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Employment Law in the Colorado Construction Industry

by Jude Biggs

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1. INTRODUCTION

As employees become increasing aware of their rights in the workplace, employers in the construction industry need to be particularly mindful of the legal and practical pitfalls inherent in their hiring and firing decisions. Federal and state statutes regulate almost every aspect of the employment relationship. In addition, Colorado common law has expanded to a great extent in the last decade, providing more grounds on which employees may sue. Although there are many potential legal pitfalls or challenges for employers to consider, if employers keep in mind a few key rules when hiring and firing employees, they may avert many legal challenges or, at least, defend against them more successfully. The general types of claims described below are not exhaustive, but they provide a good starting point.

2. TRADITIONAL EMPLOYMENT-AT-WILL IN COLORADO

The traditional rule in Colorado is that, absent an agreement stating otherwise, the relationship between an employer and employee is "at-will", meaning that, absent a specific term of employment, either the employer or the employee may terminate the employment relationship at any time with or without notice or cause. *Continental AirLines, Inc. v. Keenan,* 731 P.2d 708, 710 (Colo. 1987); *Justice v. Stanley Aviation Corp.*, 530 P.2d 984, 986 (1974), *cert. denied* (Feb. 3, 1975). Obviously, this doctrine provides both the employer and employee great flexibility.

Over the last decade, Colorado has recognized several exceptions to the "at-will" doctrine, permitting employees to sue on a variety of theories of "wrongful discharge." Wrongful discharge claims most often are brought on theories of breach of an express or an implied contract, promissory estoppel, or discharge in violation calf public policy claims. Under contract or promissory estoppel theories, former employees may claim that they entered into an employment agreement with their employer which their former employer breached or that their employer made promises to them which it did not keep when it discharged the employee.

As evidence of these alleged promises, employees often point to employee handbooks or employment applications or other written policy manuals. In some instances, former employees may allege that they were wrongfully discharged in violation of public policy, because they refused to do something illegal on the employer's behalf. In addition, they may allege other tort claims, such as intentional infliction of emotional distress or misrepresentation.

It is important to understand that, although the "at-will" doctrine has not been completely supplanted by a "for cause" standard, it is difficult for employers to defend wrongful discharge suits on the theory that they were free to let the employee go without cause. Jurors tend not to be sympathetic to an employer that discharged a good employee as a mere exercise of its "at-will" right. Therefore, as a practical matter, the employer must be ready to prove that it
had sound business reasons for terminating the employee.

2.1 Implied Contract and Promissory Estoppel Claims

Colorado courts have recognized two exceptions to the employment at-will doctrine:

1. Wrongful discharge claims alleging breach of an implied contract or on a theory of promissory estoppel; and
2. Claims for wrongful discharge in violation of public policy (a tort claim).

In *Colorado Air Lines, Inc. v. Keenan*, the Colorado Supreme Court held that the presumption of at-will employment is rebuttable under certain circumstances, particularly when an employer promulgates termination policies that suggest the employee is not employed at the will of the company. 731 P.2d at 711. In the wake of *Keenan*, countless employees have sued their former employers under a theory of breach of contract for allegedly failing to follow a employee termination (or other) policy. According to the *Keenan* decision, an employee may pursue relief under two possible theories: an implied contract or promissory estoppel. Under the implied contract: theory, an employee normally claims to be entitled to relief because the employer, by promulgating certain termination procedures, allegedly was making an offer to the employee of

continuing employment, and the employee's initial or continued employment constituted an acceptance of and consideration of those procedures. Alternatively, under a promissory estoppel theory, an employee may be entitled to relief if he or she can demonstrate that the employee reasonably should have expected the employee to consider the employee termination policy as a commitment from the employer to follow the termination procedures, that the employer reasonably relied on the termination procedures to his or her detriment, and that injustice can be avoided only by enforcement of the termination procedures. *Id.* at 711-12. As a result, it is vital for Colorado employers to review the wording of their employee handbooks to avoid mandatory language implying that a certain procedure must be followed or that any reason must exist before termination can occur. Likewise, it is important to delete other references that imply that an employee is not employed at the will of the company, such as referring to employees as "permanent."

Generally Colorado's three-year statute of limitations applies to such claims. Colo. Rev. Stat. § 13-80-101. In addition, recoverable damages include lost pay and, in cases involving a willful breach, emotional distress damages. *Decker v. Browning-Ferris Indus. of Solo., Inc.*, 931 P.2d 436, 447 (Colo. 1997).

One of the best defenses against an implied contract/promissory estoppel type of wrongful discharge claim is an express, written disclaimer stating that the employee handbook, and any other statements by the employer, do not change the employee's at-will status. Such clear and conspicuous disclaimers can show that an employer did not intend to create a contract, and that the employee could not reasonably rely on statements of the employer as an enforceable contract or promise. *See, e.g., Healion v. Great-West Life Insurance Co.*, 830 F. Supp. 1372, 1375 (D. Colo. 1993); *Ferrera v. Nielsen,* 799 P.2d 458, 461 (Colo. App. 1990). Carefully drafted handbooks that expressly state that the handbook policies are not intended to create an employment agreement and that expressly reserve the right of the employer to modify or rescind any policy are critical to preserving the at-will status of employees. Such disclaimers—which should be set forth in a conspicuous way, preferably in bold print at the beginning of the handbook-should

not only be used in handbooks, but also in policy manuals or other employment related policy statements. In addition, it is helpful to insert such a statement on application forms, and vital to have an employee sign an acknowledgment form repeating the disclaimer language of the employee handbook, at the time that the employee receives a copy of the handbook.

2.2 Tort Claims for Wrongful Termination Against Public Policy

The Colorado Supreme Court adopted the public policy exception to the at-will doctrine in *Martin Marietta Corp. v. Lorenz*, 823 P.2d 100, 108 (Colo. 1992). In so ruling, the Court held that the employee may be entitled to relief from a discharge if he or she can show that:

1. The employer directed the employee to perform an illegal act as part of the employee's work-related duties or prohibited the employee from performing a public duty or exercising an important job-related right or privilege;
2. The action directed by the employer would violate a specific statute relating to the public health, safety, or welfare, or would undermine a clearly expressed public policy relating to the employee's right or privilege as a worker; and
3. The employee was terminated as the result of refusing to perform the act directed by the employer.

Id. at 109. In the construction industry, such claims may arise when an employee says that he or she was fired for refusing to do something fraudulent or of a criminal nature.

Public policy types of claims also may arise when a former employee alleges that he or she was fired in retaliation for filing a workers compensation claim, or for jury duty.

Such claims are tort claims, subject to Colorado's two-year statute of limitations. Colo. Rev. Stat. § 13-80-102. . In addition, a successful plaintiff may recover lost pay, emotional distress and punitive damages.

Colorado also by statute prohibits employers from retaliating against employees for performing their obligations as jurors. Colo. Rev. Stat. § 13-71-134. An employer's willful violation of the statute may result in treble damages, and is a Class II Misdemeanor.

2.3 Breach of Implied or Express Covenant of Good Faith and Fair Dealing

Colorado courts consistently have rejected wrongful discharge claims brought under a theory of breach of an implied covenant of good faith and fair dealing. *See, e.g., Decker, 931 P.2d at 446; Farmer v. Central Bancorporation, Inc.,* 761 P.2d 220, 221-22 (Colo. App.), *cert. denied*. (Sept. 6, 1988).

Although the law is not clear, express promises of fair treatment, however, might give rise to a claim for breach of an express covenant of good faith and fair dealing in certain employment situations. *See, e.g., Decker,* 931 P.2d at 446[2] ; *Stahl v. Sun Microsystems, Inc.,* 19 F.3d 533, 536 (10th Cir. 1994). Therefore, although it may sound cynical, employers should train their supervisors **to be fair, but not to promise to be fair.**

Although no Colorado appellate court has addressed whether written disclaimers may bar claims for breach of an express covenant of good faith and fair dealing, the claim is a contract-like claim. *Decker*, 931 P.2d at 446. As a result, the claims should be barred where an express statement disclaims any intent to change the employees' "at-will" status. *See McFarland v. Bank One Colorado,* Civ. Ac. No. 97-S-3239 (D. Colo., Memorandum Opinion and Order dated Dec. 30, 1997) (discharged bank employees' claims for breach of implied contract, promissory estoppel and breach of covenant of good faith and fair dealing based on handbook statement that bank would treat employees "in good faith, fairly and evenhandedly" barred by three disclaimers plaintiff had signed acknowledging his at-will status); *Madrid v. Battle Mountain Gold Mine,* Civ. Ac. No. 97-N-476 (D. Colo., Order and Memorandum of Decision dated November 24, 1997) (disclaimer and handbook barred Plaintiff from enforcing supervisor's statement that company would "take care of" salaried employees). Other states have recognized that disclaimers bar such claims. *Rawlings v. Riverside Med. Ctr.,* 1995 WL 352916 (Minn. App. 1995:). As a result, wise employers should state in their disclaimers that statements of fair treatment are a goal only, and not enforceable as a contract or covenant, and they should raise the disclaimer as a defense against any such claim.

[7] A number of former employees argue that Colorado recognized a claim for wrongful discharge in breach of an "express covenant" of good faith and fair dealing" in *Decker v. Browning-Ferris Industries,* 931 P.2d 436 (Colo. 1997). However, Colorado employers may argue to the contrary, as, in *Decker*, the parties submitted to the jury the issue of whether the company had breached

In addition, a number of Colorado cases indicate that vague statements concerning fair treatment are unenforceable "vague assurances." *See Soderlun v. Public Service Co.*, 944 P.2d 621-623 (Colo. App. 1997), *cert. denied* (Oct. 20, 1997) (affirming dismissal of plaintiffs' wrongful discharge claims based on company code of conduct concerning fairness and trustworthiness; statement too indefinite to support wrongful discharge claims and plaintiffs could not have reasonably relied upon such statements, as a matter of law); *McFarland, supra*, (handbook statements that bank would treat employees "in good faith, fairly, and evenhandedly" were mere unenforceable, vague assurances or descriptions of general policies); *Madrid, supra* (supervisor's statement that company would "take care of" salaried employees, statement in code of business conduct that company would comply with applicable laws, were mere unenforceable vague assurances); *George v. Ute Water Conservancy Dist.,* 950 P.2d 1195, 1199 (Colo. App. 1997) (statement that employee handbook was to "promote fair and equitable standards for all employees" and that supervisor was to maintain "fair and equitable treatment for all employees" was too vague); *Schur,* 878 P.2d at 55 (promise of fair treatment in handbook did not alter at-will nature of employment nor create a contract claim); *see* also *Vasey v. Martin-Marietta Corp,* 29 F.3d 1460, 1466 n.2 (10th Cir. 1994) (court rejected express covenant claim; employer statements of fair treatment were unenforceable, vague assurances); *Dupree v. United Parcel Serv. Inc.*, 956 F.2d 219, 222 (10th Cir. 1992) (handbook provisions containing general commitments to fair and equal treatment insufficient).

2.4 Statute of Frauds

Often, discharged employees claim that oral promises were made to them guaranteeing job security. Employers should raise the defense of the "statute of frauds," as an alleged employment contract guaranteeing more than one year's employment must b in writing to satisfy the Colorado statute of frauds. *See* Colo. Rev. Stat. § 38-10-112(1)(a); *but see Pickell v. Arizona Components Co.,* 902 P.2d 392, 396 (Colo. App. 1994) (holding statute did not apply under facts alleged), *rev'd on other grounds*, 931 P.2d 1184, 1186 (Colo. 1997).

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an express covenant of good faith and fair dealing; however, the company apparently merely had objected to the claim being submitted as a tort claim, rather than a contract claim. See *Id.* at 440. The Supreme Court held that in the context of the issues presented by the parties, a claim for wrongful discharge in breach of an express covenant of good faith and fair dealing is a contract claim, not a tort claim. *Id.* at 443. It is important to understand, however, that the *Decker*

3. TORTIOUS INTERFERENCE WITH CONTRACT CLAIMS AGAINST INDIVIDUAL SUPERVISORS

Many employees not only *see* their employer for wrongful discharge, but also will sue an individual supervisor, in essence, for the same discharge, on a theory of tortious interference with contract. To state such a claim, an employee must prove that a valid contract existed between the employee and his or her employer; that the supervisor knew or should have known of this contract; that the supervisor intended to induce and caused a breach of the contract by the employer; and that the employee was damaged as a result. *Trimble v. City and County of Denver,* 697 P.2d 716, 725-26 (Colo. 1985). In one Colorado case, an employee was allowed to sue an individual supervisor under this theory for conduct that amounted to sexual discrimination. *See Brooke v. Restaurant Servs. Inc.*, 906 P.2d 66, 68-70 (Colo. 1995).

In general, an officer or supervisor acting within the scope of his or her official duties is not liable under such a theory, unless the former employee can prove that the individual was motivated solely by a desire to induce the corporation to breach its contract with the employee. *Cronk v. Intermountain Rural Elec. Assn'n,* 765 P.2d 619, 623 (Colo. App. 1988). As a result, wise employers emphasize the work-related reasons for any discipline or discharge, and avoid taking action for purely personal reasons.

4. DEFAMATION AND REFERENCE CHECKS

Defamation is a common law tort based on the alleged publication of false or derogatory statements about a person. If an employer makes a false statement of fact about an employee, which tends to injure the employee's reputation, and that statement is published to a third person, the employee may state a claim for defamation. False statements about a person's ability to perform his or her jobs are *pro se* defamatory, which means that damages are presumed. Libel pertains to written statements, *Continental Cas. Co. v. Southwestern Bell Tel. Co.*, 860 F.2d 970, 976 (10th Cir. 1988), and slander, to oral statements. *Pittman v. Larson Distrib. Co.,* 724 P.2d 1379, 1387 (Colo. App. 1986).

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court was not asked to address, and never directly addressed, whether such a claim exists in the at-will employment context in the first place. Further, thereafter the Court refused to review the Court of Appeal's *Soderlun* decision, which held promises of fair treatment unenforceable. *See Soderlun v. Public Service Co*, 944 P.2d 621-23 (Colo. App. 1997), *cert. denied*, (Oct. 20, 1997). In addition, the Supreme Court has explained in an even more recent case that Colorado recognizes

Defamation is a particular risk whenever an employer makes statements about an employee. For instance, employee performance evaluations, job references and statements to co-workers about another employee's termination all may set the stage for potential defamation claims. There are, however, a number of defense available to employers.

Truth is an absolute defense. *Lindermuth v. Jefferson County Sch. Dist. R-1,* 765 P.2d 1057, 1058 (Colo. App. 1988). However, in the employment context, truth can be a difficult defense to prove. For instance, it is difficult to prove that an employee was "dishonest" or that he or she "falsified a time record."

The qualified privilege defense is a more accessible and often more appropriate defense. The qualified privilege protects an employer's negative remarks about an employee, with certain limitations. *Churchey v. Adolph Coors Co.,* 759 P.2d 1336, 1346 (Colo. 1988). The employer must have a legitimate interest in the subject of the statement; the statements can only be made to others having a legitimate interest in the subject matter; and the employer's statement must be made in good faith and without malice. The privilege can be lost if an employer abuses it. For instance,if an employer widely publishes the reasons why an employee was firedto co-workers who have no need to know, the employer might be deemed to have exceeded the scope of the privilege. *See Borrquez v. Robert C. Ozer,* 923 P.2d 166, 175-76 (Colo. App. 1995), *rev'd in part on other grounds*, 940 P.2d 371, 377 (Colo. 1997)

In Colorado, a Colorado statute protects employers to some extent when giving references about former employees. Colo. Rev. Stat. § 8-2-114(2). Under that statute, a Colorado employer that provides fair and unbiased information about a current or former employee's job performance is presumed to be acting in good faith and is immune from civil liability for such disclosure and the consequences of such disclosure. The presumption of good faith may be rebutted upon a showing by a preponderance of the evidence that the information disclosed was knowingly false, deliberately misleading, disclosed for a malicious purpose, or

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two exceptions to at-will employment, wrongful discharge in breach of an implied contract and wrongful discharge in violation of public policy. See *Crawford Rehabilitation Services, Inc. v. Weissman*, 938 P.2d 540, 547 (Colo. 1997).

violative of a civil right of the employee. An employer that provides written information to a prospective employer about a current or former employee must send a copy of the information to the last known address of the person who is the subject of the reference. *Id.*

Although this statute provides some protection for employers, the issues of what may be considered "fair and unbiased information" and "acting in good faith" are fact issues that often must be decided by a jury. As a result, the safest approach is to have a waiver and release form signed by the employee, releasing both the prospective employer and former employer from any liability for requesting or providing references.

5. INVASION OF PRIVACY CLAIMS

A defamation claim, by definition, involves false statements by an employer about an employee or former employee. By contrast, an employer may get into hot water if the statements are true, place the person in a bad light, and the publication was made with actual malice. In that case, sometimes an employee may sue under the tort of invasion of privacy.

In many states, the right of privacy may be invaded in four different ways:

1. Unreasonable intrusion upon the seclusion of another;
2. Appropriation of another's name or likeness;
3. Unreasonable publicity given to another's private life; and
4. Publicity that unreasonably places another in a false light before the public (a "kissing cousin" of a defamation claim). *Borquez,* 940 P.2d at 377 (citing cases).

In 1997, in *Borquez,* the Colorado Supreme Court recognized a claim for invasion of privacy based on unreasonable publicity concerning an employee's private life. *Id.* To prevail on such a claim, a party must meet the following requirements:

1. The fact or facts disclosed must be private in nature;
2. The disclosure must be to the public;
3. The disclosure must be one which would be highly offensive

4. The fact or facts disclosed cannot be of legitimate concern to the public; and
5. The party who made the disclosure acted with reckless disregard of the private nature of the fact or facts. *Id.*

In the *Borquez* case, the Colorado Supreme Court held that a plaintiff may prevail only if the employer had disclosed private information to a large number of persons or the general public. Nonetheless, employers should still proceed with caution, because the Court noted that public disclosure may occur when an individual merely initiates a process whereby the information is eventually disclosed to a large number of persons. *Id.* at 377 & n.7. As a result, the familiar rule of disclosing private information only to those with a need to know the information still applies.

In July 1998, the Colorado Court of Appeals recognized an invasion of privacy claim based on a theory of unreasonable intrusion upon seclusion. In that case, a student in a medical assistant training program told his supervisor that he had tested positive for HIV, and asked that the information be treated as confidential. Later that month, the instructor told all students in the class that they would be required to be tested for rubella by means of a blood test. The student signed a consent form for the blood test after being reassured by the instruction that the sample wold be tested only for rubella. However, the instructor requested that the laboratory also test for HIV, although the instructor did not request such a test for any other student.

The Colorado Court of Appeals held that the student was entitled to recover on two theories: one resulting from the unreasonable dissemination of private information, and the other from improper intrusion upon seclusion.

To recover for invasion of privacy based on a theory of unreasonable intrusion upon seclusion, an individual must show that:

1. Another person has intentionally intruded, physically or otherwise, upon the individual's seclusion or solitude; and
2. Such intrusion would be offensive or objectionable to a reasonable person

Intrusion upon private physical space is not always necessary; for instance, when one intrudes upon information concerning a person's health, there may be such a claim. The key is whether the intrusion was unwarranted or offensive under the circumstances. *Doe v. High Tech Institute, Inc., Cambridge College,* Case No. 97-CA-0385 (Colo. App. 1998).

Although the *Doe* case did not involve an employment situation, Colorado employers, particularly those who do drug testing, ought to beware. First, the employer should be sure that a drug test is limited to discovering only information that the employer need to know. Second, the employer should make sure that the test and consent form is specific enough that the employees know for what substances the sample will be tested. Finally, the employer should make sure that the test results are kept confidential and are not shared with those who have no need to know about them.

6. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS (OUTRAGEOUS CONDUCT)

To establish a claim for intentional infliction of emotional distress under Colorado law, an employee must allege conduct that is so "outrageous in character, and so extreme in degree, as to be beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." *Grandchamp v. United Air Lines, Inc.*, 854 F.2d 381, 383 (10th Cir. 1988) (internal citations omitted), *cert. denied*, 489 U.S. 1080 (1989). Generally, courts in Colorado have refused to find that ordinary, adverse employment actions constitute outrageous conduct. *See Covert v. Allen Group, Inc.,* 597 F. Supp. 1268, 1270 (D. Colo. 1984) (no outrageous conduct for refusing to honor promise to employees); *Salimi v. Farmers Ins. Group,* 684 P.2d 264, 265 (Colo. App. 1994) (demotion in violation of policy and procedural manual not outrageous conduct); *Gelman v. Department of Educ.,* 544 F. Supp. 651, 653 (D. Colo. 1982) (breach of contract and disability discrimination not outrageous conduct).

7. MISREPRESENTATION

Colorado courts do not recognize an independent tort action for negligent or intentional misrepresentation based on alleged employment contract obligations. *See, e.g., Centennial Square, Ltd. v. Resolution Trust Co.,* 815 P.2d 1002, 1004 (Colo. App. 1991); *Bloomfield Fin. Corp. v. National Home Life Assurance Co.,* 734 F.2d 1408, 1414-15 (10th Cir. 1984). Nonetheless, statements made by an employer, particularly in the pre-hire situation where an employee is induced to accept a new job, may provide the basis for tort, contract or statutory types of claims. *See, e.g., Berger v. Security Pac. Info. Sys.,* 795 P.2d 1380, 1384 (Colo. App. 1990) (employer's failure to disclose known risk that job would soon be discontinued supported claim for fraudulent concealment); *Pickell*, 931 P.2d at 1186 (reinstating trial court's judgment that employer's representations created a term of employment, giving rise to plaintiff's promissory estoppel claim); Colo. Rev. Stat. § 8-2-104.

8. COLORADO WHISTLEBLOWER ACT

Colo. Rev. Stat. § 24-50.5-103 prohibits retaliation against a state employee for reporting a state employer's illegal conduct. Relief is limited to reinstatement and back pay. Colorado also extends the same protection to employees of private enterprises under contract with the state. Colo. Rev. Stat. § 24-114-102.

9. LAWFUL OFFSITE CONDUCT

Colo. Rev. Stat. § 24-34-402.5, popularly referred to as the "smoker's rights" statute, makes it a discriminatory practice for employers to terminate an employee due to the employee's involvement in any off-duty, off-premises lawful activity, unless the restriction relates to a bona fide occupational requirement or is reasonably and rationally related to job performance or is necessary to avoid a conflict of interest. While initially conceived to protect smokers, outspoken advocates of unpopular causes, and persons who failed drug tests due to their off-duty use of alcohol or prescription drugs, the statute has been used to protect other kinds of conduct. *See Borquez,* 940 P.2d at 376 & n.6 (reversing court of appeals for relying on lawful activities statute not submitted to jury, but expressing no opinion on cognizability of claim).

An employee may sue under this statute for wages and benefits that would have been due him up to and including the date of judgment had the discriminatory practice not occurred and, in addition, may recover costs and reasonably attorneys' fees.

10. RIGHT TO MARRY

An employer's refusal to hire or discharge a person solely because that person is married or plans to marry another employee of the same employer is considered a discriminatory or unfair employment practice under Colorado statute. Colo. Rev. Stat. § 24-34-402(1)(h)(1). There are, however, three exceptions: if one spouse has a supervisory role over the other; if one spouse is entrusted with monies received or handled by the other spouse; or if one spouse has access to the employer's confidential information, including payroll and personnel records. C.R.S. § 24-34-402(1)(h)(II)).

11. ANTI-DISCRIMINATION AND ANTI-RETALIATION CLAIMS

Some of the most often litigated claims arise under statutes that prescribe discrimination against "protected class" members. Adverse employment decisions based on a person's race, ethnicity, color, gender, marital status, religion, age, disability, lawful off-duty conduct, or veteran status are unlawful under federal and/or state law. *See* Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, 42 U.S.C. § 2000e *et seq.*; the Age Discrimination and Employment Act, 29 U.S.C. § 621 *et seq.*; the Americans With Disabilities Act, 42 U.S.C. § 12101 *et seq.*; 42 U.S.C. § 1981; Vietnam-Era Veteran's Readjustment Assistance Act of 1974; Colo. Rev. Stat. §§ 24-34-402, 24-34-402.5.

In Colorado, it is a discriminatory practice for an employer to refuse to hire, to discharge, to promote or demote, or to discriminate in matters of compensation against any person otherwise qualified because of disability, race, creed, color, sex, age, national origin or ancestry. Colo. Rev. Stat. § 24-34-402(1)(a). What is important to understand, however, is that, depending on the circumstances, nearly every employee can claim protected class status on some basis.

Employers should note there are two theories of liability under discrimination laws; disparate treatment and disparate impact. Disparate treatment liability arises due to intentional discrimination, when an employee has been treated adversely because of his or her protected class status. Disparate impact (unintentional discrimination) arises when an employer's neutral policy places a greater burden or adversely affects a protected class. *Griggs v. Duke Power Co.,* 401 U.S. 424, 429-32 (1971). As a result, it is important to implement hiring and firing policies that treat employees evenhandedly, and that do not have a disproportionate effect on protected class members.

Discrimination issues arise frequently in the hiring context, and employers must be bindful to focus their hiring questions on a person's ability to do the job, not the protected class characteristic. The following sections summarize some of the more common issues.

11.1. Age, Date of Birth Discrimination

Normally, pre-employment questions about a prospective employee's age or date of birth are inappropriate under the Age Discrimination in Employment Act (ADEA) and Colo. Rev. Stat. § 24-34-402, which protect employees who are age forty or older against age-based discrimination. It is permissible to ask for an applicant to disclose his or her age if the employees appears to be under eighteen years of age and age is a bona fide occupational qualification. In addition, if an employer needs an employee's date of birth for administrative reasons (such as for pension purposes), this information may be obtained after the person is hired.

11.2. Race, Religion, National Origin Discrimination

Title VII of the Civil Rights Act and Colorado's Anti-Discrimination Statute (Colo. Rev. Stat. § 24-34-402) prohibit discrimination based on race, religion and National origin. Questions relating to a person's race, ethnicity, or religion are invitations to discrimination claims. Indeed, a requirement that an applicant furnish a picture has been used to support a claim for race discrimination, when the employee proved the photograph was required so the employer could identify minority applicants. *Colorado Anti-Discrimination Comm'n. v. Continental Air Lines, Inc.*, 372 U.S. 714, 716 n.2, 721

(1963). Employers should also be wary of qualifications that may *see*m race-neutral, but may have a disparate impact on certain groups. For instance, one court has ruled that a no-beard policy may have an unlawful disparate impact on African-American males. *EEOC v. Trailways, Inc.,* 530 F. Supp. 54, 59 (D. Colo. 1981). Religious discrimination claims arise often in the context of an employee scheduling time off or requesting to wear religious garb. Title VII requires that employers make at least a minimal reasonable accommodation for such requests, unless the accommodation would impose an undue hardship. 42 U.S.C. § 2000e(j).

11.3. Physical Traits, Disability Discrimination

The ADA and Colo. Rev. Stat. § 24-34-402 prohibit disability-based discrimination. Of particular importance to construction employers, the ADA limits the kinds of medical examinations and inquiries an employer may conduct before an employee is hired. At the pre-offer stage, employers may not ask any questions about disabilities, including questions about how the employee became disabled, the prognosis for the disability, or how often the applicant would require leave for treatment for a disability. Employers may, however, ask questions about an applicants' ability to perform job-related functions, including the applicant's ability to meet attendance requirements. Physical agility tests may be administered as long they are given to all Similarly situated applicants for the position. *EEOC Compliance Manual* ¶ 3706 (1995); *see also* 42 U.S.C. § 12112(b).

An employer may not requite a medical exam until after making a job offer, contingent on the results of the examination. The examination must be given to all entering employees in that particular job category, regardless of whether they have a disability. If a job offer is withdrawn because of the examination results, the employer must be able to show that the examination criteria are necessary to performing the job and that the applicant could not perform the job even with reasonable accommodation. *Colorado Civil Rights C'omm'n v. North Washington Fire Protection Dist.,* 772 P.2d 70, 75-76 (Colo. 1989). All medical information should be kept in a separate file and treated as confidential. *See United*

States v. Westinghouse Elec. Corp., 638 F.2d 570, 577-80 (3d Cir. 1980). Supervisors may be informed of necessary restrictions or accommodations. *See Id.* at 579.

Colo. Rev. Stat. § 10-3-1104.5 provides that no person can require an applicant to \submit to an HIV-related test without written informed consent. In addition, no person can disclose HIV-related test results without obtaining separate, written informed consent.

In addition to potentially offensive questions, employers should be careful about job requirements that disparately impact protected class members, such as height and weight requirements.

11.4. Sex, Marital and Family Status

Questions about an applicant's marital and family status tend to have very little relevance to the central functions of a job, and are viewed with suspicion. Questions concerning child-care arrangements are generally improper, and suggest sex discrimination. Personal questions about an applicant's intentions as to childbearing are similarly improper. If there are workplace dangers that might affect an individual's Fertility, an employer should warn the applicant of the potential danger, but leave the decision to that person. If information about a person's gender, martial status, and family status is needed for benefit or tax purposes, it may be obtained after the applicant has been hired.

Employers should note that Colorado specifically prohibits an employer from discharging or refusing to hire a person solely on the basis that the person is married to or plans to marry another employee of the employer, with certain exceptions. Colo. Rev. Stat. § 24-34-402(1)(h).

A subset of gender discrimination is sexual harassment, which is also prohibited by Title VII. Conduct that may constitute sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other sexual verbal or physical conduct. In any industry, sexual harassment is especially problematic if the offending behavior is done by a supervisor. Now, according to a recent United States Supreme Court decision, if an employee can show that he or she suffered a tangible employment action because of a

supervisor's sexually harassing conduct, then the employer will be strictly liable for the harassment. *See Burlington Industries, Inc. v. Ellert,* 118 S.Ct. 2257 (1998). Tangible employment action includes firing, demotion, reducing an employee's compensation, withholding raises or promotions, reassigning the employee with significantly different job responsibilities or reducing job responsibilities, changing benefits significantly and diminishing a job title.

If no adverse employment action has been taken, an employer may not be liable if:

1. The employer exercised reasonable care to prevent and correct promptly the sexually harassing behavior; and
2. The employee failed to take advantage of the preventive and corrective procedures.

An employer may be liable for its supervisors' conduct, even though it was unaware of the existence of the sexually harassing conduct. *See Faragher v. City of Boca Raton,* 118 S.Ct. 2275 (1998) (city was liable for the sexually harassing conduct of its supervisors where officials had not disseminated its policy on sexual harassment among employees and officials did not keep track of the conduct of their supervisors). Thus, employers should develop sexual harassment policies and make sure they are distributed to all employees. When a complaint is made, an immediate investigation must be conducted, and, if necessary, correction action must be taken.

In another recent Supreme Court decision, Title VII's prohibition against sexual harassment in the workplace was held to apply even when the harasser and the harassed employer were of the same sex. *Oncale v. Sundowner Offshore Services, Inc.,* 118 S.Ct. 998 (1998). In *Oncale*, the Court struggled to emphasize that Title VII does not prohibit all verbal or physical harassment between employees; rather, it is specifically limited to discrimination that occurs "because of . . . sex." Further, the Court held that the prohibition of harassment on the basis of sex "requires neither asexuality nor androgyny in the workplace; it forbids only behavior so **objectively offensive** as to alter the 'conditions' of the victim's employment." *Id.* at 1003 (emphasis added). The

Court's opinion does not provide much guidance to employers regarding the contours of a same-sex sexual harassment claim, suggesting only that the severity and the pervasiveness of the conduct, with "appropriate sensitivity to social context," will help courts and juries distinguish between simple teasing or roughhousing and discrimination. *Id.* The Court has essentially left the work of defining the standards to the lower courts.

11.5 Arrest, Conviction Records

EEOC, the federal agency charged with enforcing the federal anti-discrimination laws, takes the position that questions concerning arrests are improper unless the applicant is being considered for a "security-sensitive" job and the employer does an investigation to determine, in effect, whether the applicant likely committed the crime for which he or she was arrested. *EEOC Compliance Manual* 2088. The EEOC guidelines also provide that questions about an applicant's conviction record are improper unless the employer can show that the convictions in some way related to the position being applied for. *Id.* The reasoning behind the EEOC's position is based on statistics which show that certain minorities are arrested and convicted at considerably higher rates than non-minorities.

As a practical matter, many Colorado employers inquire about convictions, for safety reasons. If so, it is important to follow the strict procedures provided in the Fair Credit Reporting Act, as amended in October 1997, which require a separate consent by the applicant (separate from any consent on an application form), and notice before an adverse action is taken. See 15 U.S.C. §§ 1681b(b), 1681k.

11.6 Garnishment.

Questions concerning whether an applicant has been the subject of garnishment proceedings should be eliminated from application forms and job interviews, as the relevance of such questions to an employee's ability to perform a job is not apparent and reliance on them may be discriminatory.

11.7 Citizenship

The anti-discrimination provision of the Immigration Reform and Control Act provides that an employer cannot discriminate against

non-U.S. citizens, 8 U.S.C. § 1324b(a). With certain limited exceptions, private employers cannot preclude lawful aliens from their work force. Inquiries about an applicant's citizenship should be deleted from employment applications, although it is proper to ask whether an applicant may lawfully work in the U.S.

11.8 Immigration Reform and Control Act

The Immigration Reform and Control Act prohibits the employment of "unauthorized aliens," penalizing employers who hire them and requiring all employers to check whether each of their employees is legally entitled to work. 8 U.S.C. § 1324a(a). The law requires every employer to verify the employment eligibility and identity of every employee. Once an employee is hired, the INS Form I-9 must be completed by the employee and employer. In addition, the employee must provide certain documentation or documents that establish his or her identify and employment eligibility. The employer should review the documents to make sure that they ppear to be genuine and relate to the individual. *Id.* § 1324a(b). Employers should maintain I-9 Forms and related documents in a separate file to avoid claims of discrimination based on national origin.

11.9 Other Problem Areas

If a question does not specifically relate to a job requirement of a position, an employer should check why it is making such an inquiry. If there is some business justification for *see*king the information, an employer should evaluate that need against the potential for discrimination claims. Employers who have homogenous, predominately white work forces should be careful about giving preference to applicants who have friends and families who already work for the same employer, to avoid claims of race discrimination. Questions concerning credit ratings or credit references have been found to be discriminatory against minorities and women. While questions about military experience or training are permissible, questions about the type or circumstances of a person's discharge are not appropriate.

It is important to keep in mind that questions that should not be asked on applications, likewise should not be asked during an interview.

12. FEDERAL AND STATE WAGE ACTS

Under the Fair Labor Standards Act, employers are required to pay covered employees a certain minimum hourly wage, currently $5.15 per hour. In addition to minimum wages, covered employees working over 40 hours per week are entitled to overtime page of at least time and a half; that is, at least one and one-half times the covered employee's regular hourly wage rate. Outside sales people, executive, administrative and professional employees are exempt from the minimum wage and overtime provisions of the Fair Labor Standards Act. 29 U.S.C. §§ 206, 207, 213. Construction enterprises are covered under the Fair Labor Standards Act if they have an annual volume of business of at least $500,000. 29 U.S.C. § 203(s)(1)(A). However, an enterprise need not be engaged exclusively or primarily in the construction business to be covered by the provisions. *Ferguson v. Neighborhood Housing Services, Inc.,* 780 F.2d 549 (6th Cir. 1986).

The Fair Labor Standards Act also sets minimum age standards for allowing children to work. Under the law, most cannot work before age 16, with 18 being the minimum age for hazardous jobs. Children between the ages of 14 and 16 may work at certain types of jobs that do not interfere with their health, education, or well-being. 29 U.S.C. §§ 203(1), 213(c), 214(b). *See also* Colo. Rev. Stat. § 8-12-108 (listing permissible occupations for children 14 and older).

Construction industry employers contracting with the federal government or the District of Columbia must comply with standards regulating minimum wages and overtime pay. For example, construction industry employers must agree to pay "prevailing wages" to their employees in order to secure a public contract. These contracts may be subject to the Walsh-Healy Act, Davis-Bacon Act, or the Service Contracts Act.

The Colorado Wage Claim Act governs when and how wages are to be paid. *See* Colo. Rev. Stat. §§ 8-4-101 to 8-4-126. Generally, wages must be paid on regularly scheduled paydays. Id. § 8-4-105. In addition, when an employee is terminated, he or she should receive payment for all wages earned as of that date on the date of termination; if the employer's accounting unit

is not operational at that time, wages are due not more than six hours after the start of the next workday. *Id.* § 8-4-104(1). If the employee resigns, wages are due on the next payday. *Id.* Failure to pay wages at termination may result in not only liability for the wages due, but also a 50% penalty and attorneys' fees. *Id.* §§ 8-4-104(3), 8-4-114.

13. OSHA

In 1970, President Nixon signed the Occupational Safety and Health Act into law, attempting to assure safe and healthful working conditions for all employees. 29 U.S.C.A. § 651(b). The Act basically imposes two requirements on employers under Section 5(a) of the Act. First, an employer must comply with all of the safety and health standards dictated by the Department of Labor, generally called "compliance" requirements. *Id.* § 654(a)(2). Second, the employer must furnish its employees with a place of employment that is "free from recognized hazards that are causing or are likely to cause death or serious physical harm." *Id.* § 654(a)(1). This second, broad requirement is called the "general duty" clause.

Specific compliance standards apply to the construction industry. *See* 29 CFR 1926. For example, the Secretary of Labor promulgates safety and health standards on issues about occupational health and environmental controls. *Id.* In addition, the Secretary of Labor regulates personal protective and life saving equipment, fire protection and prevention, signs, signals and barricades, handling materials, storage use and disposal, tools, electrical equipment, scaffolding, excavations, and toxic and hazardous substances. *Id.* Specifically, construction employers must guard equipment, conduct excavations, train employees, provide personal protective equipment, and take other steps to provide a safe working environment for their employees. 29 CFR §§ 1926.21, 1926.28, 1926.95, 1926.200, 1926.651. Employees must be trained and informed (through classes, labels, signs) regarding protective measures, on everything from wearing protective devices such as respirators to the proper use of chemicals. *Id.* §§ 1926.21, 1910.134. In addition, medical examinations must be provided by an employer when an employee

has been exposed to toxic substances. *See e.g., Id.* 6 1926.60(n) (providing medical surveillance for employers exposed to MDA). One of the most burdensome requirements for employers is the continual-training requirement concerning the communication of workplace hazards. Generally, every time an employee is hired or transferred into a new position, the employer must provide safety training to that employee. *See, e.g.,* 29 CFR § 1910.1001(j)(7) (requiring continual education and training for employees exposed to impermissible amounts of asbestos). A violation of this requirement is one of the most frequently cited types of violations.

Another area of regulation that affects a number of construction employers is a group of requirements that deal with driver training, vehicle inspection and seat belt usage. For example, material handling (earth-moving) equipment and other motor vehicles must be outfitted with seat belts. 29 CFR 6§ 1926.601(b)(10), 1926.602(a)(2). In addition, vehicles must be inspected at the beginning of each shift to ensure parts, equipment and accessories are in safe operating condition. 29 CFR § 1926.601(b)(14).

Penalties and abatement orders may be assessed by the Department of Labor after an inspection of the workplace by an OSHA compliance officer. A non-serious or a serious violation may require payment of a penalty ranging from zero dollars to $7,000. 29 U.S.C.A. § 666(c). Repeated or willful violations may require payment of up to $70,000. *Id.* § 666(a). Criminal sanctions, including imprisonment and high fines, are even possible where the employer acts willfully and causes the death of an employee. *Id.* § 666(e).

14. NATIONAL LABOR RELATIONS ACT

Although Colorado employers have not experienced as much union activity as many employers located on the East Coast, it is important to understand that, under the National Labor Relations Act, employees have a right to engage in organizing activities, without improper interference. In addition, as unionizing activity is not as common in Colorado as in other states, it is

important to understand that employers can easily make mistakes in handling such situations, unless they immediately contact counsel for guidance.

Special rules apply to the construction industry. The National Labor Relations Act (NLRA) governs labor relations issues only if all jurisdictional requirements are satisfied. In essence, the controversy must be considered a "labor dispute" affecting commerce that involves employers and employees.

Examples of situations in which labor disputes in the construction industry affected commerce include:

1. A construction project where a substantial amount of the materials were procured out of state. *See Shirley-Herman Co. v. International Hod Carriers, Bldg. & C.L. Union,* 182 F.2d 806 (2nd Cir. 1950).
2. A subcontractor involved in a labor dispute who was engaged solely in local construction, but was hired by a general contractor that engaged in interstate commerce. *See NLRB v. E.F. Shuck Constr. Co.*, 243 F.2d 519 (9th Cir. 1957).

"Supervisors" are not considered "employees" under the NLRA and thus lack the protections afforded to employees. 29 USCA § 152(c). In the construction industry, a foreman or leadman are considered supervisors if they have effective authority to make employment hiring and firing decisions, and to reward, direct and discipline employees. In general, the extent of authority governs the supervisory status rather than the job title of "foreman" or "leadman."

Although the NLRA may have jurisdiction to govern a particular dispute, the National Labor Relations Board (NLRB) has discretion to decide not to hear a particular case. The NLRB generally relies on a minimum-dollar standard designed to measure the disputes impact on commerce. There are special rules for calculating this minimum-dollar standard for employers in multi-employer bargaining units and those involved in secondary boycott cases, which may impact certain construction industry employers.

The NLRB also establishes the criteria for creating appropriate bargaining units to carry out collective bargaining under the NLRA. The construction industry, however, is exempt from coverage of a recent NLRB proposal that favors single-location bargaining units.

Hot cargo agreements, which include agreements between a union and employer to cease conducting business with another employer, are prohibited. 29 USCS § 158(e) (hot cargo agreements). The prohibition of these agreements, however, does not apply to labor agreements in the construction industry that relate to work to be done at the construction site. *NLRB v. Muskegon Bricklayers Union,* 378 F.2d 859 (6th Cir. 1967). Thus, a bargaining agreement between a union and a contractor can contain a clause requiring the subcontract to enter into a similar agreement with the union. *Jim McNeff, Inc. v. Todd,* 461 U.S. 260 (1983). This exemption is limited to employers engaged in on-site construction work.

The construction industry is similarly exempt from some picketing prohibitions. For example, a construction industry union may picket to obtain a prehire agreement, provided the picketing extends for a reasonable period of time, not to exceed 30 days.

Finally, special rules regarding the NLRA's treatment of work assignment disputes apply to the construction industry. Generally, the NLRA prohibits certain activities by employee groups in support of their work assignment dispute. The elimination of a job by an employer generally ends any dispute about that work. However, an exception exists for the construction industry because work assignments typically terminate when one portion of a project has been completed. The NLRA also prohibits coercive strikes and inducing work stoppages of primary or secondary employees. In the construction industry, work stoppages and picketing practices were found to be coercive when they were directed against a contractor in attempts to force it to refuse to work with subcontractors who did not exclusively employ union members. *George E. Hoffman & Sons, Inc. v. International Brotherhood of Teamsters,* 617 F.2d 1234 (7th Cir. 1980).

15. COLORADO WORKERS' COMPENSATION ACT

Under the Workers' Compensation Act of Colorado, all private and public employers must provide workers' compensation coverage for their employees. C.R.S. § 8-40-101 *et. seq*. The Workers' Compensation Act provides the exclusive remedy for employees' job-related injuries, without regard to fault. An "employee" covered by the Act includes "every person in service of another pursuant to a contract of hire either express or implied." *Id.* at 8-40-202(1)(b). The Act contains certain specific statutory exemptions from the definition of employee. *See e.g.,* § 8-40-301(1) (recreational activity exclusion); 8-40-301(2) (licensed real estate agents); § 8-41-202 (corporate officer exclusion).

A worker who meets the criteria established for an independent contractor will not be included within the coverage of the Workers' Compensation Act. § 8-40-202(2). The Act provides that:

> "Any individual who performs services for pay... shall be deemed to be an employee ... unless such individual is free from control and direction in the performance of the service, both under the contract ... and in fact, and such individual is customarily engaged in an independent trade, occupation, profession, or business related to the service performed."

Id. The power to terminate a worker without incurring any liability will be an important factor in determining whether a worker is "free from control." *See Dana's Housekeeping v. Butterfield*, 807 P.2d 1218, 1220 (Colo. App. 1990) ("one of the main issues to be decided is whether the purported employer has the right to terminate the relationship without liability"). In addition, another factor courts will examine is the relative nature of the work in relation to the regular business of the employer. *Id.* at 1221. Finally, while a written contract may provide evidence that a certain relationship is an independent contractor relationship (*see* § 8-40-202(b) outlining the specific criteria), the ultimate decision will depend on the actual facts of the relationship.

Although an independent contractor may not be considered an actual employee under the Workers' Compensation Act, that contractor may still be covered under the "statutory employer" section. *See* § 8-41-401. Under the statutory employer section, any business entity that contracts out any part of work to a subcontractor will be required to pay workers' compensation benefits for injuries to uninsured subcontractors and their employees. In turn, the statutory employer has immunity from tort liability for an employee's job-related injuries.

The court in *Finlay v. Storage Technology Corp.*, 764 P.2d 62 (Colo. 1988) provides guidance for determining when a business is a statutory employer. In *Finlay,* the court addressed whether a worker employed by a janitorial service company was a statutory employee of Storage Technology by virtue of the janitorial services the worker provided to Storage Technology. The court concluded that the test for whether an alleged employer is a statutory employer is "whether the work contracted out is part of the employer's 'regular business' as defined by its total business operation." *Id.* at 67. In particular, the courts will examine elements of "routineness, regularity, and the importance of the contracted service to the regular business of the employer." *Id.* In *Finlay,* the janitorial services were considered an integral, routine and regular part of Storage Technology's total business operation. The court noted that in the absence of the contracted janitorial services, it would have been necessary for Storage Technology to obtain those services by other means, including employment of janitorial workers. *Id.* at 68.

16. CONCLUSION AND PRACTICAL TIPS

A knowledgeable and well-advised employer that treats its employees well, providing notice of performance or discipline issues, may reap the benefits of a productive workforce. In addition, such an employer stands in a better position to avoid and defend against employee lawsuits. The key is investing the resources and developing and implementing personnel policies that are effective and manageable, and in training managers and supervisors to understand the legal and practical consequences of their decisions.

The following list summarizes practical tips that may help
any employer:

- Be fair - but don't promise to be fair
- Document, document, document
- Repeat statements concerning at-will employment in job application forms, employee handbooks, acknowledgement forms, etc.
- State that misrepresentations made in the hiring process or a job application forM are grounds for not being hired or, if discovered after an employee is hired, grounds for immediate discharge
- Look for employees who are honest and who don't make excuses
- Have a strong sexual harassment policy with several options for reporting harassment and train all employees on your policy
- Promptly investigate complaints and take appropriate action
- Consider adopting an internal dispute resolution system
- Require a written, signed release before giving out references on former employees

17. HOLLAND & HART LLP CONSTRUCTION PRACTICE OVERVIEW

Holland & Hart's Construction Practice Group has represented both public and private entities at the local, state and federal levels. Members of the group have extensive experience with construction agreements, including the various widely-used standard forms. The firm is actively involved in construction litigation before state and federal courts in Colorado and the surrounding states as well as before agency boards of contract appeals. Holland & Hart trial lawyers have extensive arbitration experience, both as advocates and arbitrators, and utilize various alternative dispute resolution mechanisms to achieve favorable, prompt and economic settlements wherever possible.

Lawyers in the Construction Practice Group have substantial experience in preparing, presenting and defending construction disputes, including those involving architect and engineer liability for defective design; delay and disruption claims; terminations for default; claims

for interference; lost productivity; cost escalation; construction failures; insurance claims; and a wide variety of other controversies pertaining to all parties involved in the construction process. We represent a broad spectrum of owners, engineers, architects, contractors, subcontractors, surety companies and professional liability carriers. Our Construction Practice Group is experienced in representing both public and private entities at the local, state and federal levels in disputes arising over public construction projects.

Holland & Hart's Construction Practice Group offers general business advice to clients engaged in the construction industry, including drafting, or reviewing and modifying standard industry forms of construction contracts, bid packages, architect's contracts and subcontracts, drafting and reviewing contract documents prior to bid or proposal; reviewing insurance coverage including error and omissions insurance and builder's risk insurance; advising clients in regard to liens and Miller Act claims; reviewing bonds and other surety relationships; preparing pension and profit-sharing programs; developing key personnel compensation programs; and drafting and negotiating commercial loan documents.

Holland & Hart also utilizes alternative dispute resolution (ADR) procedures, including arbitration, mediation and mini-trials. In appropriate circumstances, these ADR procedures may provide a more economical and expeditious means of resolving a dispute. While not always appropriate, Holland & Hart believes that ADR should be considered in most disputes. Holland & Hart lawyers have extensive experience in ADR and are prepared to utilize the various ADR methods when they will best achieve the client's objectives.

18. HOLLAND & HART LLP LABOR & EMPLOYMENT PRACTICE OVERVIEW

Holland & Hart has the largest and most extensive management-side labor and employment law practice in the Denver area and the Rocky Mountain region. Our attorneys have expertise in virtually every area of labor and employment law. Described below are the various types of work we handle.

Personnel Counseling. We regularly advise employers with respect to all aspects of the employment relationship. We draft and review employee handbooks and personnel policies and procedures. We consult with employers regarding matters of discipline and, if necessary, discharge. We work with employers to design and implement alternative dispute resolution ("ADR") mechanisms, such as peer review systems, mediation, and arbitration, as an alternative to litigation. We prepare employment agreements, and where necessary, separation agreements and releases. In all of these matters, it is our goal to help employers comply with the myriad of laws and regulations governing the employment relationship and avoid costly and expensive litigation.

Employment Discrimination. We have extensive experience in handling all types of employment discrimination claims, including race, color, religion, sex, sexual harassment, national origin, disability/handicap, marital status, and sexual orientation. We do work in all phases of such matters, including giving advice regarding preventive programs to eliminate or minimize risks to employers, drafting or reviewing affirmative action plans, participating in investigations by governmental agencies (such as the EEOC, the Colorado Civil Rights Commission (or the analogous state agency), and the Office of Federal Contract Compliance Programs), and litigating in federal and state courts.

Our federal court trial practice is extensive. Holland & Hart labor lawyers have tried and currently are trying employment discrimination cases in federal courts throughout the Rocky Mountain region. Our lawyers regularly speak at seminars and institutes and have written extensively on fair employment topics.

Wrongful Discharge. We have substantial experience litigating wrongful discharge cases on behalf of management. Our lawyers have handled many of the precedent-setting decisions in our region on issues of implied contract, promissory estoppel, and employment torts, and have been instrumental in defining the parameters and limitations on such claims.

We have litigated such cases in Colorado, Wyoming, Montana, and Utah, in both the state and federal trial and appellate courts, as

well as in other jurisdictions. These cases have often involved breach of contract, promissory estoppel, covenant of good faith and fair dealing, public policy discharge, defamation, outrageous conduct, intentional infliction of emotional distress, intentional interference with contract, and related state tort theories.

We also regularly advise employers as to ways in which they can avoid wrongful discharge claims by their employees, including reviewing employee handbooks, preparing appropriate disclaimers, using employment agreements, and the like.

Individual Employee Rights. We have extensive experience in the full range of issues arising out of the rapidly-growing area of individual employee rights, which include such varied topics as employee privacy, e-mail, voice mail, and telephone monitoring, drug and alcohol testing, AIDS, threats of violence in the workplace, lawful off-duty conduct, and many more. We help employers develop policies and procedures to meet the company's particular needs and litigate about such issues when necessary.

Wage-Hour Matters. We have experience in all aspects of the minimum wage and overtime pay obligations imposed under the federal Fair Labor Standards Act and other federal and state laws. We regularly advise employers with respect to compliance with the FSLA, including determining whether a particular position is exempt or non-exempt. We also assist employers during DOL audits and litigate government and private wage suits on behalf of employers.

Union Organizational Campaigns. We work with our clients to resist union attempts to organize their employees. This may involve setting up sound personnel policies and practices to avoid unionization, conducting or reviewing supervisor training to maintain union-free status, advising employers as to no-solicitation and no-distribution policies, and the like. We have helped a number of companies in the construction, coal mining, and other industries operate in the merit-shop mold by using double-breasting techniques.

We also have extensive experience in advising employers with respect to representation matters under the National Labor

Relations Act, from responding to the filing of a petition or a demand for bargaining from a union, to representing employers at the representation hearing, to assisting employers in designing and implementing election campaign strategy. We also have experience in representing employers in filing objections to NLRB elections, where necessary.

Collective Bargaining. We handle collective bargaining for a number of employers, in a variety of industries. In addition to actually conducting the bargaining, we often advise the company's representatives before and after bargaining sessions with respect to legal questions, strategy, and tactics, drafting and analyzing proposals, and responding to union information requests.

Union Contract Administration. We do work in all aspects of the administration of collective bargaining agreements, such as advising the company regarding the handling of grievances and representing the company at arbitrations.

Strikes. We have substantial experience in handling the legal and practical problems confronting employers during strikes or picketing. Our services include planning and implementing strategies for operating during a strike; preparing strike contingency plans and strike manuals; advising on the use of temporary and permanent replacements; obtaining temporary restraining orders, preliminary and permanent injunctions, and contempt orders; filing and defending unfair labor practice charges with the NLRB, including filing Section 8(b)(1)(A) union violence charges and pursuing Section 10(j) injunctive relief; bringing and defending strike-related federal court injunction actions; and the like.

NLRB Practice. We represent employers in all phases of NLRB practice, including representation proceedings (including hearings and elections), decertification matters, and the defense of unfair labor practice charges.

Colorado Labor Peace Act. We have handled numerous elections under the Colorado Labor Peace Act, involving union security clauses.

Employee Safety and Health. We represent numerous types of employers with respect to compliance with and litigation under

the federal Occupational Safety and Health Act. Our clients have ranged from heavy industry (smelters, oil drilling, pulp processing, high rise construction) to retail and service and light manufacturers.

We also have substantial experience with the statutes that govern safety and health in the mining industry, including the Mine Safety and Health Act. Finally, we also have expertise in the defense of "black lung" and other occupational disease claims.

Unemployment Insurance and Workers' Compensation. We advise employers in both of these areas, and have the expertise to handle the broad range of legal matters that these areas present.

Government Contractors. We have substantial expertise in the peculiar labor problems of government contractors. These employers are subject to a number of federal statutes and regulations governing many of their labor and personnel practices, including overtime, minimum wages, prevailing wages, affirmative action, hiring of handicapped workers, hiring of Vietnam veterans, drug testing, striker replacement, and the like.

Covenants Not To Compete/Trade Secret Matters. Together with lawyers in other areas of our firm, we have substantial experience in advising employers and prosecuting and defending covenant not to compete and trade secret actions. Especially given the growth of "high tech" companies in the Rocky Mountain region, this has become a rapidly-expanding area of our practice.

Transactional Matters. We regularly advise our corporate attorneys and their clients with respect to the labor and employment aspects of transactions, including issues ranging from successorship to the federal WARN Act to vacation pay matters.

ERISA and Other Employee Benefits Matters. Our lawyers have litigated a wide variety of ERISA issues based on our own expertise and relying upon our Employee Benefits Group. We also f requently depend upon the Employee Benefits Group to advise employers with respect to pension plans, profit-sharing plans, deferred compensation, and other types of qualified and non-qualified plans. We work closely with the Employee Benefits Group to assure our clients that their benefits questions are answered fully and completely.

19. HOLLAND & HART LLP CONSTRUCTION LAW ATTORNEYS' RESUMES

Robert E. Benson, a partner in Holland & Hart's Denver office, has been with the firm for over 30 years and has been active in all phases of construction litigation, mediation, and arbitration, including major construction disputes involving wrongful termination of contracts; delay, acceleration, interference and extended performance; changed conditions; extra work and change order compensation; defective construction; negligent supervision and inspection; and defective design. His practice also encompasses a wide variety of commercial litigation cases. In addition, he serves as an arbitrator and mediator for the American Arbitration Association, and is a member of the AAA Large Complex Case Panel of Arbitrators. Mr. Benson is a frequent speaker, lecturer, and author on construction law and alternative dispute resolution. He was the founding chairman of the Colorado Bar Association Construction Law Committee and was the chair of the Continuing Legal Education First Annual Construction Law Symposium. He is the editor of *Colorado Construction Law* to be published in June, 1999 by CLE in Colorado. Mr. Benson is a graduate of the University of Iowa and the University of Pennsylvania Law School. He is the co-author of *How to Prepare For, Take and Use Depositions* (5th ed. 1995 James Publishing), as well as numerous articles, including "Drafting Arbitration Clauses for Construction Contracts," "The Power of Arbitrators and Courts to Order Discovery in Arbitration," and "Application of the Pro Rata Liability, Comparative Negligence and Contribution Statutes." Mr. Benson has spoken on many construction topics, including "Contractual Management, Allocation, and Transfer of Construction Project Risks."

Jude Biggs, a partner in Holland & Hart's Boulder office, manages the firm's employment practice group. She has defended a number of construction and development companies in employment related litigation and advises such employers on a variety of employment law topics, such as complying with the Americans with Disabilities Act and Family and Medical Leave Act, preventing and investigating sexual harassment, drafting employee handbooks and policies, avoiding workplace violence, complying with wage and hour laws, implementing drug testing programs, developing internal

dispute resolution systems, hiring and firing employees, and reducing the risks of litigation. She chairs the Employment Law Subsection of the Construction Law Section of the Colorado Bar Association, and edits the *Colorado Employment Law Letter,* a monthly newsletter on Colorado employment law. Ms. Biggs has an undergraduate degree from Regis College and a law degree from the University of Denver School of Law.

J. Kevin Bridston, a partner in Holland & Hart's Denver office, has been with the firm since 1988. He has represented both plaintiffs and defendants in a variety of contract, commercial, and construction disputes including trials, appeals, protests, arbitrations and mediations. His construction experience includes disputes regarding backcharges, bidding and contract award issues, change orders, delay claims, defective plans and specifications, defective design, defective construction and warranty issues, and an array of payment issues. Mr. Bridston contributed the chapter on "Subcontractors and Materialmen" to the *Colorado Construction Law* book to be published by CLE in Colorado in June 1999. He has undergraduate and law degrees from the University of Colorado.

John M. Husband, a partner in Holland & Hart's Denver office, practices labor law and litigation. He has experience in litigation and administrative proceedings before the Equal Employment Opportunity Commission, the Colorado Civil Rights Commission, the Colorado Division of Labor and Employment, the National Labor Relations Board and in the courts of 18 states. His other activities have involved representation issues; class action lawsuits; sexual harassment, race, national origin, sex, handicap and age discrimination; arbitrations; equal pay act matters; contract and tort litigation arising from the employer-employee relationship, including wrongful discharge and termination at will; contract negotiations; strikes; Railway Labor Act; Fair Labor Standards Act; OSHA; MSHA; and preventive labor relations. Mr. Husband has a bachelor's degree from Ohio State University and graduated first in his class with a law degree from the University of Toledo

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Jeffrey T. Johnson, a partner in Holland & Hart's Denver office, joined Holland & Hart in 1980. He has represented management in a number of areas, including National Labor Relations Act matters (representation, unfair labor practice, collective bargaining, strikes and picketing), employment discrimination litigation and counseling

(including race, sex, sexual harassment, age, disability, religion, and national origin); wrongful discharge litigation; individual employee rights (including drugs and alcohol, AIDS, e-mail, and employee privacy matters); personnel counseling (including employee handbooks and personnel policies and procedures); wage and hour (including employer counseling, Department of Labor audits, and defense of private and government wage suits); arbitration; and employee safety and health (OSHA and MSHA). Mr. Johnson has undergraduate and law degrees from the University of Michigan.

Wiley E. Mayne, a partner in Holland & Hart's Denver office, has devoted a substantial amount of time to representing owners, contractors, and subcontractors in a wide variety of litigation. He has extensive experience in construction claims (both general liability and builders' risk), insurance coverage litigation (representing insureds and claimants in property, casualty, general 1liability, surety, and directors and officers liability claims) and environmental liability coverage. Mr. Mayne is also experienced in general contract, fraud, insurance, antitrust, and commercial litigation. He is a member of the ABA Forum Committee on the Construction Industry. He has an undergraduate degree from Harvard University and a law degree from Stanford University.

David S. Prince, an associate in Holland & Hart's Colorado Springs office, is a litigation attorney who has been with Holland & Hart since 1990. Mr. Prince has an active commercial and construction litigation practice handling cases ranging from disputes involving upscale home construction to multi-million dollar commercial construction disputes. Mr. Prince also devotes a considerable amount of his time to refining the use of technology in the efficient and innovative support of modern litigation. Mr. Prince has written and spoken on topics such as Colorado statutes affecting construction (a chapter in *Colorado Construction Law*), practical Y2K advice for businesses, using "private trials" to streamline the litigation process, and legal resources on the internet. He has undergraduate and law degrees from the University of Utah.

Harry Shulman, a partner in Holland & Hart's Aspen office, has been with the firm since 1985. He has experience in many phases of construction litigation and arbitration, including delay and change

order disputes, and emphasizes all aspects of real estate litigation in his practice. He graduated from Dartmouth College and the University of Virginia School of Law.

Christopher H. Toll, a partner, in Holland & Hart's Denver Tech Center office, has been practicing with the firm since 1987, specializing in general commercial, construction, and tort defense litigation. His construction law experience includes trials and arbitrations concerning changed conditions, delay damages, testing, and wrongful ermination. He also advised construction and other clients how to appropriately respond to emergency situations that create potential tort liability. He is a graduate of Dartmouth College and the University of Virginia School of Law.

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