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HOW TO HIRE, MANAGE, AND TERMINATE EMPLOYEES

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APPENDICES

STEP 1: USE PROPER EMPLOYMENT APPLICATION FORM AND APPLICATION PROCEDURES

The following discussion is a clause-by-clause, section-by-section analysis of a standard employment application form that contains most of the basic information that an employer can legally obtain about a job applicant. Obviously, the form must be tailored to include the job-related information that the employer needs to select the best applicant for the job in question. The application form language is printed in **bold,** and the explanatory comments are printed in *italics.* The complete employment application form also is reproduced in Appendix A at the end of this QuickGuide.

PRACTICE POINTERS

- ✓ Only information directly relevant to the job and the applicant's suitability for it may be included in the application form. If it is not relevant, do not include it.

- ✓ The Personal Information Protection Act, 815 ILCS 530/1, *et seq.,* provides that any entity that maintains personal information concerning an Illinois resident, such as that obtained on an application for employment, shall notify the resident that there has been a breach of the security of the system data following discovery or notification of the breach.

APPLICATION FORM — ANNOTATED

APPLICATION FOR EMPLOYMENT

[Employer's Name**]**
AN EQUAL OPPORTUNITY EMPLOYER

1. You must fully and accurately complete this Application for Employment. Incomplete applications will not be considered.

Comment: *The first instruction should require the job applicant to complete the entire application form. Since the employer has determined that all of the information contained on the application form is relevant, the failure to follow this basic instruction may be a first indication of the applicant's lack of suitability for employment.*

2. This Application for Employment will be inactive after 90 days. If you want to be considered after that time, you must complete a new Application for Employment.

Comment: *Limiting the length of time for which an application form is valid or "alive," whether to more or less than 90 days, may help to avoid future discrimination claims. For example, a position may be filled by a nonminority applicant who has the same qualifications as a minority applicant who completed an application form*

several months earlier. In that example, without the above clause, the minority applicant may claim that the employer should have considered his or her application form even though it was completed several months earlier. However, if the application form were to become invalid automatically after a stated period, such a discrimination claim might be avoided. At a minimum, this provision provides an employer with a nondiscriminatory explanation for its hiring decision.

NAME: _____ SOCIAL SECURITY NUMBER: _____
Last First Middle

PRESENT ADDRESS: _____
Street City State Zip

PRIOR ADDRESS: _____
Street City State Zip

PHONE NO.: _____ REFERRED BY: _____

____ YES ____ NO If you are hired, can you supply proof of your age?

Comment: *Because of the possibility of an age discrimination claim, the application form should not request the applicant's age or date of birth. However, after the applicant is hired, such information may be necessary for various employee benefits including life and health insurance coverage. Therefore, it is appropriate for an employer to request that the applicant be able to prove his or her age after the applicant is hired.*

____ YES ____ NO If you are hired, can you supply the required documentation to verify your lawful right to work in the United States?

Comment: *An employer should not ask questions regarding an applicant's citizenship or immigration status because such a question could lead to a national origin discrimination claim. However, since all employers are required to verify that all employees hired after November 6, 1986, have a lawful right to work in the United States, it is legal and advisable to ask the foregoing question of all applicants to verify that such documentation can be provided should the applicant be employed. Immigration Reform and Control Act of 1986, Pub.L. No. 99-603, 100 Stat. 3359. See discussion in Step 4 and the form in Appendix B.*

____ YES ____ NO Have you ever been convicted of a felony? *(Applicant need not disclose sealed or expunged records of convictions or arrests.)* If yes, please explain:

_____

_____

_____

Comment: *An employer should not ask questions about an applicant's arrest record (which is specifically prohibited by §2-103 of the Illinois Human Rights Act (IHRA), 775 ILCS 5/1-101, et seq., or misdemeanor convictions. Section 12(a) of the Criminal Identification Act, 20 ILCS 2630/0.01, et seq., prohibits employers from inquiring about sealed or expunged criminal records of applicants. Specific language must be included in applications for employment stating that an applicant is not required to disclose sealed or expunged records of convictions or arrests. Many courts have determined that such questions may form the basis for a discrimination claim because minorities have been proven statistically to stand a greater chance of being arrested and/or convicted of misdemeanors. However, for jobs such as those that involve the handling of money, it would be permissible to ask about misdemeanor theft and/or similar convictions.*

In previous years, application forms frequently contained questions regarding an applicant's mental or physical handicap or disability that might prevent him or her from performing the job in question. However, it is now illegal for employers with 15 or more employees to ask any questions regarding mental or physical disability. Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §12101, et seq. Employers may discuss an applicant's physical and mental capabilities by discussing the specific job requirements or job description and asking whether the applicant can perform them (e.g., "Can you stand and operate a machine requiring the use of both hands for an 8-hour shift?" "Can you climb a 10-foot ladder carrying a 50-pound bag?" "Can you carry a 9-cubic-foot box weighing 75 pounds across the factory 20 times per shift and then put it on the top of a 6-foot tall shelf?" "Can you lie on your back while repairing equipment?"). Alternatively, physical testing, as long as it is directly relevant to the job in question, can be required so that an applicant can demonstrate his or her physical and mental capacity to perform the specific job in question. For additional information on this subject, see DISABILITY LAW TODAY: AN ACCESSIBLE GUIDE FOR ILLINOIS PRACTITIONERS (IICLE, 2006).

PRACTICE POINTER

✓ Complete job descriptions and an analysis of each job's essential functions and responsibilities are extremely valuable in selecting appropriate applicants for specific jobs and in helping to avoid discrimination claims. Every job should have a detailed written job description that sets forth each of the physical and mental attributes and skills necessary to perform the essential functions of the job. A written job description helps

applicants themselves decide whether they are qualified for a specific job, and it should also help to avoid misunderstandings at the time of application or later. In addition, the exercise of putting together such job descriptions is valuable for the employer in deciding which applicants are most likely to perform jobs effectively.

Comment: *The ADA and EEOC regulations interpreting it require that employers make reasonable accommodations for qualified disabled individuals. For example, an employer could be required to assign all ladder climbing to one maintenance employee and none to another maintenance employee. The use of preemployment physical examinations is limited under the ADA; however, preemployment drug tests are allowed. In the event of a job change or modification, if an employee is unable to perform the entire job, the employer could offer him or her a different job at a lesser rate of pay.*

The IHRA is almost identical to the ADA in prohibiting discrimination against handicapped individuals.

POSITION DESIRED: _____ **DATE YOU CAN START: _____** **SALARY DESIRED: _____**

ARE YOU EMPLOYED NOW? _____ **IF SO, MAY WE INQUIRE OF YOUR PRESENT EMPLOYER? _____**

HAVE YOU EVER BEEN EMPLOYED BY THIS COMPANY BEFORE? _____ **WHEN? _____**

EDUCATION:	**NAME OF SCHOOL**	**YEARS ATTENDED**	**GRADUATED?**	**SUBJECTS STUDIED**
HIGH SCHOOL				
COLLEGE				
TRADE SCHOOL				

Comment: *"Years attended" is helpful in determining how long it took the person to complete his or her course of study. However, that information must be used carefully to prevent it from leading to an age discrimination claim under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §621, et seq., or a related statute.*

FORMER EMPLOYERS: (MOST RECENT EMPLOYER FIRST)

DATE: MONTH/YEAR	NAME AND ADDRESS OF EMPLOYER	SALARY	POSITION	REASON FOR LEAVING
From: **To:**				
From: **To:**				
From: **To:**				
From: **To:**				
From: **To:**				
From: **To:**				

WHICH OF THESE EMPLOYERS CAN WE CONTACT FOR A REFERENCE REGARDING YOUR JOB PERFORMANCE? _____

I CERTIFY THAT ALL FACTS CONTAINED IN THIS APPLICATION ARE TRUE AND COMPLETE TO THE BEST OF MY KNOWLEDGE. I UNDERSTAND THAT OMISSION OR MISREPRESENTATION OF FACTS MAY BE GROUNDS FOR REJECTION OF THIS APPLICATION OR FOR DISMISSAL FROM EMPLOYMENT IF SUBSEQUENTLY DISCOVERED.

Comment: *If a small mistake on an application form were discovered one or two years after hiring, then termination probably would not be an appropriate remedy. However, if it were discovered that a job applicant attempted to cover up a negative employment experience by adding a period of time to the term with a prior employer, that indication of a lack of truthfulness probably would be sufficient for the employer to discharge that person after he or she was hired.*

I AUTHORIZE INVESTIGATION OF ALL STATEMENTS CONTAINED HEREIN AND OF THE REFERENCES LISTED ABOVE TO GIVE YOU ANY AND ALL INFORMATION CONCERNING MY PREVIOUS EMPLOYMENT AND ANY PERTINENT INFORMATION, PERSONAL OR OTHERWISE. I RELEASE ALL PARTIES FROM ALL LIABILITY FOR ANY DAMAGE THAT MAY RESULT FROM FURNISHING SAME TO YOU.

Comment: *This paragraph is important because it grants the employer permission to investigate all facts contained on the application form, including educational experience and prior employment. Whether the release language is enforceable in court is not clear. However, it is recommended that it be included in all application forms. If the employer is interested in conducting background checks on applicants, it should consider specifying the information that will be sought, the sources that will be contacted, and whether compliance is required with the federal Fair Credit Reporting Act (FCRA), 15 U.S.C. §1681, et seq. If an employer is using a third-party vendor to perform background checks, the vendor should have the materials necessary to comply with the FCRA. The FCRA has specific guidelines that employers must comply with prior to having a background check performed or taking adverse action based on the results of a background check.*

I UNDERSTAND AND AGREE THAT, IF HIRED, MY EMPLOYMENT IS FOR NO DEFINITE PERIOD, AND REGARDLESS OF THE DATE OF PAYMENT OF MY WAGES OR SALARY, I MAY BE TERMINATED AT ANY TIME WITH OR WITHOUT CAUSE OR PRIOR NOTICE. I FURTHER UNDERSTAND THAT ONLY THE EMPLOYER'S PRESIDENT OR ANOTHER PERSON SPECIFICALLY DESIGNATED BY THE EMPLOYER'S PRESIDENT HAS THE AUTHORITY TO CREATE OR ENTER INTO ANY EMPLOYMENT AGREEMENT ON BEHALF OF THE EMPLOYER.

Comment: *This paragraph is a written acknowledgment of the "at-will" employment status of all employees who are not covered by an individual employment agreement or a collective bargaining agreement. At-will status is created irrespective of the employee's pay, e.g., timing or amount of payments, etc. By specifying that only the employer's president has the authority to create or enter into an employment agreement on behalf of the employer, the paragraph should avoid any claim that an interviewer or any personnel department employee may have created an employment agreement. Since the validity of similar clauses has been upheld by various courts, it is highly recommended.*

IN CONSIDERATION OF MY EMPLOYMENT, I AGREE TO COMPLY WITH ALL CURRENT AND FUTURE RULES, REGULATIONS, AND EMPLOYMENT POLICIES OF THE EMPLOYER.

DATE: _____ SIGNATURE: _____

Comment: *As a final note regarding application forms, the job interviewer should not make any written notes or comments on the form itself. Such comments can be very damaging to the employer if subsequent events require the application form to be used as evidence in a lawsuit or a discrimination claim.*

ADDITIONAL ACKNOWLEDGMENT FOR AT-WILL STATUS

[to be placed on a separate page at the end of the employment handbook**]**

EMPLOYEE ACKNOWLEDGMENT

I have received and read a copy of the Employer's Employment Handbook. I have had an opportunity to ask questions regarding it, and all of my questions have been answered. I agree to abide by this and any subsequent Handbook. I understand that I am an "at-will" employee and that the statements contained in the Handbook, as well as those in other personnel materials that may be issued from time to time, do not create a binding contract and may be revised at any time as deemed appropriate by the Employer. Also, I understand that my employment and compensation are for no definite period of time and may be terminated with or without cause, and with or without notice, at any time by the Employer or me.

_____

Employee's Signature

Dated: _____

Comment: *This clause should be placed at the end of the employment handbook for additional evidence of the at-will employment status. After the employee signs this page, it should be removed from the employment handbook and placed in the employee's personnel file. The language disclaiming the creation of a binding contract and reserving the employer's right to revise the policies at any time is designed to maintain the at-will status of employment. This status is further verified by the last sentence, which states that the employment and compensation are for no definite period of time and may be terminated by either party with or without notice at any time.*

STEP 2: ASK THE PROPER QUESTIONS IN AN EMPLOYMENT INTERVIEW

While the interview process can and should be utilized to develop much additional valuable information about a job applicant, it is fraught with dangerous areas of inquiry that employers must avoid.

QUESTIONS TO ASK

The following questions may be asked by the job interviewer to determine issues of dependability, location, travel, entertainment availability, and career commitment.

Dependability:

a. What was your absenteeism and tardiness record at your prior employer?

b. Do you foresee any reason(s) why you would not be able to be at work on time and on a regular basis?

Comment: *These questions are intended to replace dangerous and possibly discriminatory inquiries regarding child care, handicap, disability, etc. During the course of answering these questions, the job applicant may volunteer information about a health problem or difficulty with child care, etc. The employer must be very careful in determining whether to use such information in evaluating the job applicant and would be well advised to ignore it.*

Location:

a. Do you intend to stay in this area?

b. Are you willing to relocate?

Time and Entertainment:

a. Do you foresee any reason(s) that you would not be able to travel as required?

b. Are you willing to entertain clients on weekends or in the evening?

Career Commitment:

a. What are your career objectives?

b. Where do you see yourself in [two] [five] [ten] years?

QUESTIONS TO AVOID

The job interviewer should avoid asking questions in employment interviews that contain any content noted below because they can lead to evidence of employment discrimination.

Sex and Marital Status:

a. Do not ask any questions related to gender or marital status (usually, but not necessarily, directed toward female applicants). Asking married women for their maiden name may lead to issues of sex or national origin discrimination.

b. Do not ask any questions regarding the spouse's name, occupation, income, or possibility of a job transfer.

c. Do not ask any questions regarding a spouse's expectations about the applicant's hours of work, required travel, business entertainment, or possible job relocation.

d. Do not ask any questions regarding family plans, the number and ages of children, day care arrangements, or sick child arrangements.

Comment: *Such questions may lead to evidence of sex discrimination.*

e. Do not ask any questions regarding sexual orientation.

Comment: *The Illinois Human Rights Act, 775 ILCS 5/5-101, et seq., prohibits discrimination on the basis of sexual orientation in employment. "Sexual orientation" is defined broadly to include actual or perceived heterosexuality, homosexuality, bisexuality, or gender-related identity, whether or not traditionally associated with the person's sex at birth. Covered employers include those with 15 or more Illinois employees and those that contract with the state regardless of the number of their employees.*

Arrest, Conviction, and Litigation:

a. Do not ask any questions regarding arrest, indictment, or misdemeanor conviction records.

Comment: *Numerous courts have stated that inquiries about anything other than felony conviction records may lead to discrimination against minorities because they are arrested more frequently and convicted of misdemeanors more frequently than nonminorities. In addition, §2-103 of the IHRA prohibits employment actions based on an arrest record.*

b. Do not ask any questions regarding expunged or sealed criminal records.

Comment: *The Criminal Identification Act, 20 ILCS 2630/0.01, et seq., prohibits employers from inquiring about sealed or expunged criminal records. Employers may not consider an expunged or sealed record in making any employment decisions. Employers also are prohibited from asking an applicant if he or she has had any records sealed or expunged.*

c. Do not ask any questions regarding dishonorable military discharge.

d. Do not ask any questions regarding automobile accidents, insurance claims, lawsuits, or complaints.

e. Do not ask any questions regarding workers' compensation claims.

Comment: *Any questions that may lead to information regarding any disability (handicap) are specifically prohibited by the Americans with Disabilities Act of 1990, 42 U.S.C. §12101, et seq., and the IHRA. Additionally, §4(h) of the Workers' Compensation Act, 820 ILCS 305/1, et seq., prohibits retaliation against individuals who file workers' compensation claims.*

Financial Status or Reliability:

a. Do not ask any questions regarding ownership of a home or length of time at former residence(s).

b. Do not ask any questions regarding ownership of an automobile or form of transportation to work.

c. Do not ask any questions regarding loans and credit cards.

d. Do not ask any questions regarding wage assignments, garnishments, or wage deduction orders.

e. Do not ask any questions regarding judgments or bankruptcy.

Comment: *Unless these matters are directly related to the job in question (e.g., credit analyst), do not ask about them.*

Age:

a. Do not ask any questions regarding birthday.

b. Do not ask any questions regarding date of high school or other graduation information that could be used to calculate the applicant's age.

Comment: *Questions regarding age or from which age can be calculated can lead to age discrimination claims against individuals over the age of 40.*

Citizenship or National Origin:

a. Do not ask any questions regarding place of birth or ancestry.

b. Do not ask any questions regarding proficiency in speaking, reading, or writing English unless this is a specific requirement of the job.

c. Do not ask any questions regarding proficiency in other language(s) unless this is a specific requirement of the job.

d. Do not ask any questions regarding the derivation of an applicant's surname or the nature of an accent.

Comment: *It is illegal for an employer to have an "English only" rule that prohibits any language other than English from being spoken at the workplace. 775 ILCS 5/2-102(A-5). Proficiency in other languages may or may not be relevant.*

Disability or Handicap (Physical or Mental):

a. Do not ask any questions regarding prior accidents, illnesses, or injuries.

b. Do not ask any questions regarding hospitalization record.

c. Do not ask any questions regarding current or prior medication or treatment.

Comment: *Such questions can lead to a handicap discrimination charge under the IHRA or a disability discrimination claim under the ADA.*

Physical Appearance and Mannerisms:

a. Do not ask any questions regarding length and style of hair and facial hair.

b. Do not ask any questions regarding attractive and clean clothing.

c. Do not ask any questions regarding skin color.

d. Do not ask any questions regarding youthful appearance.

e. Do not ask any questions regarding foreign accent.

f. Do not ask any questions regarding height and weight.

Comment: *An employer may not allow personal preferences or real or imagined preferences of customers, clients, suppliers, or employees to dictate employment decisions. E.g., an employer could not refuse to hire a minority female job applicant because the employer believed that customers would not want to deal with such a person or would feel more comfortable dealing with a nonminority male.*

Religion:

a. Do not ask any questions regarding church affiliation.

b. Do not ask any questions regarding social or benevolent organization membership.

Additional Problem Areas:

a. Do not ask any questions regarding political party or labor union membership.

b. Beware of phrases that may be interpreted as creating an employment "agreement." For example, avoid phrases like "permanent employment," "you can have the job as long as you perform well or as long as you want it," or "employees are discharged only for cause." Don't "oversell" the job.

c. Do not write on the employment application form.

d. Be aware of the Service Member's Employment Tenure Act, 330 ILCS 60/1, *et seq.*

Comment: *Under the Service Member's Employment Tenure Act, if an employer has given a job applicant a date on which he or she is to begin working but that individual is called into active military service before the start of employment, the individual may request a written copy of the employment offer. In that event, the employer is obligated to furnish the individual with the offer, including the following: (1) a statement repeating the offer of work and the date on which the services were to be preformed; (2) a statement describing the job title or duties to be preformed; (3) a statement showing the remuneration offered; (4) the signature of the employer. Upon satisfactory completion of military service, if the individual is still qualified for the position and applies within 90 days of discharge, the individual shall be given preference with the employer for up to one year. This does not apply if the original offer was for part-time or temporary employment or casual labor.*

e. Be aware of special considerations for healthcare employers.

Comment: *Section 25 of the Health Care Worker Background Check Act, 225 ILCS 46/1, et seq., prohibits the hiring of an individual in a position with duties involving direct care of clients, patients, or residents who has been convicted of committing or attempting to commit specified offenses in the Criminal Code of 1961, 720 ILCS 5/1-1, et seq., the Illinois Credit Card and Debit Card Act, 720 ILCS 250/1, et seq., and the Wrongs to Children Act, 720 ILCS 150/0.01, et seq., or violated §50-50 of the Nurse Practice Act, 225 ILCS 65/50-1, et seq. The Health Care Worker Background Check Act also requires a criminal background check for all employees of licensed and certified long-term care facilities who have or may have contact with residents or access to living quarters or the financial, medical, or personal records of residents.*

STEP 3: USE EFFECTIVE AND PROPER REFERENCE-CHECKING PROCEDURES

It has always been a good idea for a prospective employer to attempt to obtain information regarding a job applicant from that person's prior employer(s). Such a reference check can be utilized to determine whether the job applicant had a good working record, the circumstances of his or her separation from employment, etc. Those practical reasons are now supplemented by the emerging legal doctrine of negligent hiring. Pursuant to that doctrine, an employer can be held liable to other employees and possibly to third parties for hiring an employee whom it would not have hired if it had conducted a thorough reference check.

Unfortunately, confronting prospective employers who may try to conduct such a reference check is the fear of prior employers that they may be subjecting themselves to a defamation lawsuit if they make negative comments about a former employee. To avoid this problem, many prior employers refuse to provide general reference information or provide merely "name, rank, and serial number" information regarding a former employee.

In spite of this dilemma, it is recommended that a prospective employer attempt to obtain reference check information from a prior employer. Initially, the job applicant should complete a form that authorizes the prior employer to provide such information and attempts to release the prior employer from any liability in supplying the information. Here is a sample of such an authorization form:

FORM(S) AVAILABLE BY PURCHASING HANDBOOK OR BY SUBSCRIBING TO SMARTBOOKS® OR SMARTBOOKSPLUS.

After the job applicant has completed this form, it should be forwarded to the prior employer, along with a form requesting relevant employment information. A sample of a form that can be used to obtain such information from the prior employer is included in Appendix H.

STEP 4: USE PROPER EMPLOYMENT DOCUMENTATION PROCEDURES AND FORMS

All employees hired after November 6, 1986, must verify for their employer that they have the lawful right to work in the United States. The Immigration Reform and Control Act of 1986, Pub.L. No. 99-603, 100 Stat. 3359, prohibits all employers from hiring illegal aliens and requires all employers to review documentation supplied by all employees hired after November 6, 1986, that they have the lawful right to work in the United States.

Employers Covered: All employers.

Employers' Duties:

a. Employers may not hire any illegal aliens.

b. Employers must insist that each employee hired after November 6, 1986, complete Department of Homeland Security Form I-9.

Employees Covered: All employees hired after November 6, 1986, must supply documentation to their employers so that Form I-9 can be completed.

Deadline for Completion of Form I-9: Within 3 working days of hiring, unless the employee provides a receipt for a replacement document that was lost, stolen, or destroyed and the employee produces that document within 90 days of the date employment began.

Documentation Required — Alternatives: The employee must supply either

a. one document from List A on Form I-9 that establishes both the employee's identity with a photograph and the employee's lawful right to work in the United States (*e.g.*, a United States passport); or

b. both

1. one document from List B on Form I-9 that establishes the employee's identity (*e.g.*, a driver's license); and

2. one document from List C on Form I-9 that verifies the employee's lawful right to work in the United States (*e.g.*, a social security card).

See Appendix B for a reproduction of Form I-9.

Comment: *The employer must actually review the required documents (originals or certified copies only) provided by the employee. The employer should photocopy the documents reviewed and attach the photocopies to Form I-9.*

Record Retention: Form I-9 should be kept for three years after the date of hire or one year after the employee's last date of employment, whichever is later.

Comment: *All employees' I-9 forms should be kept together in a separate file for ease of retrieval should an audit be conducted by the Department of Homeland Security's United States Immigration and Customs Enforcement Agency or the United States Department of Labor. If the I-9 forms are placed in the employees' personnel files, they will be very difficult to locate for the audit.*

Comment: *Although the employer is neither required nor expected to be an expert in detecting document forgeries, if a document presented by an employee raises any reasonable question that should lead an employer to doubt its validity, then the employer would be held responsible for violating the law if an illegal alien were hired.*

STEP 5: IMPLEMENT AND FOLLOW AN EMPLOYMENT HANDBOOK

A detailed, accurate employment handbook is recommended for several reasons:

a. It outlines all of the benefits that each employee enjoys.

b. It clearly establishes the rights of both the employer and the employees.

c. It informs employees exactly what is expected of them and should prevent any employee from saying that he or she "did not understand."

The at-will disclaimers noted at the end of this Step are recommended for inclusion in all employment handbooks. However, it cannot be guaranteed that a court will not interpret the employment handbook to be an employment agreement, therefore voiding the at-will status. Prudence dictates that although similar disclaimers have been upheld by various courts, the employer should not include any provision(s) in the employment handbook unless it is willing to have those provisions enforced against it. Employers also should take care to use permissive rather than mandatory language throughout the handbook and avoid the use of contract-based provisions, such as a severability provision.

TYPICAL SUBJECTS COVERED IN AN EMPLOYMENT HANDBOOK

About the Company:

- Welcoming letter from the President
- History of the company and facilities
- Product lines and/or services

- Organization chart
- General operating policies
- List of key employees
- Employment philosophy (at-will, unions, open-door policy, cooperation and teamwork, etc.)
- Employer's objectives (growth, profits, business plan)

Comment: *The amount of information contained in these sections depends on the employer's preference as to how much detail it wishes to include. However, it is strongly suggested that the employer's general employment philosophy be explained in the handbook, particularly such issues as at-will employment, the employer's position on unions, etc. This disclosure should discourage employment of employees who do not agree with the employer's philosophy and possibly minimize resentment or agitation by unhappy employees in the future.*

Employment Policies:

- Equal Employment Opportunity statement

Comment: *A statement prohibiting discrimination based on race, religion, national origin, sex, sexual orientation, age, handicap, or disability should be included in all employment handbooks. This statement also should cover sexual and other harassment even if there is a separate policy on the subject (which is recommended).*

- Recruitment and relocation
- Medical examination and physical testing and interview process
- Probationary period

Comment: *It used to be commonplace for probationary periods to be described in terms of leading to an employee's "permanent" status. However, to be consistent with the concept of at-will employment status, it is strongly recommended that the phrase "permanent employee" not be used. The probationary period language should be related to a different concept, such as the evaluation system. For example, "During the probationary period, the employee is continually evaluated to determine whether he or she is learning the job and functioning properly. Upon completion of the probationary period, the employee will be evaluated every ____ months." (The employer's regular evaluation system of six- or twelve-month intervals should be inserted.) The successful completion of the probationary period does not constitute a guarantee of continued employment and in no way alters the employee's at-will status.*

- Anniversary date of employment
- Expense reimbursement
- Emergency actions
- Notifying company of changes (address, marital status, number of dependents, etc.)
- Job description/classification/departments

Comment: *Note that under the Americans with Disabilities Act of 1990, 42 U.S.C. §12101, et seq., detailed job descriptions of the physical and mental requirements and essential job functions for each position are recommended for defensive purposes to avoid disability discrimination charges.*

- Posting new jobs and promotions (training vs. familiarization and qualifications vs. length of service)
- Announcements on bulletin boards
- Confidentiality of information

Comment: *This provision should specifically require confidentiality of all employment information, including wages, as well as any information about customers, clients, suppliers, and the employer's business. Note, however, that binding confidentiality/nondisclosure agreements should be obtained separately on an individual basis when necessary.*

- Conflict of interest
- First aid, safety, and OSHA requirements
- Parking lot facilities, locker room, and good housekeeping
- Notification policy (absenteeism, tardiness, leaving early, returning from breaks)
- Use of mail, fax, photocopier, and telephones
- Use of company equipment
- Use of computer equipment (e-mail and Internet policy)

Comment: *The high level of technology currently available in the workplace presents a dilemma for employers. While desiring to supply employees with the best equipment to perform their jobs effectively, employers do not want employees to divert attention from their jobs (e.g., through personal use of the Internet). In addition to this issue, employers should clearly warn employees that they should not expect privacy for activities on or use of the employer-provided technology (i.e., personal use of the e-mail system). A sample employee handbook policy addressing these and related areas is contained in Appendix C.*

- Personnel file access and employee privacy expectations
- Layoff policy
- Temporary assignments
- Supervisors (working) (authority)
- Return to work (after medical or other leave of absence) and rehire
- Gratuities to government officials or customers or gratuities from suppliers
- Inventions and patents
- Political activities
- Work rules

Comment: *It is essential that work rules be fair and consistently applied. See Step 10.*

- Alcohol and drug policy

Comment: *See detailed drug and alcohol policy in Step 7.*

- Discipline and termination criteria (counseling) (warnings):

  inability or refusal to perform the job
  inability or refusal to meet expected performance levels
  inability or refusal to adhere to policies
  inability or refusal to maintain satisfactory interpersonnel relationships

Comment: *This section is absolutely critical to the proper functioning of a good employment handbook. In addition to listing specific reasons for discipline and dismissal in work rules (see Step 10), the employment handbook should contain broad and general reasons such as those stated above. If the employee does not improve his or*

her performance after being warned, then the employee may be terminated. However, certain reasons should be clearly identified as those for which no notice or prior warning is required before discharge, e.g., theft, insubordination, etc. Generally, the employer must retain maximum flexibility to make such decisions.

- Discussing complaints and grievances (procedure)

Comment: *Employers should consider whether to offer and require arbitration of all employment issues as opposed to a court proceeding.*

- Suggestions welcomed and open-door policy
- Moonlighting
- Dress code
- No-solicitation policy

Comment: *In order to be enforceable, a no-solicitation policy should prevent solicitation only during "working time," as opposed to during "working hours." If working hours are 9:00 a.m. to 5:00 p.m., the actual working time might be from 9:00 a.m. to the time of the first coffee break and from the end of the coffee break until the noon hour, etc. It is not legal to prevent solicitation by employees, such as for charitable causes, birthday gifts, and unions, during breaks and lunch and before and after work. Similarly, it is not appropriate to prohibit employees from discussing their working conditions, such as prohibiting employees from discussing their salaries. Doing so constitutes a per se violation of the National Labor Relations Act, 29 U.S.C. §151, et seq., even if the work force is not organized.*

- Language policy

Comment: *The Illinois Human Rights Act, 775 ILCS 5/1-101, et seq., prohibits an employer from restricting an employee from speaking in his or her native tongue when the content of the speech is unrelated to the employee's duties. This law does not permit an employee's use of slang, jargon, profanity, or vulgarity. This law covers employers with 15 or more employees within Illinois during 20 or more calendar weeks, any employer who is a party to a public contract regardless of the number of employees, and the state and any political subdivision, municipal corporation, or other governmental unit or agency.*

- Whistleblower policy

Comment: *The Whistleblower Act, 740 ILCS 174/1, et seq., prohibits an employer from adopting policies that would prevent an employee from disclosing information to a government or law enforcement agency when an employee has reasonable cause to believe that the information discloses a violation of a state or federal law. Because*

this provision is likely to affect employers' agreements and policies that seek to protect confidential information and trade secrets, those agreements and policies should be reviewed. In addition, an employer may not retaliate against an employee for certain disclosures made to a government or law enforcement agency when the employee has reasonable cause to believe that the information disclosed reveals unlawful conduct. Finally, an employer may not retaliate against employees who refuse to participate in specified activities that would violate a state or federal law.

Wage and Salary Policies:

Comment: *The portion of the employment handbook that contains the employment benefits should be utilized for its "public relations" effect by stating the positive reasons for and benefits of employment. The employer may want to place these sections at the beginning of the employment handbook.*

- Full-time/part-time/temporary employees
- Minimum wage rates (when applicable)

Comment: *The Illinois minimum wage is $8.00 per hour, and the federal minimum wage is $7.25 per hour.*

- Equal pay policy

Comment: *The Equal Pay Act of 2003, 820 ILCS 112/1, et seq., prohibits compensating an employee of one sex less than an employee of the opposite sex for work that requires equal skill, effort, and responsibility under similar working conditions. The law requires employers to provide equal pay to male and female employees performing substantially similar work in one county, whether they are located in the same facility or not.*

- Hours of work (start, breaks, lunch, end)
- Meal periods and rest periods
- Flextime
- Payday and payroll advances
- Shift differential
- How pay is computed
- Payroll deductions

- Periodic performance evaluations (criteria)
- Wage increases
- Severance pay
- Overtime and exempt employees

Comment: *Many employers do not realize that the federal Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §201, et seq., requires that employees be paid overtime (time and one-half) for all hours worked in excess of 40 in any week unless the employee is specifically exempt (executive, professional, administrative, or outside sales employee). Payment on a salary basis rather than at an hourly rate does not automatically exempt an employee from overtime pay. The exemption from overtime is based on the nature of the work, the duties, and the educational requirements of the job. Being paid on a salary basis of at least $455 per week, however, is a prerequisite to quality for the most common exemptions.*

Comment: *Illinois amended its overtime law to ensure that employees who were categorized as nonexempt (i.e., entitled to overtime pay) under the old federal regulations shall continue to be treated as nonexempt in Illinois. To be exempt under the Illinois law, employees must earn a weekly salary of at least $455 and meet certain tests as to their duties and responsibilities.*

- Nurse mandated overtime.

Comment: *Section 10.9 of the Hospital Licensing Act, 210 ILCS 85/1, et seq., prohibits mandated overtime by nurses except in the case of an "unforeseen emergent circumstance" when such overtime is required as a last resort. Mandated overtime shall not exceed 4 hours beyond the predetermined work shift, and after 12 hours on duty, a nurse must be allowed at least 8 consecutive hours off-duty time.*

Employee Benefits:

- Insurance (hospitalization, dental, life, disability, etc.)
- Holidays
- Vacations
- Pension plan
- Stock purchase plan
- Profit-sharing plan
- Individual retirement account

- Annual bonus or Christmas gift
- Coffee breaks
- Picnic/annual parties
- Educational assistance
- Referral bonus
- Expense reimbursement (automobile, entertainment, travel, memberships)

Employee Leave:

- Sick leave
- Leave of absence
- Disability leave of absence

Comment: *Contained in Appendix D is a sample employee family and medical leave of absence policy that defines the leave period as a maximum of 12 workweeks. Note that the employer maintains control over the leave situation by providing for examination at any time by the employer's doctor, whose opinion shall be final. This sample policy complies with the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. §2601, et seq. Please note that the FMLA also may apply to a leave of absence for the employee to care for certain other individuals.*

- Jury duty leave
- Funeral leave
- Military leave and family military leave

Comment: *The Family Military Leave Act, 820 ILCS 151/1, et seq., requires employers that employ between 15 and 50 employees to provide up to 15 days of unpaid family military leave to an employee during the time federal or state deployment orders are in effect. An employer with more than 50 employees shall provide up to 30 days of unpaid family military leave to an employee during the time federal or state deployment orders are in effect. Any employee who exercises rights under the Act, upon expiration of the leave, shall be entitled to be restored by the employer to the position held by the employee when the leave commenced or to a position with equivalent seniority status, employee benefits, pay, and other terms and conditions of employment. During any family military leave taken under the Act, the employer shall make it possible for employees to continue their benefits at the employee's expense.*

- Voting time and leave.

Comment: *The Election Code, 10 ILCS 5/1-1, et seq., provides that employers must allow employees a two-hour absence between the opening and closing of polls to vote.*

- Organ and blood donor leave

Comment: *The Employee Blood Donation Leave Act, 820 ILCS 149/1, et seq., provides paid time off to allow employees of units of local governments, boards of election commissioners, or private employers with 51 or more employees to donate blood. Further, it provides that an employee may be entitled to blood donation leave with pay of up to one hour to donate blood every 56 days.*

The Organ Donor Leave Act, 5 ILCS 327/1, et seq., permits state employees, excluding employees of units of local government or school districts, to receive paid time off from work to donate organs, bone marrow, blood, or blood platelets.

- Other types of leave

Comment: *The Victims' Economic Security and Safety Act, 820 ILCS 180/1, et seq., grants employees the right to take a leave from work when the purpose for the leave is to prevent domestic or sexual violence or to provide treatment, counseling, or legal assistance for victims of such abuse or violence. The Act allows an employee to take up to 12 weeks of unpaid leave during any 12-month period whether it was the employee who was threatened with or suffered the abuse or someone in the employee's family or household who was the victim of such action. An authorized leave from work may be taken for the purpose of obtaining restraining orders or other injunctive relief, obtaining physical or psychological treatment, obtaining services from a domestic violence shelter or rape crisis center, or participating in safety programs designed to prevent future episodes of domestic violence. The Act applies to the state or any agency of the state, local governments, school districts, and any employer that employs at least 50 employees.*

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Comment: *See Comments at the end of Step 1 and at the beginning of this Step above regarding at-will employment status.*

STEP 6: DEVELOP, PUBLISH, AND ENFORCE POLICIES TO AVOID SEXUAL AND OTHER HARASSMENT IN THE WORKPLACE

The topic of sexual harassment has received increased public attention because of the reported activities of certain public officials and other high-visibility court decisions. Basically, "sexual harassment" is defined as unwelcome sexual conduct by one or more employees directed at one or more other employees, whether it is communicated by words, conduct, or some other activity. There are two forms of sexual harassment. The first type is "quid pro quo," which involves one employee demanding some form of unwanted sexual action or attention from another employee in return for some term or condition of employment, such as compensation, benefits, or continued employment. Examples include a job interviewer conditioning a job offer on a sexual act or a supervisor conditioning a raise or employment benefit on a sexual act. The second type of sexual harassment, which is entitled "hostile environment," is more prevalent. In this type of situation, one employee commits or permits the existence of sexual actions, communications, or other acts that another employee does not welcome. In fact, the second

employee may interpret the sexual activities as making him or her uncomfortable and/or interfering with his or her job performance. A hostile environment can involve physical touching or conduct, verbal statements, joking, pictures or other print materials, or comments about sexual matters. However, to the extent that the alleged victim voluntarily participates in or willingly accepts such conduct or comments, they may not be interpreted as constituting sexual harassment because conduct must be unwanted to qualify as harassment. It is recommended that employers adopt an antiharassment policy that covers all types of harassment (*e.g.*, racial, religious, national origin, sexual, etc.). The policy contained in this QuickGuide can easily be modified to accomplish that goal.

There are several other points to remember about sexual harassment. The alleged victim can be either male or female. It is also possible to have same-sex as well as heterosexual sexual harassment. The final critical point is that of the employer's liability for sexual harassment. An employer is absolutely liable for any sexual harassment of a subordinate by a supervisor when a tangible employment action is also involved (*e.g.*, discharge, demotion, reassignment, etc.). The employer is liable whether or not it knew or could have known about the situation. If no tangible employment action is involved, an employer may defend itself by proving that the victim should have made a claim pursuant to the sexual harassment policy. In coworker-to-coworker or third-party sexual harassment, the employer is liable only if it knew or should have known about the conduct and failed to take timely corrective action.

STEPS IN DEVELOPING A SEXUAL HARASSMENT PROGRAM

The following guidelines should be helpful in developing a sexual harassment policy/program.

a. Develop a strong policy that defines "sexual harassment" and includes a statement as to why it is important for the company to prevent sexual harassment.

Comment: *The following are examples of a sexual harassment policy and a definition of "sexual harassment" used by many companies.*

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b. Develop a grievance procedure that encourages the reporting of incidents of sexual harassment, that allows for informal resolution, and that, if the informal process fails, provides a mechanism for formal resolution. For example:

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c. Disseminate the policy to all employees as well as to those who do business with the employer. The policy and supporting materials should be included in the employment handbook.

d. Develop a method for informing new employees about the policy. Orientation programs and other in-house workshops and seminars may serve as appropriate forums. Obtaining written acknowledgment of attendance at such workshops is recommended, as this may later serve to support the defense of a future harassment claim.

e. Create and keep current an educational program designed to help all employees understand, prevent, and combat sexual harassment. Brochures describing the kinds of behavior that constitute sexual harassment and what the person who is being harassed should do about it have been used very successfully.

f. Provide training to supervisory personnel.

g. Appoint a coordinator to handle reports of sexual harassment. An ombudsperson, an affirmative action officer, or a combination of these positions could serve in this capacity. The person or persons appointed should be well-known to all employees and be highly respected by them.

h. Adopt, publicize, and enforce penalties for violations of the policy.

i. Investigate and resolve all complaints promptly.

j. Keep written records, but take precautions to protect the privacy of all parties involved.

k. Take action to resolve claims even if a discrimination charge has been filed with the EEOC or a state discrimination agency.

l. Publish the results of resolved complaints on a periodic basis, making certain that all information used protects the privacy of the people involved.

GRIEVANCE PROCEDURE FOR SEXUAL HARASSMENT COMPLAINTS

The following generic grievance procedure can be utilized for sexual harassment claims as well as all types of employment complaints and/or grievances. The number of steps and the personnel involved can be reduced.

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Comment: *Some employers have extended the grievance procedure concept to include a provision for binding arbitration of all complaints in order to avoid court proceedings. In order for an arbitration provision to extend to federal civil rights laws, it must include a clear "knowing and voluntary" waiver of the rights at issue.*

STEP 7: DEVELOP, PUBLISH, AND ENFORCE PROPER DRUG AND ALCOHOL ABUSE POLICIES

The following policy is designed to comply with the Drug-Free Workplace Act of 1988, 41 U.S.C. §701, *et seq.* Although the Act relates only to drug issues, the following policy is designed as a combined drug and alcohol policy. Since both problems are addictions and both offer opportunities for rehabilitation and employee assistance programs, it is recommended that they be managed in the same way by similar, consistent policies.

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Comment: *All employees should be required to complete and return this employee acknowledgment form so that it can be placed in the employee's personnel file. This is proof that the employee has received proper notice of the policy, acknowledges it, and agrees to abide by its terms.*

STEP 8: COMPLY WITH THE PERSONNEL RECORD REVIEW ACT

The Personnel Record Review Act, 820 ILCS 40/0.01, *et seq.*, requires all Illinois employers with five or more employees to permit employees, under specified conditions, to inspect their own personnel records. The following is a summary of the key provisions of this Act.

Inspection of Records:

a. An employee can request (in writing if required by the employer) permission to inspect his or her personnel records at least twice a year. The employer must grant the employee's request within seven working days or request a seven-day extension if it cannot reasonably meet the deadline.

b. The inspection should take place on the employer's premises during working hours unless other arrangements are agreed on. The employer can prohibit the employee from removing the personnel records from its premises but may mail copies if the employee is unable to review the records on the employer's premises. If the employee requests a copy of any document in the file, the employer must furnish it at cost, to be paid for by the employee.

c. Records an employee may inspect include all documents that are, have been, or are intended to be used in determining the employee's qualifications for employment, promotion, transfer, additional compensation, discharge, or other disciplinary action. This may extend beyond those documents maintained in a formal personnel file, such as documents in a supervisor's file.

Items Excluded from Inspection:

d. Items that can be excluded from the employee's inspection are

1. medical records;

2. letters of reference and test documents (other than the score itself);

3. materials relating to the employer's staff planning that do not include references to or evaluations or appraisals of specific employees' job qualifications, capabilities, or performances;

4. information about other people if it would invade the privacy of the people referred to;

5. records involving the employee that are relevant to a judicial proceeding between the employer and the employee; and

6. any records alleging criminal activity.

Improperly Excluded Information:

e. Any information that was improperly excluded from an employee's personnel file cannot be used by an employer in any judicial or quasi-judicial proceeding.

Grievance:

f. An employee involved in a grievance against the employer may designate in writing a representative to inspect the employee's personnel records that are relevant to the grievance. The above conditions then apply to this situation.

Employer's Right To Amend Record:

g. If the employee disagrees with any information contained in the personnel records, the employer may agree to remove or correct it. If an agreement cannot be reached, the employee may submit a written statement of his or her position, which then must be attached to the disputed record.

Privacy:

h. The employer shall not divulge any disciplinary report, action, or letter of reprimand to any third party without written notice to the employee unless

1. the employee has, in writing, waived the written notice;

2. the disclosure is ordered as part of a legal action or arbitration; or

3. the information is required by a government agency pursuant to the employee's complaint or as part of a criminal investigation.

Before releasing an employee's personnel record to a third party, the employer must delete disciplinary reports, letters of reprimand, or other records of disciplinary action that are more than four years old except when release is ordered in a legal action or arbitration.

Nonemployment Activities:

i. The employer may not gather or keep records of political or nonemployment activities without the employee's written consent unless the activities are harmful to the employer's interest or constitute criminal conduct.

Comment: *The Illinois Department of Labor is responsible for administering the Personnel Record Review Act and may issue rules and regulations necessary to administer and enforce the Act. Additionally, any employer or its agent who violates the Act may be subject to a state court action to compel compliance. Failure to comply with an order of the court may be punished as contempt, for which the employer may be found guilty of a petty offense, and the employee may be entitled to actual damages, costs, and reasonable attorneys' fees. Finally, any employer or its agent who discharges or discriminates against an employee for exercising rights under the Act is guilty of a petty offense.*

PRACTICE POINTER

✓ Three final notes: First, an employer is not required to create personnel records if none exist. (This statement should not be interpreted as a recommendation that personnel records not be kept.) Second, although inspection of personnel records can amount to "free discovery" for an individual or a union instituting or contemplating legal action, the employer still must comply with the Act. Third, a prior version of this Act was in existence from July 1, 1984, to November 1987, when the Illinois Supreme Court decided that a portion of that Act was unconstitutionally vague. The current Act was created to overcome the Supreme Court's previous objections.

See Appendix E at the end of this QuickGuide for a chart setting forth various employment record retention requirements.

STEP 9: USE PROPER EMPLOYEE PERFORMANCE EVALUATION PROCEDURES

Thorough and detailed performance evaluation procedures are essential for monitoring employees' performance, meeting employer goals, and laying the groundwork for essential personnel decisions. Key elements of a proper performance evaluation program are outlined in the following checklist. Two different sample evaluation forms are contained in Appendices F (for employees) and G (for managers).

EVALUATION SYSTEM CHECKLIST

1. Keep in mind the purposes of employee performance evaluation procedures, which are to

   a. establish objective and job-related criteria;

   b. measure employee development and growth;

   c. improve management practices;

   d. identify problems;

   e. provide clear and adequate notice of deficiencies;

   f. identify specific corrective activity required;

   g. generate employee participation and self-monitoring; and

   h. provide supportable evidence in adversary proceedings.

2. Provide training and understandable instructions to the evaluators to minimize inconsistency and to ensure that evaluators understand job requirements.

3. Evaluate employee strengths and weaknesses.

4. Rank employees within a work group according to evaluations.

5. Require higher management review of each evaluation prior to the employee-evaluator meeting (to ensure fairness and consistency).

6. Require a face-to-face employee-evaluator meeting to discuss each evaluation (and establish mutually agreed goals).

7. Provide advance notice to the employee of the time and place of the meeting.

8. Require employee acknowledgment, and allow space for the employee's comments and/or rebuttals.

9. Provide an appeal procedure.

10. Monitor the evaluation system for possible disparate impact on minorities.

11. Make evaluation performance one element of the evaluator's own performance review.

12. Protect the employee's right to privacy by limiting knowledge of the evaluation to those who need to know.

STEP 10: USE PROPER PROCEDURES FOR DISCIPLINE AND TERMINATION

The following sample discipline and termination policy is typical of those used by many employers.

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Comment: *These first five rules are "capital offenses" that justify immediate discharge as opposed to a system of progressive discipline and warnings as illustrated in paragraphs 7 through 12 below.*

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Comment: *This is a standard provision that states that the employee is not discharged but is deemed to have quit his or her job. That difference in treatment should provide an argument to deny unemployment compensation to such a former employee.*

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Comment: *Rules 7 through 12 involve a system of "progressive discipline" designed to warn the employee that if his or her performance does not improve, employment may be terminated. Rule 12 is broadly designed to enable employers to deal with most performance problems not specified in any of the other rules. It is recommended that a file memorandum be prepared to document an oral warning and that it be placed in the employee's personnel file.*

Commission of any three offenses within a one-year period may result in the employee's discharge. Prior offenses shall not be used as a basis for further discipline if the employee has maintained a clear record for one year. The Employer reserves the right to cancel or modify these rules or issue new ones.

PRACTICE POINTER

✓ All employers should use complete, consistent, and carefully planned procedures for dealing with instances of employee problems and causes for discipline and discharge. The following is a checklist of steps and considerations to use in analyzing and acting on instances in which an employee's conduct, actions, attitude, performance, or the like is unsatisfactory or inappropriate.

INCIDENT ANALYSIS CHECKLIST

1. Before making any decision or taking any action, be certain to gather and document all of the facts involved. Find out who, what, when, where, and why. Speak with any witnesses, and then allow the employee involved to offer his or her version of the facts and any explanation.

2. Determine whether the behavior is an isolated incident or a repeat occurrence.

3. Examine the employee's past work and discipline record.

4. Note any mitigating circumstances.

5. Determine the exact nature of the incident; *i.e.*, was it negligence, an accident, or an intentional act?

6. Determine the standard of conduct to which the employee should be held based on his or her job, training, experience, etc.

7. Analyze the actual or potential effect of the incident on the employee, other employees, supervisors, employer policies, employer property, etc.

8. Determine whether there is any precedent in terms of the incident or the employer's response.

9. Determine the employee's attitude toward the incident (*i.e.*, admissions, remorse, apologies, etc.).

10. Review all relevant documents, including

    a. employment agreements (written and oral promises);

    b. collective bargaining agreement provisions, if any (including negotiation notes);

    c. work rules and employment policies;

    d. the employee's personnel file, specifically including discipline, incident reports, warnings, etc.; and

    e. similar incidents involving other employees (including warnings, grievances, etc.).

11. Analyze legal rights that may be involved, including

    a. minority issues (race, religion, national origin, sex, handicap, disability, and sexual harassment);

    b. any other statutory protections such as the National Labor Relations Act, 29 U.S.C. §151, *et seq.*, or the Fair Labor Standards Act of 1938, 29 U.S.C. §201, *et seq.;*

    c. the possibility of a retaliatory discharge suit (governmental complaint); and

    d. any previously made promises to the employee regarding conduct, discipline, etc.

12. Determine the effectiveness of proposed disciplinary action by

    a. evaluating whether the discipline is appropriate under the circumstances;

    b. determining whether the discipline is consistent with prior disciplinary actions (to avoid allegations of favoritism);

    c. making certain that the discipline does not overlook work rules or other related policies;

    d. emphasizing correcting the problem instead of punishment;

    e. allowing the employee to maintain his or her self-respect; and

    f. following sensible, progressive disciplinary steps.

13. Analyze any real or potential security concerns raised by the incident, including

    a. determining whether the incident suggests that any further action may be necessary to protect people or property;

    b. determining whether the incident suggests the need for any changes in employer security procedures, locks, computer codes, etc.; and

    c. if employment termination is to be carried out, arranging for supervision of the departure.

14. Manage the termination meeting by

    a. being calm, brief, and direct (*i.e.*, not rationalizing or embellishing);

    b. having a witness;

    c. using a private office to preserve confidentiality and employee dignity;

    d. considering a separation package of benefits;

    e. obtaining employer documents, materials, keys, credit cards, etc.;

    f. transferring work responsibility;

    g. analyzing the timing of the meeting for the least disruption and trauma for all concerned (early in the week is usually preferable); and

    h. analyzing the potential for violence and the possible need for security.

PRACTICE POINTER

✓ Should an employee be terminated, it may be appropriate for the employer to offer the employee a separation agreement that includes a full release. Consideration is required, in the form of a benefit to which the employee is not otherwise entitled, to support release language such as the following or such as contained in the sample separation agreement in Appendix I.

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Comment: *In order to comply with the Older Workers Benefit Protection Act, 29 U.S.C. §621, et seq., the release of any claim by an individual who is more than 40 years of age must recite that the individual was given a 21-day or 45-day period, as applicable, to consider whether to enter into the waiver agreement and a 7-day period to revoke before the release became effective. Additionally, under certain circumstances, age and other demographic information must accompany the release. Claims under the FLSA cannot be waived. Consequently, the concluding paragraph is designed to obtain an admission that the employee is not aware of any such claim, even though a formal waiver would be ineffective.*

COMPLIANCE WITH THE ILLINOIS WARN ACT

The Illinois Worker Adjustment and Retraining Notification Act (Illinois WARN Act), 820 ILCS 65/1, *et seq.*, requires that employers with more than 75 employees provide 60 days advance written notice of plans to reorganize when the reorganization involves laying off or relocating a substantial number of employees. Similar to the federal Worker Adjustment and Retraining Notification Act (WARN), 29 U.S.C. §2101, *et seq.*, the Illinois WARN Act requires that employers also give notice to employee unions and to government officials, namely the Illinois Department of Commerce and Economic Opportunity and the chief elected official of each municipal and county government within which the employment loss, relocation, or mass layoff occurs.

COMPLIANCE WITH COBRA AND THE ILLINOIS INSURANCE CODE

Employers with 20 or more employees must comply with the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), Pub.L. No. 99-272, 100 Stat. 82, with respect to health insurance plans. Key elements in such compliance are as follows.

"Qualifying Events": COBRA requires that group health insurance benefits be continued upon a qualifying event for persons whose eligibility for group membership otherwise would have terminated. Qualifying events are

a. death of the covered employee;

b. termination of the employee (other than because of the employee's "gross misconduct") or reduction of hours of the covered employee's employment;

c. divorce or legal separation of the covered employee from the employee's spouse;

d. the covered employee's becoming eligible for Medicare;

e. a dependent child's ceasing to be a dependent child under the generally applicable requirements of the plan; and

f. proceeding in a case under Title 11 of the U.S. Code, commencing on or after July 1, 1986, with respect to the employer from whose employment the covered employee retired at any time.

Required Offer: When any of the "qualifying events" occur, the affected employee, spouse, or dependent child must be offered continued membership in the group insurance plan identical to the coverage provided to group members to whom a "qualifying event" has not occurred. If coverage under the group plan is modified for group members, it also must be modified with respect to continuation coverage.

Miscellaneous Provisions: The insurer may not condition the affected member's coverage on evidence of insurability.

The insurer may require that the affected member pay premiums, including the portion that the employer had been contributing. The "full premium" is defined as the cost to the insurer of providing similar insurance to other group members. (There are special rules regarding premiums for self-insured plans.) In addition to this full premium, the employer also may charge the affected member an administration fee of up to two percent of the full premium. At the election of the affected member, the premium may be paid in monthly installments. The first payment must be made within 45 days of the affected member's decision to accept the continued insurance benefits. Thereafter, the premium must be timely paid, *i.e.,* within 30 days after the day due, or coverage may cease. The plan shall permit payment for continuation coverage during the period preceding the election to be made within 45 days of the date of the election.

Required Notices: The group health plan must provide, at the time of commencement of coverage under the plan, written notice to each covered employee and spouse of an employee of the rights conferred by COBRA.

Further, when a qualifying event occurs, additional notice must be given.

If the qualifying event is

a. the death of the covered employee,

b. the termination of employment or reduction of hours of the covered employee's employment,

c. the covered employee's eligibility for Medicare, or

d. a proceeding under Title 11 of the U.S. Code,

the *employer* must notify the plan administrator within 30 days of the qualifying event.

If the qualifying event is

a. divorce or legal separation from the covered employee, or

b. a dependent child's ceasing to be a dependent child,

the *employee or affected member* must notify the plan administrator within 60 days of the qualifying event.

When the plan administrator has received notice from the employer of any of the four qualifying events noted above or notice from the affected member of either of the two qualifying events noted thereafter, the plan administrator then has 14 days in which to notify the affected member or the affected member's qualified beneficiary of the member's rights under COBRA. An affected member has 60 days in which to elect to accept the continued insurance benefits. This 60-day period begins either on the date that the qualifying event occurs or on the date that the affected member received notice of the qualifying event from the insurance company, whichever is later.

Length of Benefits:

Once elected, the insurance benefits must continue

a. for 18 months if the qualifying event was the termination of employment or reduction of hours of the covered employee; or

b. for 36 months if the qualifying event was

   1. the covered employee's death;

   2. divorce or legal separation from the covered employee; or

   3. a dependent child's ceasing to be a dependent child.

Termination of Entitlement:

The entitlement to secure health insurance ends

a. with the last day of the maximum coverage;

b. when the affected member fails to timely pay the premium;

c. when the employer ceases to maintain any group health plan;

d. when the affected member becomes covered under another group health plan through reemployment (even if the coverage is less valuable to the employee than the COBRA coverage);

e. when the covered employee becomes eligible for Medicare benefits; or

f. when a qualified beneficiary (by reason of being the spouse of a covered employee) remarries or becomes covered under a group health plan.

The benefits must continue until the first of the above events occurs.

Conversion Opportunities:

Whenever the continuation plan ends as a result of the expiration of the 18-month or 36-month period described above, the insurance company must offer a conversion plan to the affected member. The insurance company must make this offer within 180 days; the 180-day period ends on the last day of the effectiveness of the continuation plan.

COBRA Enforcement:

COBRA requirements are enforced by virtue of the Internal Revenue Code, the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §1001, *et seq.*, and the Public Health Service Act, 42 U.S.C. §201, *et seq.* Noncompliance with COBRA may result in the loss of tax deductions for a health plan administered by the employer. Failure to provide proper notice to employees and beneficiaries also may result in fines of up to $100 per day under ERISA. Civil actions also are available to affected employees and beneficiaries.

Illinois Insurance Code:

Section 367, *et seq.,* of the Illinois Insurance Code, 215 ILCS 5/1, *et seq.*, provides protections similar to those of COBRA with the following differences:

a. The Illinois statute applies to employers who have at least 20 employees. (If the employer has 20 or more employees, COBRA controls.)

b. Protection under the Illinois statute is afforded only if the employee or affected member had been continuously insured for the three months prior to the qualifying event. (COBRA does not have a similar requirement.)

c. Under Illinois law, an election to accept the continuation benefits must be made within 10 days. (COBRA allows 60 days.)

d. The Illinois statute provides that continuation coverage need not include dental care, vision care, prescription drug benefits, disability income, or specified disease coverage. (In contrast, COBRA requires that the continuation coverage be "identical to the coverage provided under the plan." 29 U.S.C. §1162(1).)

e. Illinois requires insurers not to terminate the benefits if a dependent is handicapped or continues to be chiefly dependent on the employee for support. (COBRA does not have a similar provision.)

f. Under the Illinois statute, continuation benefits extend for at most nine months. Like COBRA, however, other events (Medicare eligibility, failure to pay premiums, etc.) may trigger termination of the continuation benefits prior to the stated deadline. Conversion policies also may be offered to affected members.

g. The Illinois statute sets forth rather detailed provisions for the calculation of premiums to be paid by the affected employee. Distinctions are based on a spouse's age. (No similar distinctions are made by COBRA.)

APPENDICES

APPENDIX A: APPLICATION FOR EMPLOYMENT

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APPENDIX B: DEPARTMENT OF HOMELAND SECURITY FORM I-9

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APPENDIX C: TECHNOLOGY POLICY

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APPENDIX D: FAMILY AND MEDICAL LEAVE OF ABSENCE POLICY

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APPENDIX E: EMPLOYMENT RECORD RETENTION REQUIREMENTS

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APPENDIX F: EMPLOYEE PERFORMANCE EVALUATION FORM

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APPENDIX G: MANAGER PERFORMANCE EVALUATION FORM

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APPENDIX H: PRIOR EMPLOYMENT INFORMATION REQUEST FORM

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APPENDIX I: SEPARATION AGREEMENT AND GENERAL RELEASE

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