

Employment Law Seminars

2007-2008

The Two Most Difficult Employment Decisions: Hiring & Firing Employees

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Lynnwood, WA 98036

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Tuesday, March 4, 2008
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The Two Most Difficult Employment Decisions: Hiring and Firing Employees

By Linda Walton and Brian Flock

PART 1—CONSIDERATIONS WHEN HIRING EMPLOYEES

I. The Prohibitions

A litany of federal, state, and local laws impact the hiring process for every employer. Title VII of the Civil Rights Act of 1964 (“Title VII”) and the Washington Law Against Discrimination (the “WLAD”) prohibit discrimination in hiring on the basis of race, color, religion, sex, and national origin (except under *very* limited circumstances involving bona fide occupational qualifications (“BFOQs”) relating to gender, national origin, and religion). The WLAD also makes it an unfair employment practice to refuse to hire an applicant because the person is over the age of 40, as does the federal Age Discrimination in Employment Act of 1967 (the “ADEA”) (also subject to a *very* limited BFOQ), and many local ordinances. The WLAD also prohibits discrimination in hiring on the basis of marital or veteran status. Washington also recently enacted a statute that prohibits discrimination against individuals based on sexual orientation.

Under federal, state, and local law, employers are also prohibited from discriminating against disabled employees because they are disabled. Neither the WLAD nor the Americans with Disabilities Act of 1990 (the “ADA”) requires an employer to hire an applicant who is unable to perform the essential functions of a job because of a disabling physical or mental condition. The laws do, however, prohibit the employer from refusing to hire the applicant because of the disabling condition if a reasonable accommodation would allow the disabled applicant to perform those duties.

The Seattle Municipal Code also prohibits discrimination in hiring on the basis of age, race, color, religion, sex, national origin, marital status, parental status, sexual orientation, gender identity, political ideology, creed, ancestry, or the presence of any sensory, mental, or physical disability.

II. Is the Organization a “Covered” Employer?

Whether any or all of these laws govern a particular organization will depend upon the size of the organization. Title VII applies to all employers engaged in an industry affecting commerce who have **15** or more employees.

The ADEA governs employers of **20** or more employees. The ADA governs employers of **15** or more employees. The WLAD applies to the employment practices of employers of **8** or more employees. Finally, the Seattle Municipal Code applies to employers with **1** or more employees.

III. Advertising and Recruiting

A. Sex-Specific Job Titles

Under WAC 162-16-260(3), it is unlawful for an employer to use “any job title that contains a gender noun or suffix” in advertisements, job descriptions, job announcements, and similar statements, unless the employer has shown the applicability of a BFOQ under WAC 162-16-240. The prohibition includes the use of job titles “such as waitress, foreman, salesman, maid.” The regulation also provides that when a “neutral job title is not practicable,” the employer may use sex-specific alternatives, e.g., “waiter/waitress,” “foreman, man or woman,” or “tailor, male or female,” or a sex-specific job title may be used if accompanied by the designation “man or woman,” “male or female,” or “M-F.”

The regulation also encourages the use of “male or female” in all job advertisements because “most job titles, through long practice and association, have acquired the connotation of one gender or the other,” and “[a]n equal opportunity employer should attempt to counteract connotations of sex preference.”

B. Discriminatory Language

WAC 162-16-260(2) prohibits the use of language “that tends to influence, persuade or dissuade, encourage or discourage, attract or repel, any person or persons because of” their membership in a protected class under state and local laws. The only exception is if the language is justified by a BFOQ. Examples of prohibited language are the terms handsome, pretty, cute, clean-cut, recent graduate, and college student. The regulation provides other examples and suggests nondiscriminatory alternatives.

C. The Americans With Disabilities Act

The Technical Assistance Manual on the ADA issued by the Equal Employment Opportunity Commission (“EEOC”) states the following:

- Employers are not required (but are encouraged) to undertake special activities to recruit individuals with disabilities.
- Recruitment activities that have the effect of screening out potential applicants with disabilities may violate the ADA.
- Employers must provide accommodation, if needed, to enable an applicant to have equal opportunity in the hiring process, for example, accessible locations, sign interpreters, and readers.
- It is advisable that job announcements, advertisements, and other recruitment notices include information on the essential functions of a job to attract applicants including individuals with disabilities.
- Information about job openings should be accessible to people with different disabilities. An employer is not obligated to provide information in various formats in advance but should make it available in an accessible format on request. Job information should be available in a location that is accessible to people with mobility impairments. If an advertisement provides only a telephone

number, a TDD number should be included, unless a telephone relay service has been established. Job information in print, in large print, and on tape should be available on request. If job postings are available on a website, you should consider accessibility issues as well.

IV. Preemployment Inquiries and Procedures

A. Chapter 49.60 RCW

Under Chapter 49.60 RCW, employers must refrain from asking applicants questions that express limitations or discrimination as to age, race, creed, color, national origin, sex, marital status, disability, veteran status, sexual orientation, or the use of a trained guide dog. Examples include the following: Are you married? How old are you? Do you have children? What country were you born in? Do you live alone?

The Washington State Human Rights Commission (the “WSHRC”) has written a “Preemployment Inquiry Guide” to assist employers in fulfilling this duty.

To avoid violating these provisions, employers should:

- Review the WSHRC Preemployment Inquiry Guide. See Appendix A.
- Carefully prepare interview questions to eliminate discriminatory questions or language.
- Provide training and/or information to employees who will be conducting interviews to help them understand what questions are inappropriate.
- Ask the same questions of all applicants, regardless of race, sex, national origin, etc.

B. Uniform Guidelines on Employee Selection Procedures

To assist employers in complying with Title VII and other federal antidiscrimination laws, the EEOC published Uniform Guidelines on Employee Selection Procedures (the “Uniform Guidelines”). 29 C.F.R. § 1607; 41 C.F.R. § 60-3.5. Some of the more significant provisions of the Uniform Guidelines are as follows:

- The Uniform Guidelines apply to selection procedures, including tests that are used as bases for making employment decisions such as hiring, promotions, and demotions.
- A selection procedure that has an adverse impact on a protected class will be considered discriminatory unless it has been “validated” in accordance with the Uniform Guidelines, i.e., demonstrated to be significantly job-related and consistent with business necessity.
- When two or more selection procedures are available that are substantially equal, the employer should use the procedure that has the lesser adverse impact on protected groups.

- Employers should maintain and have available for inspection records or other information that will disclose the impact that tests and other selection procedures have upon employment opportunities of protected groups, as well as whether, and how, selection procedures with an adverse impact have been validated. The specifics of these record-keeping requirements are complex and detailed, but there are simplified requirements for employers with fewer than 100 employees.

1. Alcohol and Drug Inquiries

An employer may ask whether an applicant drinks alcohol or currently uses drugs illegally. However, an employer may not ask whether an applicant is a drug addict or alcoholic, nor inquire whether he has ever been in a treatment program.

After a conditional offer of employment is made, an employer may ask any question regarding drug or alcohol use. However, the employer may not use such information to exclude the individual unless the reason for the exclusion is consistent with business necessity and the legitimate job criteria cannot be met with a reasonable accommodation.

V. All Things Being Equal

What about the age-old hiring process dilemma: what should the employer do when the applicants are “equally qualified” and one of them is a member of a protected category? First, employers should note that everyone falls into some protected category and understand, therefore, that either of the applicants could challenge the hiring decision on that basis.

Federal courts have held that an employer does not violate Title VII by choosing between equally qualified candidates, so long as the decision is not based on unlawful criteria. Therefore, pretext cannot be shown simply by identifying minor differences between a plaintiff's qualifications and those of successful applicants. Sanchez v. Philip Morris Inc., 992 F.2d 244 (10th Cir. 1993); see also Odom v. Frank, 3 F.3d 839, 847 (5th Cir. 1993) (The disparity in qualifications of applicants must be so apparent as “to jump off the page and slap us in the face” to support a finding of pretext).

VI. Subjective Criteria

Almost every employer uses some subjective component in assessing the suitability of an applicant for a particular job. The use of subjective criteria is not per se discriminatory, but it can be abused. The following are examples of permissible and impermissible uses of subjective criteria.

A. Permissible Criteria: The “Warm and Fuzzy” Test

In the case of Scott v. Parkview Mem'l Hosp., 175 F.3d 523 (7th Cir. 1999), the plaintiff, a male applicant for a position as a hospital social worker, sued the employer alleging, among other things, that the female interviewers asked questions that signaled their favoritism toward women. One of the allegedly questionable questions was “Describe a situation where you went beyond your normal responsibilities in order to meet a patient's needs.” The plaintiff argued that the question indicated a preference for attitudes that he was sure predominated among women.

Affirming the trial court's dismissal of the plaintiff's claim on summary judgment, the Seventh Circuit U.S. Court of Appeals said:

Let us suppose that women are more likely than men to display caring or generally warm-and-fuzzy attitudes—though this may be a stereotype about stereotypes, rather than an accurate description of traits in the population. How would this imply sex discrimination? [The plaintiff] does not deny that caring about others' welfare, and eagerness to assist strangers, are appropriate traits for social workers. They are appropriate even when, as at Parkview Hospital, social work is evolving to include more emphasis on negotiations with third-party payors. *Questions about engagement with clients' needs are no less appropriate for social workers than questions about aggressiveness toward adversaries would be when hiring trial lawyers.* [Emphasis added.]

The court in the Scott case noted that although some courts have found that subjective interviews can be smokescreens for unlawful discrimination, unless evidence demonstrates that an open-ended process has been used to evade statutory antidiscrimination rules, subjectivity cannot be condemned.

B. Impermissible Criteria: "Chemistry"

In Farber v. Massillon Bd. of Educ., 917 F.2d 1391 (6th Cir. 1990), a plaintiff teacher's lawsuit challenged not only the school system's failure to promote her to the position of elementary school principal, but the school system's later decision not to hire her for an administrative position. The second hiring decision followed the plaintiff's filing of an EEOC charge challenging the school system's failure to hire her for the principal position.

Approximately two years after the plaintiff sought the principal position and filed the EEOC charge, she sought a promotion to the position of Director of Instruction. She was again denied the appointment in favor of a young man. The superintendent (not the same superintendent who had failed to hire her for the principal position) said that the male candidate was selected "because of subjective reasons" and because he "met the minimum established qualifications." The evidence disclosed that the plaintiff met the minimum of five years of teaching experience and two years of administrative experience, and the successful applicant did not. The school system argued that even though the successful applicant might not have met the stated requirements for the position, he was nevertheless more qualified than the plaintiff, in part because "there was a 'chemistry' between [the superintendent and the successful applicant] which would be beneficial to their working relationship."

Holding that the plaintiff had established a prima facie case which the school system could not rebut with a legitimate nondiscriminatory reason for its decision, the court found that while "[t]he use of subjective criteria is permissible in the selection of management positions. . . . [The successful applicant in this case] failed to meet the minimum stated qualifications for the position. The subjective criteria were [therefore] not utilized to distinguish among peers, but to favor an unqualified person, discriminatorily. [In addition,] although [the plaintiff's] evidence was insufficient to prove systemic sex discrimination, certainly part of [the successful applicant's] favorable "chemistry" was the fact that no female administrator had ever been appointed in the [defendant's] system. Implicit in [the successful applicant's selection was the unacceptable preference for maintaining the continuity of an all-male administration."

VII. A Special Note About Disability Discrimination

Under the ADA, it is illegal to ask whether the applicant has any disabilities that would prevent her from performing the job. An employer may describe particular skills required on the job, and ask whether the applicant can perform those tasks with or without reasonable accommodation. An employer may also ask an applicant to demonstrate how he will perform job tasks.

Warning: An employer may not ask the applicant whether she needs reasonable accommodation to perform the task. That question requires the applicant to disclose her disability and the need for reasonable accommodation.

Generally an employer may not ask about the kinds of accommodation that may be required until after the applicant is hired. **Exception:** When an employer could reasonably believe that an applicant will need reasonable accommodation to perform the functions of the job, the employer may ask that applicant certain limited questions. Specifically, the employer may ask whether the applicant needs reasonable accommodation and what type of reasonable accommodation would be needed to perform the functions of the job. The employer could ask these questions if 1) the employer reasonably believes the applicant will need reasonable accommodation because of an obvious disability; 2) the employer reasonably believes the applicant will need reasonable accommodation because of a hidden disability that the applicant has voluntarily disclosed to the employer; or 3) an applicant has voluntarily disclosed to the employer that s/he needs reasonable accommodation to perform the job. See EEOC Enforcement Guidance on Pre-Employment Inquiries under the Americans with Disabilities Act [<http://www.eeoc.gov/policy/docs/preemp.html>]. An employer may make a contingent offer of employment and then discuss reasonable accommodation and whether it would cause undue hardship to the employer's business.

The federal regulations amplifying the ADA also provide that:

- It is unlawful for a covered entity to use qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, on the basis of disability, unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity.
- It is unlawful for a covered entity to fail to select and administer tests concerning employment in the most effective manner to ensure that, when a test is administered to a job applicant or employee who has a disability that impairs sensory, manual or speaking skills, the test results accurately reflect the skills, aptitude, or whatever other factor of the applicant or employee that the test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

29 C.F.R. §§ 1630.10, 1630.11.

VIII. Recent Development Regarding Pregnant Applicants

In a recent Washington Supreme Court decision, Hegwine v. Longview Fibre Co., the court considered the claims of an applicant who alleged she was not hired because of her pregnancy. Stacy Hegwine applied for a job as a customer service clerk/order checker at Longview Fibre Company. The newspaper advertisement for the job did not mention any lifting requirements, and no description existed at the time the job was advertised. When Hegwine was interviewed, however, she was told that the job required the ability to lift up to 25 pounds.

Hegwine was offered the job contingent on her successful completion of a physical examination. In response to a medical questionnaire (part of the exam), she revealed that she was pregnant. Hegwine's doctor initially cleared her to lift up to 20 pounds overhead—and up to 30 pounds to waist level—for up to two hours per day.

Hegwine called her doctor and told him that the job required the ability to lift 25 pounds. She asked him to clear her to lift heavier weights. When the doctor asked for more information, Hegwine contacted Fibre. She was told that the lifting requirement was 40 pounds, which she reported to her doctor. He cleared her to lift up to 40 pounds for up to two hours daily. He testified that if he had known the job required lifting even heavier weights, he might have cleared her to do so, depending on the nature and frequency of the lifting.

Fibre's equal employment opportunity coordinator analyzed the essential job functions of the order checker position and concluded that "an order checker must be able to lift boxes weighing up to 60 pounds." Based on Hegwine's clearance to lift only 40 pounds, Fibre rescinded its conditional job offer. In a nonjury trial, the court employing a reasonable accommodation analysis concluded that (1) lifting 60 pounds was an essential job function that Hegwine could not perform, and (2) the company could not have accommodated her lifting restrictions. The court ruled in Fibre's favor.

The court of appeals reversed the lower court's decision, finding that Fibre was liable for pregnancy discrimination, and ordered a new trial solely on the issue of damages.

The Washington Supreme Court upheld the court of appeals.

First, the supreme court made it clear that pregnancy discrimination claims should be viewed as "matters of sex discrimination and are not subject to an accommodation analysis like that utilized in the disability context." Of course, the court noted, a pregnant employee may also be entitled to an accommodation. The court noted that "[s]hould an employer hire a pregnant employee, [she] is to receive the same treatment as any other employee with similar physical limitations."

Moreover, the court conceded, an employer need not hire a pregnant applicant who cannot perform the essential job functions—but only upon a strict showing that those functions are bona fide occupational qualifications or business necessities, difficult showings for an employer to make under the best of circumstances.

Second, the court affirmed the finding that Fibre made illegal preemployment inquiries by conditioning Hegwine's job offer on a medical exam that included a pregnancy inquiry.

Based on this decision, an employer that could have made reasonable accommodations to enable a pregnant employee to work might have a hard time showing that it had a nondiscriminatory business justification for failing to hire the applicant.

IX. Prohibition on Hiring of Illegal Aliens

The Immigration Reform and Control Act of 1986 (the "IRCA") makes it unlawful for an employer knowingly to hire, recruit, or continue to employ any alien not authorized to work in the United States. It also prohibits discrimination based on an individual's national origin or citizenship status.

A. Employers Must Verify the Identity and Authorization to Work of All Newly Hired Employees

Federal law requires employers to verify the identity and authorization to work of all job applicants by examining relevant documents pertaining to them. The documents must establish two things: (1) that the applicant is presenting his or her true identity, and (2) that the applicant is eligible to work in the United States.

Under federal regulations an employee may either present one document from a List A (establishing both identity and employment eligibility) or one document each from a List B (identity) and a List C (eligibility). The employer then reviews the documents and certifies that they appear to be genuine and relate to the named employee and that to the best of the employer's knowledge, the employee is eligible for employment.

Regulations were recently enacted to revise List A, which now contains five documents that may be used to establish both identity and eligibility:

- U.S. passport (unexpired or expired);
- Permanent Resident Card (Form I-551);
- Unexpired foreign passport with a temporary I-551 stamp;
- Unexpired foreign passport with an unexpired Arrival-Departure Record (Form I-94) for nonimmigrant aliens authorized to work for a specific employer; and
- Unexpired Employment Authorization Document that contains a photograph (Form I-766, I-688, I-688A, or I-688B). This last listing has been added to List A as part of the I-9 Form revision.

The following five items are no longer on List A and may not be used because they lack sufficient features to help deter counterfeiting, tampering, and fraud:

- Certificate of US. Citizenship (Form N-560 or N-561);
- Certificate of Naturalization (Form N-550 or N-570);
- Alien Registration Receipt Card (Form I-151);
- Unexpired Reentry Permit (Form I-327); and

- Unexpired Refugee Travel Document (Form I-571).

In another change, employees don't have to furnish their social security number if they don't want to, unless their employer participates in the U.S. Citizenship & Immigration Service's (USCIS) Electronic Employment Eligibility Verification Program ("E-Verify"). The instructions on photocopying and retaining Form I-9 now include information about electronically signing and retaining I-9 forms.

Employers should have begun using the new I-9 forms on November 7, 2007, when they were issued. The new forms bear a revision date of June 5, 2007, found in the lower right corner and reading "(Rev. 06/05/07)N." The USCIS, however, has given employers a break in the form of a 30-day phase-in period during which they will not be penalized for using the old Form I-9. The grace period was to start upon notice in the Federal Register from the U.S. Department of Homeland Security (the "DHS"). As of this writing, the DHS has not given notice.

Employers only need to complete the new version of Form I-9 for new employees, or when they reverify current employees. The form is available online at www.uscis.gov/files/form/I-9.pdf.

The new form is available in English and Spanish. Employers in Puerto Rico may use either version to verify employees. All other employers may use the Spanish version as a translation guide but must complete the English version and keep it in their records.

B. Employers Must Complete and Retain I-9 Forms

An employer must complete and retain an Employment Eligibility Verification form, commonly known as an I-9 form, for each new hire. The I-9 form is a record that an employee's identity and work authorization were verified. I-9 forms must be retained for at least three years, or for one year after an employee is terminated, whichever is later. Though not required, it is also advisable for the employer to keep on file photocopies of the documentation provided. Such photocopies will be helpful in avoiding penalties if an employee is later found to be an unauthorized alien.

C. Penalties

Currently, civil fines for hiring unauthorized aliens range from \$2,500 for a first offense up to \$10,000 for repeated offenses per alien. Criminal penalties and injunctive relief may be imposed for "pattern or practice" violations. Paperwork violations are punishable by civil fines of between \$100 and \$1,000.

D. Avoiding Discrimination

The IRCA makes it unlawful for an employer

to discriminate against any individual (other than an unauthorized alien) with respect to the hiring, or recruitment or referral for a fee, of the individual for employment . . . (A) because of such individual's national origin, or (B) in the case of a [protected individual] . . . because of such individual's citizenship status.

A “protected individual” is a person (1) who is a citizen or national of the United States, or (2) is an alien who is lawfully admitted for permanent residence, granted temporary residence, admitted as a refugee, or granted asylum, *and* who evidences, in certain specific ways, an intention to become a citizen of the United States.

There are four exceptions to the IRCA's discrimination provisions: (1) an employer with three or fewer employees is exempted; (2) an employer may discriminate on the basis of national origin if permitted to do so under Title VII's BFOQ defense; (3) an employer may discriminate based on citizenship status where required to comply with federal, state, or local laws, regulations, or contracts; and (4) an employer may give hiring preference to a U.S. citizen or national over an equally qualified authorized alien.

E. Pending No-Match Guidelines

In past years, the Social Security Administration (“SSA”) sent out about 130,000 letters per year to employers with at least 10 employees whose social security numbers did not match SSA data. A mismatch may be caused by a simple clerical error, or it can be a sign that the worker is an unauthorized alien. An estimated eight million unauthorized aliens currently work in the United States.

On August 15, 2007 the DHS issued a new rule entitled “Safe-Harbor Procedures for Employers Who Receive a No-Match Letter.” See 72 Fed. Reg. 45611 (August 15, 2007). The rule’s “safe harbor” provision precludes the DHS from using receipt of a no-match letter as evidence that an employer has constructive knowledge—knowledge that could fairly be inferred from having received certain information—of an employee’s unauthorized status, provided that the employer takes certain actions set forth in the rule.

The rule provides that a reasonable employer should determine, within 30 days of receipt of a no-match letter, whether a clerical error explains the discrepancy, and if so, correct the error, and advise the relevant agency. If no such error is found, the employer should instruct the employee to confirm the correctness of the information and, if the employee confirms it, request that the employee resolve the matter directly with the relevant agency. The rule states that this process should take no more than 90 days from receipt of the letter. If the employee’s identity and work authorization is not verified, the employer must terminate the employee or utilize special verification procedures to avoid liability under the Immigration and Nationality Act. 8 U.S.C. § 1324a(a)(2). Under the special verification procedures, the rule provides the employer and employee three additional days to complete a new I-9 form, just as if the employee were a new hire. However, in completing the new I-9, the employer *may not* rely on any documents bearing the Social Security Number (“SSN”) or alien identification number that is the subject of the no-match letter, and no document without a photograph may be used to establish identity.

Action	Timeline
Employer receives letter from SSA or DHS indicating mismatch of employees name and social security number.	Day 0
Employer checks own records, makes any necessary corrections of errors, and verifies corrections with SSA or DHS.	0-30 days
If necessary, employer notifies employee and asks employee to assist in correction.	0-90 days
If necessary, employer corrects own records and verifies correction with SSA or DHS.	0-90 days

Employers that follow the DHS' suggested steps after receiving no-match letters avoid the risk that the letters will be used to show constructive knowledge that employees were unauthorized aliens. **However**, implementation of the new rule has been put on hold. Prior to the regulation's September 14, 2007 effective dates the AFL-CIO filed a lawsuit challenging the regulation. On October 10, 2007, the U.S. District Court for the Northern District of California issued a preliminary injunction in AFL-CIO v. Chertoff, No. 07-CV-4472 CRB, 2007 WL 2972952 (N.D. Cal. Oct. 10, 2007). The preliminary injunction enjoins and restrains the Department of Homeland Security and the Social Security Administration from implementing the Final Rule entitled "Safe-Harbor Procedures for Employers Who Receive a No-Match Letter." That restraining order remains in effect at the time of this presentation.

X. Job Applicants Who Have Sued a Previous Employer

Employers may be reluctant to hire an applicant who has instituted legal action against a previous employer for fear that the applicant may be "litigation prone." While this reluctance is understandable, employers must be aware that antiretaliation protections in various federal and state statutes could have a bearing on such decisions. For example:

- Employers may not discharge "or in any manner discriminate against any employee because such employee" has initiated or participated in workers' compensation proceedings. RCW 49.17.160.
- Employers are prohibited from "discharg[ing] or in any other manner discriminat[ing] against any employee" because the employee has protested wage violations, or instituted or participated in proceedings alleging wage violations under Chapter 49.46 RCW. RCW 49.46.100.
- Employers are prohibited from "discharg[ing] . . . or otherwise discriminat[ing] against any person because he or she" has protested discriminatory practices or instituted or participated in proceedings alleging discrimination under state, federal, or local laws. RCW 49.60.210; see also 42 U.S.C. § 2000e-3.
- Employers may not discriminate against any person who has initiated or participated in any complaint or proceedings "related to" the Washington Industrial Safety and Health Act. RCW 49.17.160; WAC 296-360.

No case has yet addressed whether employers are generally prohibited from refusing to hire an applicant because the applicant has instituted a lawsuit against a former employer.

XI. Criminal Record Checks

A. Permissible and Impermissible Inquiries

The EEOC has determined that basing employment decisions upon past convictions has an adverse impact on certain minorities and that past convictions should not be considered unless there is a "business necessity" to do so. The current WSHRC regulations provide that questions regarding an applicant's prior convictions are justified by business necessity—and thus fair employment practice—if the crimes asked about relate reasonably to the job duties and if the convictions or release from prison occurred within the last 10 years.

Arrests. The current WSHRC regulations allow employers to ask an applicant about arrests as long as certain requirements are met. First, the employer would have to ask whether charges are still pending, have been dismissed, or led to a conviction. Second, the crime for which the arrest was made would have to involve behavior that would negatively affect job performance. Third, the employer could only ask about arrests that occurred within the last 10 years. A question about arrests not meeting these requirements would be considered an unfair employment inquiry.

B. School District Employees With Unsupervised Access to Children

Chapter 28A.400 RCW requires school districts and their contractors to conduct criminal record checks, through the state patrol and the FBI, of all new employees who will have “regularly scheduled unsupervised access to children.” RCW 28A.400.303. “Unsupervised access” means access not in the presence of another employee, volunteer, relative, or guardian. The statute also provides:

- Prospective employees must provide their fingerprints using Washington State criminal investigation cards.
- If necessary, applicants can be employed on a conditional basis pending completion of the record check.
- School districts may waive a record check if an applicant has had a record check within the previous two years but must still require the applicant to complete an applicant disclosure form (disclosing criminal convictions, adjudications of child abuse or physical abuse in civil actions, and final decisions of the Department of Licensing or disciplinary boards that include a finding of sexual or physical abuse of a minor).
- Applicants must be informed that a check will be conducted and must be provided a copy of the results of the check.

The Washington State Patrol will conduct checks of state and FBI records. Forms are available from the Washington State Patrol.

C. Employees of Other Agencies and Organizations That Provide Services to Children and Vulnerable Adults

Washington law requires licensed agencies and organizations that provide services to children, developmentally disabled persons, or vulnerable adults to do criminal background and record checks for prospective employees and volunteers who will have unsupervised access to children and/or vulnerable adults. Agencies and organizations covered include, for example, the Department of Social and Health Services, elder care facilities, foster care facilities, and facilities that house the disabled.

The background check must be in the form of a written questionnaire on which applicants are asked to disclose criminal convictions, adjudications of child abuse or physical abuse in civil actions, and final decisions of the Department of Licensing or disciplinary boards that include a finding of sexual or physical abuse of a minor. The disclosure must list certain specified crimes, be in writing, and be signed by the applicant and sworn under penalty of

perjury. When necessary, applicants may be employed on a conditional basis pending completion of the background investigation.

RCW 43.43.834 authorizes, but does not require, employers to do criminal record checks through the State Patrol in addition to these written questionnaires. However, the employer must obtain a completed questionnaire *before* conducting the criminal record check. Although the record check is not required, it is strongly recommended because it will help the agency or organization avoid possible claims for negligent hiring.

Applicants and employees are entitled to certain protections in connection with these questionnaires and background checks. First, the applicant must be informed if any record check will be conducted and must be provided a copy of the record within 10 days after the agency or organization receives it. Second, the agency or organization may use information about past criminal activity only in making its initial employment decision. Third, the agency or organization may not disseminate the information other than to the applicant and those who are involved in the hiring decision.

D. Other Employers Who May Request Information About Criminal Records

For certain purposes, agencies may request criminal record checks relating to prospective and current employees even if their jobs do not involve access to children and vulnerable adults. The allowable purposes are (1) if the check is necessary to secure a bond required for employment; (2) if the employee's job may involve access to trade secrets, money, items of value, information affecting national security, or confidential or proprietary information; and (3) if the check will further an investigation of employee misconduct that may constitute a state or federal crime.

Protections relating to the subjects of such record checks are essentially the same as those listed in section (XI)(C).

XII. Credit Checks

A. Obtaining: Using Credit Reports for Employment Decisions

The rules regarding employer use of credit and other consumer reports are governed by federal law (the Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681x) and state law (Washington Fair Credit Reporting Act, Ch. 19.182 RCW). Both the federal Fair Credit Reporting Act (the "FCRA") and the Washington State Fair Credit Reporting Act apply to "consumer reports"—reports obtained from a credit reporting agency. Consumer reports can contain information about an individual's personal and credit characteristics as well as information concerning the person's character, general reputation, or lifestyle.

For Washington employers subject to both federal and state law, the rules now can be outlined as follows:

- You may not obtain for employment purposes a consumer report that bears on an individual's creditworthiness, credit standing, or credit capacity unless the information is either:
 - (1) required by law; or

- (2) substantially job-related and your reasons for using the information are disclosed to the individual in writing.
- Before obtaining a consumer report for employment purposes, you must notify the individual in writing that a report may be used. **The notice must be in a stand-alone document.**
 - You must get the person's written authorization before asking a credit reporting agency for the report.
 - If you take an action based on a consumer report (for example, denying a job or reassigning or terminating an employee), you must do the following:
 - (1) **Before** taking the adverse action, give the individual a preadverse action disclosure that includes a copy of the report and a copy of the document prescribed by the Federal Trade Association ("Summary of Your Rights Under the Fair Credit Reporting Act").
 - (2) **After** taking the adverse action, you must give the individual an adverse action notice (orally, in writing, or electronically) that includes the name, address, and phone number of the credit reporting agency that supplied the report, a statement that the credit reporting agency that supplied the report did not make the decision to take the adverse action and cannot give specific reasons for it, and a notice of the individual's right to dispute the accuracy or completeness of any information the agency furnished and the individual's right to an additional free consumer report from the agency upon request within 60 days.
 - To obtain a consumer report from a credit reporting agency, you will be required to certify that you are in compliance with the FCRA and that you won't misuse any information in the report in violation of federal or state equal employment opportunity laws or regulations.
 - When disposing of consumer reports, you must take reasonable and appropriate steps to prevent the unauthorized access to—or use of—information in the report.

There are additional limitations on the procurement of "investigative consumer reports"—reports in which information about the individual's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews of others. For those reports, you must specifically notify the individual that such a report may be made, and the disclosure must be made in writing and mailed or delivered to the individual no later than three days after the report is requested.

The disclosure must notify the individual of his or her right to a complete and accurate disclosure of the nature and scope of the investigation requested. If the individual requests that additional disclosure, it must be made in writing and mailed or delivered no later than five days after receiving the request for the disclosure.

B. Bankruptcy

To the extent that a credit check reveals information regarding an applicant's bankruptcy action, employers may not base hiring decisions, in whole or in part, on such information. The 1978 Bankruptcy Code makes it illegal for a private employer to discriminate against employees who have filed for bankruptcy or been "associated" with a person who filed for bankruptcy. 11 U.S.C. § 525.

XIII. Polygraph Tests

Both federal and state laws limit employers' use of polygraph tests during the hiring process and during any ensuing employment.

A. Federal Law

The federal Employee Polygraph Protection Act of 1988, 29 U.S.C. §§ 2001-2009, prohibits employers from:

- requiring any employee or prospective employee to take a lie detector test;
- using the results of any lie detector test of any employee or prospective employee;
- taking adverse action against an employee or prospective employee on the basis of the results of a lie detector test or the refusal to take such a test; and
- retaliating against an employee or prospective employee for exercising rights afforded by this law.

Exemptions and Exceptions: The prohibition on using polygraph tests applies only to private employers, not to federal, state, or local governments.

There are some exceptions to the general ban on polygraph examinations in certain limited circumstances:

- when the employer is in the business of providing security; or
- where the employer is involved in the manufacture and distribution of drugs.

Employers who administer polygraph exams must also comply with procedural restrictions. If an employer violates any portion of the Employee Polygraph Protection Act, it may be liable for civil penalties up to \$10,000, and the employee could sue for money damages and reinstatement.

B. State Law

Under Washington state law, it is generally unlawful for any employer to require any employee or prospective employee to take or be subjected to any lie detector or similar test as a condition of employment. However, polygraph examinations may be given to applicants for employment with law enforcement agencies and to employees involved in the manufacture or

distribution of controlled substances, or in sensitive positions affecting national security.
RCW 49.44.120.

XIV. Preemployment Drug and Alcohol Testing

A. Public Employers

The Fourth Amendment to the United States Constitution prohibits the government, including public employers, from engaging in unreasonable searches and seizures. The Washington State Constitution contains similar prohibitions, as well as restrictions on the government's right to invade an individual's privacy. Preemployment drug tests are permissible if, given the job responsibilities involved, the employer's interests, e.g., in safety and security, outweigh the privacy interests of prospective employees.

B. Private Employers

Federal and Washington State constitutional provisions on privacy rights do not generally apply to private employers. A Washington court of appeals recently held that private employers do not violate public policy as expressed in the Washington State Constitution when they require employees to submit to drug tests. Moreover, some private employers, like those subject to Department of Transportation regulation, may be required to administer preemployment testing.

Although private employers may require preemployment drug tests, private employees could sue their employers for invasion of privacy, negligence, intentional or negligent infliction of emotional distress, and other causes of action if drug tests are administered or acted upon in an intrusive or unreasonable manner.

For unionized employers, preemployment drug testing does not constitute a mandatory subject of bargaining.

C. The ADA

- An employer may test for and deny employment to current illegal users of drugs on the basis of such drug use because current illegal users of drugs are not "individuals with disabilities" under the ADA.
- The illegal use of drugs does not include drugs taken under supervision of a licensed health care professional, and employers may not inquire regarding or take adverse action against an individual for taking legally prescribed drugs before a conditional employment offer is extended.
- If an individual tests positive on a test for the illegal use of drugs, the individual will be considered a current drug user under the ADA where the test correctly indicates that the individual is engaging in the illegal use of a controlled substance.
- Tests for illegal use of drugs may reveal the presence of lawfully used drugs. If a person were excluded from a job because the employer erroneously regarded him or her as an addict currently using drugs illegally, the employer would be liable under the ADA.

- If the results of a drug test indicate the presence of a lawfully prescribed drug, such information must be kept confidential, in the same way as any medical record.
- Unlike current illegal users of drugs, a person who currently uses alcohol is not automatically denied protection under the ADA simply because of the alcohol use. An alcoholic may be a person with a disability under the ADA and may be entitled to reasonable accommodation if he or she is qualified to perform the essential functions of the job.

XV. Preemployment Medical Examinations

A. Physical Examinations Following Conditional Offers

Under the ADA, an employer may require a medical examination **only after it makes an offer of employment**. It is not always easy to determine whether something is a “medical test.” The EEOC defines a “medical test” as a procedure or test that seeks information about an individual’s physical or mental impairments or disabilities, as distinguished from a test that measures an applicant’s performance of a task.

The employer may condition the offer of employment on the results of the medical examination. If an individual is required to have a medical examination, then all individuals entering the same job category must be required to have the examination. However, if one individual’s test indicates a problem, further tests may be given to that individual.

Post-offer medical examinations need not be job-related or consistent with business necessity. If an employer withdraws a job offer based on the results of a medical examination, however, the employer must be able to show that the offer was withdrawn for reasons that were job-related and consistent with business necessity.

All information obtained about the applicant/employee’s medical condition or history must be maintained on separate forms and in medical files separate and apart from the employee’s personnel file and must be treated as confidential medical records. The only individuals who may have access to this information are first aid and safety personnel if the disability may require emergency treatment, supervisors or managers who may need to know about restrictions on an employee’s work duties, government officials investigating compliance with the ADA, or insurance companies where the employer requires an examination before providing insurance benefits.

B. AIDS Testing

1. Federal Law

Under the ADA, AIDS is a disability, and HIV/AIDS tests are “medical examinations” and may therefore only be administered after a conditional offer of employment is made and only if given to all employees in a job category. The results of the test must be kept confidential. An employer may refuse to hire someone who tests positive for AIDS only if the presence of AIDS would prohibit the individual from performing the essential functions of the job or if the individual would present a direct threat to others. Because AIDS is not transmitted through casual contact or through food (according to the Secretary of Health and Human Services), there are few jobs for which the direct threat provision would apply.

2. State Law

Under RCW 49.60.172, an employer cannot require an employee to take an HIV test as a condition of hiring unless the absence of HIV is a BFOQ for the job in question. Washington's Human Rights Commission takes the position that there is no class of jobs for which the absence of AIDS is a BFOQ. Such a determination must be made on a case-by-case basis. The absence of HIV can only be a BFOQ for a particular job if the employer shows that performance of that job would entail a "significant risk" of transmitting HIV to other persons and there is no way to eliminate the risk by restructuring the job. A "significant risk" is "a job qualification which requires person-to-person contact likely to result in direct introduction of blood into the eye, an open cut or wound, or another interruption of the epidermis, when . . . [n]o adequate barrier protection is practical[.]" WAC 246-100-204. Employers are not liable for damages to another employee or the public if an employee with HIV transmits the disease, unless the transmission occurred because of the employer's gross negligence.

C. Genetic Screening

The EEOC has stated that the definition of "disability" includes individuals who are subjected to discrimination on the basis of genetic information related to illness, disease, or other disorders.

Thus, an employer who refuses to hire employees on the basis of conditions discovered through preemployment genetic screening risks liability under the ADA.

XVI. Negligent Hiring

A. Generally

Many states, including Washington, recognize the tort of negligent hiring. Under this tort, an employer may be liable to a third person for the employer's negligence in hiring an employee who is unfit or dangerous. Such negligence usually consists of hiring the employee with knowledge of his or her unfitness, or of failing to use reasonable care to discover the unfitness before hiring the employee.

The liability of an employer for negligent hiring must be contrasted with second-hand, or vicarious, employer liability—known to lawyers as "respondeat superior." Under respondeat superior, the employer is liable for the acts of its *employees* that were done in the course and scope of employment, i.e., for the benefit of the employer. With negligent hiring, it is the *employer's* conduct that is at issue. If the employer was negligent in hiring the employee, the employer may be liable for acts of the employee that are *outside* the employee's scope of employment. For this reason, most negligent hiring cases involve "intentional torts" clearly not committed in the scope of employment, such as assault and theft.

B. Avoiding Liability for Negligent Hiring

1. Analyze Job Duties Carefully

Take special care to identify positions and responsibilities that involve contact with the public, especially children or others' property, particularly if the contact is unsupervised. Consider also whether an applicant is likely to advance to a position that will involve increased contact with members of the public or increased access to the property of others. Concern may

also be raised where the employee will be operating a vehicle or other potentially dangerous machinery.

2. Obtain a Release for Background Checks

Have all applicants sign a release authorizing the prospective employer to verify information and check references, and authorizing former employers to provide information.

3. Conduct an Investigation

The type of investigation warranted will depend on the nature of the job, i.e., what potential for harm to others it entails. For positions involving contact with money, private property, or members of the public, the employer should contact past employers or other references provided by the applicant. The employer should also request applicants to submit certified copies of licenses needed for the job. For jobs involving greater risks, investigation of conviction records and/or credit reports may also be warranted.

4. Check Criminal Records of Applicants Who Will Have Access to Children and Developmentally Disabled Persons

Two Washington statutes require that if an employee will have unsupervised access to children or certain vulnerable adults, the employer must check the applicant's criminal record. These provisions are discussed in detail above.

5. Be Alert for a Need to Conduct a More Thorough Investigation

The scope of a "reasonable" inquiry will increase if the application process yields information that would lead a reasonable person to conduct a more thorough inquiry.

6. Keep Documentation of the Investigation

Keep records of notes from an applicant's interview, responses from references, and copies of licenses, criminal records, and any other documents related to efforts to check an applicant's suitability for the job.

7. Avoid Discrimination Based Upon Criminal Convictions

In their efforts to avoid liability for negligent hiring, employers should be mindful of federal and state regulations that make it unlawful, under certain conditions, to discriminate on the basis of past convictions. These regulations are discussed in section VI.

PART 2—CONSIDERATIONS WHEN DISCHARGING AN EMPLOYEE

Approximately 80,000 charges of discrimination or retaliation are filed each year with the EEOC. The Seattle EEOC office (which covers Washington, Oregon, Idaho, Montana, and Alaska) typically receives 1,700 charges of discrimination each year. Thousands more are filed with the WSHRC and similar agencies. Many charges develop into lawsuits, and there are, of course, many other theories besides discrimination on which a present or former employee may base a claim.

The following chart shows the allocation of charges based on the type of discrimination claimed and the difference between the charge statistics for the Seattle office and the charge statistics for the entire nation. One significant difference is the higher percentage of disability discrimination complaints filed with the Seattle office compared to the national average. This disparity likely reflects the broader reach of Washington's disability discrimination law.

	Seattle FY 07	Nationwide FY 06
Race	30%	36%
Gender	30%	31%
Retaliation	29%	30%
Age	25%	22%
Disability	26%	31%
National origin	16%	11%
Religion	6%	4%

More often than not, charges or lawsuits by former employees raise allegations that the claimant has been discharged wrongfully or unfairly. Discharge is sometimes labeled as the “capital punishment of the workplace.” Thus, most employers want to be sure that their decision to discharge an employee is well-justified and fairly carried out—if only to protect themselves from legal liability.

I. “Employment At Will”?

The general rule in Washington is that an employment relationship of indefinite duration is terminable at the will of the employer. The idea is that just as the employee is free at any time to tell the employer that she is terminating her employment with or without a reason, the employer can do the same. However, just as in the hiring context, a myriad of federal, state, and local laws prohibit employers from discharging employees for discriminatory reasons, i.e., because of employee’s race, creed, color, sex, age, marital status, disability, veteran status, sexual orientation, or use of a dog guide or service animal.

II. Common Law Claims Created by the Courts (Wrongful Discharge)

A. Tort Claim for Public Policy Violation

Washington courts have consistently held that just as public policy prohibits an employer from considering an employee’s race, gender, disabling condition, or national origin when deciding whether to discharge an employee, public policy also prohibits an employer from considering certain activities when deciding whether to discharge an employee.

Thus, it is unlawful for an employer to discharge an employee because the employee:

- refuses to do an illegal act,
- performs a public duty or obligation such as serving on a jury,
- saves another citizen’s life, or

- exercises a legal right or privilege, such as
 - filing a worker’s compensation complaint under RCW 51;
 - filing a discrimination complaint under RCW 49.60;
 - filing a whistleblower complaint under RCW 42.40;
 - filing a complaint under the Washington Industrial Safety and Health Act (WISHA), RCW 49.17;
 - filing a community-right-to-know complaint under RCW 49.70;
 - reporting nursing home abuse under RCW 70.124;
 - filing a farm-labor claim under RCW 19.30;
 - filing a minimum wage claim under RCW 49.46;
 - filing a family-leave claim under RCW 49.78;
 - exercising rights under the Washington Family Care Act under RCW 49.12.287; or
 - engaging in collective bargaining activities

It is also unlawful for an employer to discharge an employee because of certain garnishments and wage assignments.

These and similar provisions are often summarized by saying that it is unlawful for an employer to “retaliate” against an employee for “protected activity.” The courts consider these to be terminations “in contravention of public policy.” Washington courts have found contravention of a clear mandate of public policy in four general areas: (1) where the discharge was a result of refusing to commit an illegal act; (2) where the discharge resulted due to the employee performing a public duty or obligation; (3) where the termination occurred because the employee exercised a legal right or privilege; and (4) where the discharge was premised on employee “whistleblowing” activity.

B. Claim for Breach of Employer’s Policies

The second theory of wrongful discharge is based on an employer’s failure to follow its own published policies. Under this theory, the discharged employee must show that the employer created an atmosphere of job security and fair treatment with promises of specific treatment in specific situations, inducing him to remain on the job and not seek other employment. In such instances, the employer has created an expectation and an obligation to treat employees in accord with its written promises.

An employee who is discharged in violation of published policies may assert a claim on that basis alone, although the potential damages are different and less than those available for a claim of public policy wrongful discharge.

C. Lack of “Cause” Under Bargaining Agreements or Other Contracts

In some situations, most commonly under collective bargaining agreements, the parties agree that employment may be terminated only for “cause.” Some individual employment agreements contain a similar provision. In such instances, employment is not terminable at will, and the burden is on the employer to show that there was cause for any discharge. Cause may be defined in a particular contract. In the collective bargaining setting, there is a body of law, largely developed in arbitration, as to what constitutes cause.

III. SOME ADDITIONAL ADA CONCERNS

A recent decision from the Ninth U.S. Circuit Court of Appeals bears some note. In Gambini v. Total Renal Care, Inc., 486 F.3d 1087 (9th Cir. 2007), the court examined the claims of an employee with bipolar disorder who was discharged following an angry outburst in her workplace.

Gambini was hired in November 2000 as a contracts clerk for DaVita, Inc. (f/k/a Total Renal Care, Inc.). Gambini had a history of health problems, and after a few months of work she began to experience anxiety and depression, which eventually culminated in an emotional breakdown at work in April 2001. Soon after she was told that her symptoms were consistent with bipolar disorder.

Gambini informed her supervisor about her condition and requested several workplace accommodations. Specifically, she asked coworkers not to be personally offended by her irritability because she was experiencing mood swings, seeing a therapist, and struggling with medication issues.

In the spring of 2002, Gambini’s symptoms worsened. She was increasingly irritable, was easily distracted, and had a hard time concentrating on her work. DaVita became concerned with Gambini’s poor performance and attitude, and a meeting was set to propose a performance improvement plan (“PIP”) to Gambini. When Gambini was presented with the PIP, she started crying. She then became increasingly irritable and threw the PIP across the desk with a flourish of obscenities. She then stomped out, continuing her tirade of profanity and threatening the managers who had presented her with the PIP. Gambini was later observed throwing things around her cubicle. DaVita provisionally provided Gambini with FMLA leave, but also launched an investigation into her behavior. Approximately a week after her outburst, Gambini was discharged. Gambini contended that her behavior was a result of her bipolar disorder, and filed a lawsuit alleging that her disability was the basis for her discharge. DaVita prevailed at the jury trial.

On appeal, Gambini contended that the jury was erroneously instructed about her disability claim and should have been instructed that “conduct resulting from a disability is part of the disability and not a separate basis for termination.” On review, the Ninth Circuit noted an earlier disability case decided by the Washington Supreme Court. That case said that when an employee demonstrates a causal link between conduct caused by her disability and the termination of her employment, a jury should be instructed that it may find the termination to be unlawful disability discrimination. The Washington court had relied on a Ninth Circuit interpretation of a similar issue under the ADA. Thus, the Ninth Circuit concluded that Washington law was consistent with the ADA, and the trial court had erred in not instructing the jury as Gambini had proposed. If the jury could reasonably find that a mental disability was a

substantial factor in the employer's termination decision, it was entitled to conclude that there had been a violation of the state's law against discrimination.

This decision is a hard one for employers. When dealing with unacceptable conduct by an employee with a known disability, employers must now consider whether the conduct is "part of" the disability. If it is, the decision to discharge the employee on the basis of that conduct could be challenged by the employee under state and federal disability laws.

IV. KEYS TO EFFECTIVE DISCIPLINE

A. Setting the Standard

Tell employees clearly the rules or standards for conduct and performance. This may take the form of written work rules, orientation materials, and communications in crew or staff meetings and/or individual one-on-one meetings. Employers will be on the surest footing where they have let employees know what is expected.

B. Identifying the Deficiency

If discipline is contemplated or undertaken, tell the employee clearly what the problem is. Do not rely on vague terms like "bad attitude." Be specific.

C. Expectation for Correction/Improvement

Describe what would demonstrate improved conduct and set a time frame for the correction or improvement.

D. Consistency Tempered With Flexibility

Consistency is often the key to showing that discipline has not been discriminatory or retaliatory. If employees in similar situations are treated similarly, regardless of protected status, an employer has a strong defense to claims of discrimination, retaliation, or violation of public policy. On the other hand, one instance of misconduct or poor performance may be markedly different in severity from another. Sometimes uniform treatment of situations is not necessarily fair treatment. Although some employers have strict rules that apply regardless of the circumstances, most will temper discipline depending on specific circumstances. In those situations, the reasons for lesser discipline in some situations should be based on a good reason that can easily be explained to and understood by a third party—such as a juror.

E. Progressive Steps as Appropriate

Many deficiencies in performance or conduct may be correctable through progressive discipline. Often, this takes the form of an initial informal discussion with the employee about the issue. If the misbehavior continues to occur, progressive steps impress upon the employee the seriousness of the need to improve. Typical steps include a formal oral warning, followed by a written warning, followed by a suspension if appropriate, followed by discharge. Progressive discipline is not appropriate in all situations. Employers who have a stated policy of progressive discipline should take care to reserve the right to determine when to utilize it. In employment situations where employment is terminable only for "cause," progressive discipline will be expected except where the employee's conduct clearly warrants immediate dismissal.

F. Documentation

It is a good idea to keep a record of every disciplinary action, even informal discussions. This does not mean that a written document must go into the employee personnel file at an informal stage of the disciplinary process. But it is important to have some institutional memory of informal discussions or warnings.

G. Human Resources Involvement and Review

Many employers get their human resources professionals involved at every step in the disciplinary process. Others routinely involve human resources only as more severe disciplinary steps, including discharge, are contemplated. The role of human resources generally is to ensure that discipline is warranted by the circumstances and that there is consistency in discipline across the organization. If the employer has written policies on discipline, human resources can assist in ensuring that the policies are followed. In addition to providing advice on specific situations, human resources should periodically review discipline within the organization to ensure fair application of the process.

V. GETTING TO DISCHARGE

A. Making the Decision

- Are all facts recorded?
- Are all documents assembled?
- Is the employee aware of the problem?
- In appropriate cases, have progressive disciplinary steps been taken and documented?
- Has the employee had an opportunity to tell his or her side of the story?
- Have you considered past similar situations to be certain your actions are consistent?
- Have you complied with all internal review procedures or other practices called for by the organization's policies?

The decision should not be based on unverified gossip from any source, and the decision maker should make an effort to disregard unrelated issues.

Seriously consider using a team approach to decision making, especially if serious discipline or termination may result. Generally, if several unbiased decision makers have agreed to a result, it is easier to defend the decision if it is challenged. If possible, centralize all decisions to ensure the consistent treatment of employees and the consistent application of work rules. Finally, the employer may also consider how the decision will be viewed if later aired in a public forum. If a contested case may result, legal counsel should be consulted.

B. Special Concerns For Public Sector Employers—Pretermination Hearings

Under the federal constitution, a public employee having a “property” or “liberty” interest in his or her employment is entitled to some sort of “due process” prior to involuntary termination. Liberty interests are uncommon in public employment.¹ Property rights in public employment are more common. A public employee who has a reasonable expectation of continued or permanent employment has a property interest in such employment. Examples in Washington include teachers who are employed beyond their provisional year, many school district classified employees, persons employed by cities and counties under civil service laws and many others.

The minimum process due to a public employee having a liberty or property interest was considered by the United States Supreme Court in Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985). Loudermill held that a civil service employee who could be terminated only for cause was entitled to a pretermination hearing prior to discharge.

The hearing required need not be a full evidentiary hearing to determine whether there is cause for dismissal. The purpose of the pretermination hearing is to determine whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action. The employee therefore must be given notice of the charges and an opportunity to respond.

A Loudermill pretermination “hearing” need not be a hearing within the normal meaning of the term. It may be informal, styled as a conference. It is possible for the Loudermill requirements to have been satisfied in the normal course of the investigation, especially if the wrongdoer was the last person to be interviewed. However, it is recommended that this issue be considered at the conclusion of the investigation after all available evidence has become known. It is also advisable to give the employee written notice of the charges and a reasonable time to reflect prior to the Loudermill hearing. Note also that a Loudermill hearing may trigger Weingarten rights to union representation.

C. LOGISTICS OF DISCHARGE

1. Security Issues

- Escort from premises if appropriate.
- Retrieve or protect confidential information (including computer codes and programs) and any other employer property, including identification and keys.
- Consider changing locks or security codes.

¹A liberty interest may be violated if the employer makes public charges against the employee that are stigmatizing and might seriously damage his or her reputation in the community, such as charges of dishonesty or immorality. As a result, public employers should carefully consider what information to make public about an investigation and subsequent personnel action.

2. Separation Agreements (Severance Packages)

Neither federal nor Washington laws require employers to pay severance to discharged employees. Nonetheless, many employers consider offering a separation agreement to a discharged employee. The reason is simple: a separation agreement generally includes a release of all claims arising out of the employment or the termination of employment. A valid and enforceable release is the strongest protection against potential employee charges or lawsuits. Indeed, some employers offer a separation agreement on almost all involuntary terminations of employment. Such agreements should, however, be done on an ad hoc basis to avoid potential ERISA issues. There are potential tax consequences associated with severance packages, especially in light of the recent enactment of new tax regulations.

3. Releases

For a general release of claims under Washington law, no particular form is required. The format may vary from an informal letter agreement to a highly formal separation agreement. At the federal level, however, there are particular requirements for a valid release of claims under the ADEA. A binding release of claims of age discrimination under federal law requires the following substantive and procedural elements:

- The employee must receive additional consideration, i.e., something more than she is already entitled to receive;
- The release must expressly recite that it is a waiver of claims under the ADEA;
- The employee must be advised to seek his or her own attorney;
- The employee must be given at least 21 days to consider the agreement; and
- The employee must be given at least 7 days after signing the release to revoke acceptance.

D. Communications About the Discharge

1. Communications to Employee

While some supervisors or managers prefer sugar-coating the explanation, there is no good reason (other than a desire to avoid confrontation) not to tell the employee the reason for termination, in a tactful way. The employer's representative **should never** give a false reason.

2. Coworkers

Coworkers will have substantial interest in the termination of a co-employee. Anticipate that the rumor mill will be in high gear.

3. Customers and Suppliers

Customers and suppliers with whom the employee dealt—particularly if the employee had contracting or check-signing authority—will have to be informed.

4. References

Potential employers will likely attempt to contact the employee's former supervisor or coworkers. In July 2005, a new Washington statute took effect that is designed to protect employers who give honest references regarding former employees. It provides:

An employer who discloses information about a former or current employee to a prospective employer . . . at the specific request of that individual employer . . . is presumed to be acting in good faith and is immune from civil and criminal liability for such disclosure or its consequences if the disclosed information relates to: (a) The employee's ability to perform his or her job; (b) the diligence, skill, or reliability with which the employee carried out the duties of his or her job; or (c) any illegal or wrongful act committed by the employee when related to the duties of his or her job.

RCW 4.24.730(1).

The statute recommends that employers providing references keep a record of the identity of the person to whom information is disclosed. The former employee has a right to review the record. If there is clear and convincing evidence that an employer gave a reference that was knowingly false, deliberately misleading, or made with reckless disregard for the truth, the presumption of good faith may be lost.

a. Liability

The new Washington statute protects employers who give references at the request of a prospective employer or employment agency. Generally speaking, however, employers should in other situations treat as confidential information about a former employee and the reasons for termination of the employment relationship. If such information is volunteered outside the context of a protected request, there could be potential claims by the former employee for defamation or interference with contract. Any statements concerning the employee should be truthful and limited to objective facts.

b. Authorization

Many employers ask departing employees to execute an authorization for references. Such authorizations may supplement the protection provided by the new Washington statute.

VI. Special Considerations for Layoffs

A. WARN

The federal Worker Adjustment Retraining and Notification Act ("WARN") requires employers to give 60 days' advance notice to employees in the event of certain plant closings, layoffs, and reductions in employees' hours. 29 U.S.C. §§ 2101-2109; 20 C.F.R. pt. 639. WARN applies to "any business enterprise" with 100 or more full-time employees or with 100 or more employees who, in the aggregate, work at least 4,000 hours per week. 29 U.S.C. § 2101(a)(1). According to Department of Labor ("DOL") regulations, employers include private for-profit business[es], private "non-profit organizations . . . and quasi-public entities . . . separately organized from the regular government." 20 C.F.R. pt. 639.3(a)(1). This definition has generally been interpreted to include nonprofit organizations, hospitals, public utilities, and

educational institutions, in addition to private businesses. In addition, an employer is defined by the number of employees it employs operation-wide, not simply at a specific plant or facility.

WARN's 60-day notice requirement is triggered by any of the following:

- A “plant closing,” defined as the permanent or temporary shutdown of a single site or a unit within the site causing 50 or more employees to have an employment loss during any 30-day period (in many cases this can be extended to 90 days). “Employment loss” is further defined to mean a layoff exceeding six months or a 50 percent reduction in hours during each month of any six-month period. 29 U.S.C. § 2101.
- A “mass layoff,” defined as an “employment loss” at a single site over a 30-day period by 500 employees or by 50 or more employees constituting 33 percent or more of the workforce at that site. Id.

Once triggered, WARN requires that notice be sent to all “affected employees,” defined to include all employees, including white collar and managerial employees, who are likely to lose their employment as a consequence of a proposed plant closing or mass layoff. Notice must also be sent to state and local agencies where the employer resides so that assistance may be provided the affected employees if necessary.

In calculating employment losses under WARN, the employer does not need to count discharges for cause, voluntary quits, retirements, certain part-time employees, or employees offered a transfer to another location within a reasonable commuting distance. However, under several different legal theories, all losses within a 90-day period, in many circumstances, may be aggregated towards a single layoff.

There are some exceptions to WARN's *advance* notice requirement:

- Where an employer suffers an unforeseen business loss, it may give notice as soon as the plant closing or mass layoff becomes reasonably foreseeable.
- Layoffs and plant closings caused by the completion of a project, where employees were hired with the specific understanding that their jobs were tied to the project, do not require WARN notice.
- An economically unstable company seeking additional capital does not need to provide advance WARN notice if such notice would hinder its ability to obtain new capital. Under the DOL's interpretive regulations, this exception applies to plant closings only, not mass layoffs.
- A bona fide strike or lockout does not constitute a plant closing or mass layoff.
- Layoffs and plant closings caused by relocation or consolidation do not require advance notice if the affected employees are offered a transfer to a new site within a reasonable commuting distance.

- Layoffs or plant closings caused by natural disaster are not subject to the advance notice requirement.

29 U.S.C. § 2103.

While the employer in many of these cases is relieved of its responsibility to provide advance notice, it may still need to comply with WARN's notice requirement as soon as layoffs or plant closures are foreseeable.

WARN contains detailed requirements for the contents of the notice that must be sent. 29 C.F.R. § 639.7. Generally the notice must be tailored to specific affected employees, including a timetable for their anticipated layoff. Additional notice may need to be sent to labor unions or employee representatives. The contents of each of these notices is detailed in the regulations enacting WARN. A comprehensive guide for employers is provided at http://www.doleta.gov/layoff/pdf/EmployerWARN09_2003.pdf.

Failure to comply with WARN can result in private actions and may result in an employer being ordered to pay full pay and benefits to each affected employee for a period of up to 60 days, as well as civil penalties of \$500 per day for up to 60 days, payable to the U.S. Treasury, where the employer does not comply with the requirements that it notify state and local governments. 29 U.S.C. § 2104.

B. Older Workers Benefit Protection Act and Severance

The Older Workers Benefit Protection Act (the "OWBPA") applies to both early retirement incentive programs and severance agreements entered into between employers and employees over the age of 40. Waiting periods proscribed by the OWBPA with regard to severance agreements seeking the release of age discrimination claims for an individual employee in an individual discharge are detailed above in section (V)(C)(3). These waiting periods are increased, however, when a release is sought from an employee over the age of 40 in the context of a layoff or exit incentive program. In those cases, the employee must be given at least 45 days (rather than 21 days) to review the agreement, and 7 days following execution of the agreement to revoke it. The employee can waive the full 45-day review period, but the employer must offer the period in conjunction with the agreement and allow the employee to take the full 45 days to review the agreement.

VII. Compensation and Benefits

A. Final Paycheck

An employee is entitled to be paid by the end of the regular pay period for any remaining wages owed. RCW 49.48.010.

B. Commissions and Bonuses

Commissions and regularly accrued bonuses are "wages," which must be paid according to the terms of the applicable policy or plan.

C. Withholding From Final Paycheck

In 2005 the Washington State Department of Labor and Industries adopted new rules restricting deductions from employees' wages. Those rules differentiate between deductions that may be taken only from an employee's **final** paycheck and deductions that may be made on an ongoing basis.

Under the current rules an employer may now take certain deductions from an employee's final paycheck without express prior authorization from the employee.

1. With or Without the Employee's Agreement

The following deductions may be taken from an employee's final wages without the employee's agreement. These deductions are permitted even if they result in the employee receiving less than minimum wage:

- Deductions required by state or federal law;
- Deductions for nonoccupational medical, surgical, or hospital care or service; and
- Deductions to satisfy a court order, judgment, wage attachment or the like.

2. With the Employee's Agreement

The following deductions may be made from an employee's final wages, but only **if specifically agreed to by the employee**. These deductions are permitted even if they result in the employee receiving less than minimum wage:

- Pension, medical, dental or other benefit plan contributions; and
- Payment to a creditor (including the employer) or a third party, so long as the payment is for the benefit of the employee (such as repaying a loan).

3. Other Permissible Deductions If Wages Do Not Fall Below Minimum Wage

The following deductions may be made from an employee's final wages, **but may not reduce them below the minimum wage**:

- Acceptance of a bad check or credit card in violation of procedures previously made known to the employee;
- Cash shortage **if** the employee had sole access to the cash and participated in the cash accounting at the beginning and end of the shift;
- Cash shortage, failure of customer to pay, or breakage or loss of equipment **if** it was caused by "a dishonest or willful act" of the employee; and
- Employee theft **if** it can be shown that the employee intended to deprive **and** the employer filed a police report.

These deductions are **only** permissible for incidents that occurred **during the final pay period**. WAC 296-126-025.

Illegal withholding risks double damages and attorneys' fees. RCW 49.48.030; RCW 49.52.070.

D. Vacation/Sick Leave

If accrued, and not subject to forfeiture upon termination, vacation is generally treated as part of compensation and paid out upon termination. If an employer wants to limit the obligation to pay out vacation time, its policy should be clearly stated to employees (e.g., with a policy that unused vacation is lost or that the maximum payout upon termination of employment will be a certain number of days or hours). In the absence of a written policy, an employer's practice should be consistent and any departure from standard practice should be justified. Generally speaking, accrued, unused sick leave need not be paid out upon termination of employment.

E. COBRA/Medical Insurance Continuation

a. For covered employers, all employees are entitled to COBRA coverage, unless discharged for "gross misconduct."

b. Continuation of medical insurance at the employee's expense is available for up to 18 months, or until the employee becomes covered under another group insurance plan.

c. The employee can be charged no more than 102% of the employer's per-employee cost.

d. The employer must notify the employee of COBRA continuation rights within 30 days of termination, and the employee has 60 days to elect coverage.

F. Unemployment Claims

1. Questionnaire

If the employer responds to the initial inquiry with the suggestion of a discharge for misconduct or a voluntary quit, the Employment Security Department responds with standard questionnaires. These should be answered with extreme care. Inconsistent statements will suggest pretext or other fault.

2. Presumption of Receipt of Benefits

Unemployment compensation provides benefits to any person unemployed through no fault of his or her own. RCW 50.01-.98. Poor job performance is not "fault."

3. Disqualification for Misconduct

If terminated for "misconduct," the employee will be disqualified. The burden is on the employer to prove:

(a) the employer has established a rule or policy that is reasonable under the circumstances of the work;

- (b) the employee's conduct is connected with the work; and
- (c) the employee's conduct violates the rule.

4. Off-Duty Misconduct

If the employee's actions were off-duty, the employer must also prove:

- (a) the conduct has some nexus to the employee's work;
- (b) the conduct results in some harm to the employer's interest; and
- (c) the employee acted with the intent or knowledge that the employer's interest would suffer.

5. Inadmissibility of Determination

The results of any Employment Security Department proceedings are inadmissible in any other proceedings. RCW 50.32.097. Testimony **may** be used, however, as discovery or for impeachment.

G. Employer's Ongoing Rights and Obligations

1. Personnel Files

Washington law gives employees the right to an annual review of their personnel file and the ability to insert rebuttal material in the file. RCW 49.12.240-.260. Former employees retain rebuttal rights for two years after termination. RCW 49.12.250(3).

The statute offers no definition or other guidance of what is a "personnel file." Thus, care must be taken to not include documents in the personnel file to which the employee would not be entitled, such as correspondence with counsel or memos memorializing conversations with counsel.

2. Service Letter

Within 10 days of a request, the employer must give the employee a statement of the reasons for discharge. WAC 296-126-050(3).

3. Ongoing Confidentiality Objections

a. Express Agreement

Common law imposes the duty on the former employee to refrain from appropriating confidential information, but this is extremely difficult to establish without an express agreement.

b. Trade Secrets

If confidential information rises to the level of a trade secret, the employee (and his or her subsequent employer) may be liable for misappropriation. Again, it is difficult to establish misappropriation without an express confidentiality agreement.

c. Notice

Departing employee should be reminded of confidentiality obligations. If a separation agreement is being negotiated, confidentiality pledges can be included.

4. Noncompetition

a. Disfavored

Noncompetition agreements are not presumed as part of the employment relationship, and are not favored. The employer must prove that an express noncompetition agreement was entered into.

b. Enforceable

In Washington, once an express noncompetition agreement is proven, it is fully enforceable to the extent reasonable. If unreasonable, it will be enforced to the extent that would be reasonable.

c. Notice

Again, departing employees should be reminded of their noncompetition obligations. Current Washington law would permit a noncompetition agreement to be included as part of a separation agreement.

APPENDIX A

WAC 162-12-140(3)
Preemployment inquiries.

<http://apps.leg.wa.gov/wac/default.aspx?cite=162-12-140>

The following examples of fair and unfair preemployment inquiries define what is an unfair practice under RCW 49.60.180(4) and 49.60.200. These examples, however, are not all inclusive. All preemployment inquiries that unnecessarily elicit the protected status of a job applicant are prohibited by these statutes irrespective of whether or not the particular inquiry is covered in this regulation.

SUBJECT	FAIR PREEMPLOYMENT INQUIRES	UNFAIR PREEMPLOYMENT INQUIRES
a. Age	Inquiries as to birth date and proof of true age are permitted by RCW 49.44.090.	Any inquiry not in compliance with RCW 49.44.090 that implies a preference for persons under 40 years of age.
<p>(For age discrimination, RCW 49.44.090 must be read in conjunction with RCW 49.60.180 and 49.60.200. RCW 49.44.090 limits age discrimination coverage to persons 40 years of age and older, and makes other limitations and exceptions to the age discrimination law.)</p>		
b. Arrests (see also Convictions)	Because statistical studies regarding arrests have shown a disparate impact on some racial and ethnic minorities, and an arrest by itself is not a reliable indication of criminal behavior, inquiries concerning arrests must include whether charges are still pending, have been dismissed, or led to conviction of a crime involving behavior that would adversely affect job performance, and the arrest occurred within the last ten years. Exempt from this rule are law enforcement agencies and state agencies, school districts, businesses and other organizations that have a direct responsibility for the supervision, care, or treatment of children, mentally ill persons, developmentally disabled persons, or other vulnerable adults. See RCW 43.20A.710; 43.43.830 through 43.43.842 ; and RCW 72.23.035.	Any inquiry that does not meet the requirements for fair preemployment inquiries.
c. Citizenship	Whether applicant is prevented from lawfully becoming employed in this country because of visa or immigration status. Whether applicant can provide proof of a legal right to work in the United States after hire.	Whether applicant is citizen. Requirement before job offer that applicant present birth certificate, naturalization or baptismal divulge applicant's lineage, ancestry, national origin, descent, or birth place.

SUBJECT	FAIR PREEMPLOYMENT INQUIRES	UNFAIR PREEMPLOYMENT INQUIRES
d. Convictions (see also Arrests)	Statistical studies on convictions and imprisonment have shown a disparate impact on some racial and ethnic minority groups. Inquiries concerning convictions (or imprisonment) will be considered to be justified by business necessity if the crimes inquired about relate reasonably to the job duties, and if such convictions (or release from prison) occurred within the last ten years. Law enforcement agencies, state agencies, school districts, businesses and other organizations that have a direct responsibility for the supervision, care, or treatment of children, mentally ill persons, developmentally disabled persons, or other vulnerable adults are exempt from this rule. See RCW 43.20A.710;43.43.830 through43.43.842 ; and RCW 72.23.035.	Inquiries concerning convictions and imprisonment which either do not relate reasonably to job duties or did not occur within the last ten years will not be considered justified by business necessity.
e. Family	Whether applicant can meet specified work schedules or has activities, commitments or responsibilities that may prevent him or her from meeting work attendance requirements.	Specific inquiries concerning spouse, spouse's employment or salary, children, child care arrangements, or dependents.
f. Disability	Whether applicant is able to perform the essential functions of the job for which the applicant is applying, with or without reasonable accommodation. Inquiries as to how the applicant could demonstrate or describe the performance of these specific job functions with or without reasonable accommodation. Note: Employers are encouraged to include a statement on the application form apprising applicants that if they require accommodation to complete the application, testing or interview process, to please contact the employment office, personnel or human resources department or other office as may be able to assist them.	Inquiries about the nature, severity or extent of a disability or whether the applicant requires reasonable accommodation prior to a conditional job offer. Whether applicant has applied for or received worker's compensation. Also any inquiry that is not job related or consistent with business necessity.
g. Height and Weight	Being of a certain height or weight will not be considered to be a job requirement unless the employer can show that all or substantially all employees who fail to meet the requirement would be unable to perform the job in question with reasonable safety and efficiency.	Any inquiry which is not based on actual job requirements and not consistent with business necessity.
h. Marital Status (see also Name and Family)	None.	<input type="checkbox"/> Mr. <input type="checkbox"/> Mrs. <input type="checkbox"/> Miss <input type="checkbox"/> Ms. Whether the applicant is married, single, divorced, separated, engaged, widowed, etc.

SUBJECT	FAIR PREEMPLOYMENT INQUIRES	UNFAIR PREEMPLOYMENT INQUIRES
i. Military	Inquiries concerning education, training, or work experience in the armed forces of the United States.	Type or condition of military discharge. Applicant's experience in military other than U.S. armed forces. Request for discharge papers.
j. Name	Whether applicant has worked for this company or another employer under a different name and, if so, what name. Name under which applicant is known to references if different from present name.	Inquiry into original name where it has been changed by court order or marriage. Inquiries about a name that would divulge marital status, lineage, ancestry, national origin or descent.
k. National Origin	Inquiries into applicant's ability to read, write and speak foreign languages, when such inquiries are based on job requirements.	Inquiries into applicant's lineage, ancestry, national origin, descent, birthplace, or mother tongue. National origin of applicant's parents or spouse.
l. Organizations	Inquiry into organization memberships, excluding any organization the name or character of which indicates the race, color, creed, sex, marital status, religion, or national origin or ancestry of its members.	Requirement that applicant list all organizations, clubs, societies, and lodges to which he or she belongs.
m. Photographs	May be requested <i>after</i> hiring for identification purposes.	Request that applicant submit a photograph, mandatorily or optionally, at any time before hiring.
n. Pregnancy (see also Disability)	Inquiries as to a duration of stay on job or anticipated absences which are made to males and females alike.	All questions as to pregnancy, and medical history concerning pregnancy and related matters.
o. Race or Color	None. See WAC 162-12-150, 162-12-160, and 162-12-170.	Any inquiry concerning race or color of skin, hair, eyes, etc., not specifically permitted by WAC 162-12-150, 162-12-160, and 162-12-170.
p. Relatives	Name of applicant's relatives already employed by this company or by any competitor.	Any other inquiry regarding marital status, identity of one's spouse, or spouse's occupation are considered unfair practices in accordance with WAC 162-12-150.

SUBJECT	FAIR PREEMPLOYMENT INQUIRES	UNFAIR PREEMPLOYMENT INQUIRES
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(While the law does not prohibit company policies governing the employment of relatives, any policy that has the effect of disadvantaging minorities, women, married couples, or other protected classes, would be in violation of the law unless it is shown to serve a necessary business purpose.) See WAC 162-12-150, 162-12-160, and 162-12-170.

q. Religion or Creed	None.	Inquiries concerning applicant's religious preference, denomination, religious affiliations, church, parish, pastor, or religious holidays observed.
r. Residence	Inquiries about address to the extent needed to facilitate contacting the applicant.	Names or relationship of persons with whom applicant resides. Whether applicant owns or rents own home.
s. Sex	None.	Any inquiry concerning gender is prohibited.