctantly. This unwillingness can be damaging to team effectiveness as it leads to the erosion of supervisory authority and ultimately to the deterioration of team performance.

b. Consistency

Defense of a wrongful discharge or discrimination claim is greatly compromised when a plaintiff identifies other employees who were not terminated for the same or similar misconduct. When employees are perceived as having been disciplined more severely than others similarly situated, the inference is that impermissible criteria went into the discipline or discharge equation. Consistency in performance management, discipline, and discharge leads to these benefits for the employer:

- Decreases the likelihood of the charge of disparate treatment (i.e., discrimination);

- Strengthens management's will to act;
- When internal consistency is absent, management sometimes becomes wary in disciplinary dealings with an individual in a protected class;
- A past record of internal consistency enables the employer to act, even though timing may not be perfect;
- Helps avoid retaliation charges; and
- Supports the employer's defense against future charges (failure to achieve internal consistency in personnel decisions is tantamount to building a case against yourself).

c. Documentation

Regardless of the issue or area of the law, "document!" is typically the best "legal" advice we can give to supervisors and managers with respect to employment issues. Supervisors face complicated legal issues associated with almost every decision they make, particularly when those decisions involve disciplinary action. Contemporaneous documentation is essential to avoid and defend claims under the employment laws. Accordingly, documentation of disciplinary problems, harassment or discrimination investigations, and other employee matters should be created and maintained for an appropriate period of time.

Documentation refers to a written record, usually in memo form, of important facts in a person's employment history. It becomes part of the employee's personnel file. Memories fade over time, and employees wait to file claims against their employers for years after the incident at issue. Thus, documenting an event when it happens may become the key to the employer's defense. The supervisor and former employee may remember different versions of a meeting or confrontation from years in the past. If the supervisor has a memo to the file regarding the incident, written the same day, supporting his/her account, the employee's claim becomes far less credible.

Whenever you deal with a performance problem, make sure you get the facts down in writing. A log or file can help you keep your facts straight, as they happen, so that you can create more lasting documentation later. When you write warning letters or memos, suspension notices, or goal-setting agreements, you will have the facts which led up to the documentation that matter.

d. Progressive Discipline

The best way to avoid claims of wrongful termination is to follow a system of progressive discipline and to document each step in the process carefully. By doing so, you will show that the employee actually fired himself and you will create the proof needed to show:

- The employee's performance was indeed unsatisfactory with respect to established job standards;
- You took reasonable steps to inform the employee of the situation and to give him/her the opportunity to improve performance;
- That other employees are able to meet the same standards that the employee fails to meet, or if they do not, are receiving the same kind of treatment as the employee; and
- That the reasons for the performance problem lie not with the employer but with the employee, and that the employee has not corrected these factors, despite being given the opportunity to do so.

Progressive discipline is a series of employee counseling sessions and/or warnings designed to remedy employee problems. If the problem is not remedied, the employee moves to the next step of progressive discipline and continues in this process until either the problem is remedied or termination results. Progressive discipline should be applied to problems or policy violations which can be corrected through counseling. Major problems which would warrant immediate termination, such as theft, gross insubordination, or fighting, are not meant to proceed through the progressive discipline process. Discipline is most effective when it gives employees

the opportunity to choose their own course of action with a clear understanding of the consequences involved.

While a sense of fair play should always govern your actions, you should not let fear of discrimination handcuff you in dealing with troublesome employees. Keep this in mind: although the law protects various classes and categories of employees, poor performers are not a protected class. You can and must document declining performance, and take the necessary measures to correct performance problems, including progressive discipline, all the way to the end — termination.

While the standard of performance and the steps of progressive discipline should remain consistent for all employees, the manner in which you apply those standards is subject to your discretion. To ensure that you can exercise this discretion safely (in the absence of explicit instructions from your employee handbook) be sure to remember the four criteria that should govern your use of disciplinary procedures:

- Severity of the offense
- The employee's past record
- The employee's length of service
- Past practice or past actions in similar incidents

Importantly, when disciplining members of a protected class, your actions must go through the following tests:

- Does your disciplinary action have a potentially adverse impact on a member of a protected class or category? In other words, could it be claimed that your action may seem to impact some employees more than others, or that you have treated some employees unfairly simply because of their race, color, national origin, etc.? For example, disciplining employees for "slowing down" or for "not being dynamic enough" may unfairly impact those employees who are older.

- Are you holding the employee who is being disciplined to a neutral standard, based on legitimate business necessity? This can be roughly interpreted as: are your decisions based on job-related factors only, and those which can be linked to the efficient and safe operation of your unit?

e. Written Warnings

Written warnings are an accepted means of serving notice of employee shortcomings.

Several key points should be considered when preparing a written warning to an employee, while taking care to avoid a "mechanical" look to the documentation prepared.

- Statement about the purpose of the warning;
- Statement of the problem or violation. (Consider "who, when, where, how and why," as appropriate);
- Statement explaining how the employee's action or performance had a negative impact on the employer's business operations;
- Statement of employer policy or customary practice regarding the situation;
- Reference to any previous verbal or written warnings about the same or related problems;
- Summary of the agreement reached with the employee on corrective action which will be taken, or, if no such agreement was reached;
- Statement of what action management will take (This may not be necessary if the disciplinary warning notice itself is the "action" taken); and
- Warning of the consequences of failure to improve.

D. Ending the Employment Relationship

1. General Issues

a. Retrieving the Employer's Property

When an employee leaves an employer, either voluntarily or involuntarily, the employer typically is concerned about retrieving its property from the employee. A common approach taken by employers to retrieve its property is to withhold the employee's final paycheck until all

proper is returned. Unfortunately, withholding the final paycheck is prohibited by state law. The employer's best weapons to ensure the return of its property are (1) to not give property to employees unless necessary; (2) use persistence when requesting the return of the property; and (3) when all else fails, file a civil complaint with a district justice demanding the return of the property.

b. The Final Paycheck

As noted above, in the event an employee is separated from employment for any reason prior to the regular payday, an employer must pay any outstanding wages to the employee no later than the next regular payday. Moreover, the employer must make the final payment by certified mail if so requested by the employee.

2. Proper Termination Practices and Procedures

Proper termination procedures go hand in hand with good intake procedures and "close the loop" on a program to minimize risk in employment matters. It is important that an employer does not "rush to judgment" in a termination decision. We recommend considering the following issues prior to reaching a decision to terminate:

- Do I have ALL the facts recorded accurately?
- Have I documented all facts and actions?
- Have I assembled the records?
 - performance and production records;
 - attendance records;
 - performance review records and appraisals;
 - discipline and warning records; and
 - special action records.

- Is my decision based on facts rather than inference, suspicion, and emotion?
- Has the employee fully understood the job requirements and behavioral statements to which he/she is held?
- Does the employee know exactly where he/she has fallen short in job performance or behavioral standards?
- Has the employee received at least one warning of a possible dismissal and did the employee understand the warning?

NOTE: Where serious misconduct is involved, immediate suspension pending investigation may be justified (e.g., drinking and drunkenness on duty, dishonesty, theft, immoral or indecent conduct, fighting, insubordination, violation of secrecy rules, sabotage).

- Has the employee had sufficient time and opportunity to correct the behavior that led to the consideration of discharge?
- Has the employee had a full opportunity to present his/her point of view?
- Have personal difficulties or special mitigating circumstances been taken into account?
- Where the situation warrants, has consideration been given to transferring the employee in lieu of discharge?
- Is dismissal consistent with past practices?
- Would the employer be able to justify treatment of the employee if he/she claims discrimination or unjust dismissal?
- How would a jury consider our treatment of the employee?
- Has this decision been discussed with appropriate higher levels of management?
- Am I prepared to handle this dismissal tactfully and objectively?
- Have I scheduled the dismissal meeting for a time that will eliminate or minimize the employee's personal contact with other employees before he/she leaves the premises?
- Have I made arrangements to notify the employee in private?
- Have I arranged for the final paycheck and am I prepared to explain the amount?

- Do I know what group insurance the employee has and am I able to explain what will happen to it after dismissal?
- Have I decided what restricted statements will be made to other employees concerning this person's discharge?
- Are there any concerns that the employee will act violently when advised of the termination? Should I consider taking appropriate measures to eliminate this risk?

III. Employee Privacy

A. HIPAA for Employers

The Health Insurance Portability and Accountability Act ("HIPAA") imposes certain obligations on "covered entities" as defined by the Act with regard to protecting the privacy of health information. Included within the definition of covered entities are health plans. Therefore, if an employer sponsors a health plan for its employees, it may be subject to HIPAA's privacy regulations.

HIPAA only applies to employer administered or "self insured" health plans with fifty or more participants, or any health plan administered by a third-party-administrator ("TPA"). Health plans administered by a TPA are traditionally referred to as "fully insured plans" that are administered by an outside insurer, not the employer. Under fully insured plans, the TPA generally assumes the HIPAA privacy responsibilities for the employer because the employer has no involvement with administration of the plan that would place protected health information in the employer's possession. An employer offering a fully insured plan to its employees generally would receive summary health information only from the insurer and would not implicate HIPAA.

B. Background Checks and the Fair Credit Reporting Act

The Fair Credit Reporting Act ("FCRA") establishes strict procedures that employers must follow prior to obtaining a "consumer report" for hiring or other employment purposes. A "consumer report" is defined, in pertinent part, as

any written, oral or other communication of any information by a consumer reporting agency bearing on a consumer's creditworthiness, ... character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected ... for the purpose of serving as a factor in establishing the consumer's eligibility for ... employment

15 U.S.C. § 1681a(d)(1).

The definition of consumer report is quite broad and would include credit reports and criminal background information, so long as the reports are obtained from a "consumer reporting agency." The FCRA defines "consumer reporting agency" as

Any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

15 U.S.C. § 1681a(f).

The definition of consumer reporting agency is also broad, and many companies that supply employers with employee background information fall within the definition. Thus, employers must follow the procedures established by the FCRA before it obtains any information through a consumer reporting agency that constitutes a "consumer report," such as criminal history and credit information. Specifically, the following requirements must be met:

1. The employer must provide a written disclosure to the applicant/employee and receive written authorization before obtaining the report. The

employer may make a one-time disclosure and receive authorization to obtain the report at any time during employment.

2. Before it provides the employer with any consumer report, the consumer reporting agency should require the employer to certify that it is in compliance with the FCRA, that necessary disclosures have been made, that any necessary adverse action notices will be issued, and that the consumer report information will not be used in violation of any applicable federal or state equal employment opportunity law or regulation.
3. If the employer intends to take any adverse action based, in whole or in part, upon information in a consumer report, it must give the individual a pre-adverse action disclosure that includes a copy of the consumer report and a copy of "a summary of your rights under the Fair Credit Reporting Act." Pre-adverse action disclosures must be provided whenever consumer report information is a factor in any adverse action decision.
4. After any adverse action is taken, the employer must also provide the individual with an adverse action notice.

These requirements summarize the FCRA obligations when obtaining and using a consumer report. In the event that the employer obtains an "investigative consumer report," certain additional obligations will apply. An "investigate consumer report" is

a consumer report or portion thereof in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends, or associates of the consumer reported on or with others with whom he is acquainted or who may have knowledge concerning any such items of information.

15 U.S.C. § 1681a(e) (emphasis added). Specific factual information on a consumer report obtained directly from the consumer, a creditor, or a consumer reporting agency (i.e., not through personal interviews) does not convert a consumer report into an investigative consumer report.

Id. To qualify as an investigative consumer report, the report must be based in part on personal interviews with the individual's neighbors, friends, or associates.

In December of 2003, FCRA was amended by the Fair and Accurate Credit Transactions Act ("FACT"). One of the more important amendments for employers concerns the use of communications from third parties in the context of investigations of employee misconduct. Under the FACT amendments, communications made to an employer in connection with an investigation of misconduct relating to employment or an investigation of compliance with state and federal law or a pre-existing written policy of the employer are excluded from the definition of a consumer report. The exclusion is conditioned on the communication not being made for purposes of investigating an employee's credit standing. The communication also may not be provided to anyone except the employer or his agent or to government officials as may be required by law. This last requirement imposes important restrictions on dissemination of such information.

Prior to the amendment, an investigation by a third party on behalf of an employer could fall within the broad definition of an "investigative" consumer report, even if the purpose of the investigation was to investigate employee misconduct. One can see how the notice requirements of FCRA made it difficult for an employer to conduct a discrete investigation into employee misconduct. Under the misconduct exception, an employer does not have to provide notice to an employee prior to adverse action taking place as a result of what would otherwise be deemed to be an investigative report. An employer only needs to disclose the substance and nature of a communication underlying the adverse action after the action has taken place. The employer does not have to disclose the sources of the information to the employee.

FACT also amended FCRA to include heightened privacy for medical information contained in consumer reports. The law states that a consumer credit reporting agency shall not furnish a consumer report for employment purposes that contains medical information unless the

information is relevant to the employment transaction and the employee provides specific written consent for furnishing the report that is clear and conspicuous as to the use for which the information is to be furnished. If medical information about an employee is obtained via consumer report, FACT prohibits the employer from sharing that medical information with other entities related by common ownership or affiliated by corporate control. FACT defines medical information as "information or data, whether oral or recorded, in any form or medium, created by or derived from a health care provider or the consumer, that relates to: past, present, or future physical, mental, or behavioral health or condition of the individual; the provision of health care to the individual; or the payment for the provision of health care to an individual." Although not explicitly stated, FACT's treatment of medical information in consumer reports mirrors the aims of HIPAA. Both statutes aim to keep medical information from being disseminated for purposes inconsistent with medical treatment, unless specifically authorized by the patient.

C. E-mail/Internet Use

Employee use of the employer's e-mail, Internet, and phones present different privacy expectations. When an employee uses these resources for personal use or for endeavors contrary to the employer's interests, the expectation of privacy is much different than if the employee was sending e-mails to friends on a home computer. An employer has a legitimate business interest in monitoring employee use of its computer systems and electronic communications. The question then becomes how an employer may perform such monitoring activities without violating the law.

An employer's ability to legally monitor/intercept Internet, e-mail, and other electronic communications is primarily dependent upon the employer's electronic resources policy and the nature of the communication. Electronic monitoring can potentially violate the Electronic

Communications Protection Act of 1986 ("ECPA"), 18 U.S.C. § 2510 et seq., the state wiretapping and electronic surveillance statutes (Pennsylvania Wiretapping and Electronic Surveillance Act, 18 Pa. C.S.A. § 5702 et seq.), and the state common law of invasion of privacy.

The ECPA and its state law counterparts generally prohibit any person from intercepting the contents of any wire, oral, or electronic communication, or disclosing or using any intercepted communication. The laws also prohibit the use of a "pen register," which documents the numbers called from a telephone line, or a "trap trace device," which identifies the source from which a wire or electronic communication originated.

The electronic surveillance statutes do not, however, prohibit all interception of electronic communications. Significantly, the laws do not explicitly prohibit logging of the destination of outgoing electronic communications without obtaining the contents of the communication. Although "pen registers" are prohibited, there is no similar prohibition for devices that trace the destination of outgoing electronic communications.

There are also three primary exceptions that permit an employer to lawfully monitor and intercept its employees electronic communications under certain circumstances:

The Provider Exception. This exception allows a "system provider" and/or its employees to intercept and use electronic communications in the normal course of employment while engaged in an activity that is necessary to rendition of the electronic communication service. This exception, as interpreted by the courts, essentially permits an employer to access any employee e-mail that is logged on its server.

The Ordinary Course of Business Exception. This exception is found in a definition of "electronic device" under the ECPA and most state law statutes, including the Pennsylvania Act.

In order to prove a violation of the statutes, a plaintiff must establish that the alleged violator used an electronic device to intercept the communications. The definition of electronic device does not include:

any ... equipment or facility, or component thereof furnished to the subscriber or user by a provider of wire or electronic communication service in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business or furnished by such subscriber or user for connection to the facilities of such service and used in the ordinary course of its business.

The ordinary course of business exception does not provide an employer with an unlimited right to monitor all employees' electronic communications in the workplace. The interception must be within the scope of the employer's legitimate business interests. For example, quality assurance monitoring may be within the ordinary course of business.

There are, however, some important requirements which must be met in order to use this exception. First, with respect to the telephone system, the business may use a device only if it is furnished by the phone company to monitor employee calls. Under the business phone provision, the basic rule of thumb is that an employer may only monitor with a device that is part of the overall telephone communication system of the business.

The other hurdle is that monitoring must occur in the "ordinary course of business." Essentially, this means that employers may not monitor the personal communications of employees, because such monitoring would not further any business purpose. While it can be argued that listening to personal telephone calls or reading personal e-mails is necessary for an employer to identify misuse of the systems, that objective is equally served when monitoring stops as soon as a communication is identified to be personal.

An employer can strengthen an argument that monitoring is within the ordinary course of business by having an Electronic Resources policy that either (1) limits use of communication systems to business purposes only and informs employees that the systems will be monitored for legitimate business purposes, or (2) allows some personal use, but explicitly states that personal use is subject to interception and monitoring by the employer for legitimate business purposes.

The Consent Exception. The ECPA provides that it is not a violation of the Act for any person to intercept an electronic communication where one of the parties to the communication has given prior consent to the interception. The Pennsylvania Act requires the prior consent of all parties to the communication. The courts have been somewhat conservative in finding that an employee has given prior consent for the employer to intercept a communication. An employer that provides only a general notice that some communications may be monitored may not have employee consent to monitoring or interception, especially where those communications are of a personal nature.

Employers are well advised to obtain an acknowledgment that all electronic communications may be monitored, including random monitoring, and indicating the employee's consent to the interception of those communications. Even if such written employee consent is obtained, the consent may be insufficient under the Pennsylvania statute where the electronic communication is between an employee (who has consented) and a non-employee (who has not). In such situations, the employer would have to rely upon one of the other exceptions discussed above.