

COLORADO EMPLOYMENT LAW - AN INTRODUCTION

SECOND EDITION (2008)

BY JUDE BIGGS

INCLUDES INFORMATION ON

- Recent Cases & Statutes
- Colorado Immigration Requirements
- Sample Forms
- Practical Tips



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ABOUT THE AUTHOR

Jude Biggs • Denver and Boulder Office

(303) 473-2707 • jbiggs@hollandhart.com
1800 Broadway, Suite 300 • Boulder, Colorado 80302

Ms. Biggs has practiced management-side employment law since 1988. She chaired Holland & Hart's employment practice group for 5 years, from 1998 through 2003. She defends employers in employment related litigation and advises employers on a variety of employment law topics, such as complying with the Americans with Disabilities Act and Family and Medical Leave Act, compliance with wage and hour laws, drafting and enforcing covenants not to compete and confidentiality agreements, drafting employee handbooks and policies, conducting internal investigations, implementing drug testing programs, developing internal dispute resolution systems, and reducing the risks of litigation. She has represented a wide variety of employers in the litigation and mediation of wage and hour disputes, including collective (class) actions under the Fair Labor Standards Act. She also has extensive experience on how to comply with employment laws that differ from one jurisdiction to another both in the U.S. and outside the U.S.

Colorado Employment Law: An Introduction

Second Edition (2008)

Jude Biggs
Holland & Hart LLP

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**COLORADO EMPLOYMENT LAW:
AN INTRODUCTION
Second Edition**

By Jude Biggs, Holland & Hart ^{LLP}¹

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1. INTRODUCTION

We live in a time when the most precious resource of a business is the people it draws together - people who together achieve a mission larger than any one person can do alone. It's a time when employees' intellectual and creative capital is often worth more than traditional physical assets. And it's a time when employees recognize their value and rights.

As employees become increasingly aware of their rights in the workplace, employers in Colorado 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 greatly expanded in the last two decades, providing more grounds on which employees may sue. Although there are many potential legal pitfalls and challenges for employers to consider, if they 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 Air Lines, Inc. v. Keenan*, 731 P.2d 708, 710 (Colo. 1987); *Wisehart v. Meganck*, 66 P.3d 124, 126 (Colo. Ct. App. 2002); *Justice v. Stanley Aviation Corp.*, 530 P.2d 984, 986 (Colo. Ct. App. 1974), *cert. denied* (Feb. 3, 1975). Obviously, this doctrine provides both the employer and employee great flexibility.

Over the last two decades, 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 of public policy. Under contract or promissory estoppel theories, former employees may claim they entered into an employment agreement with their employer which their 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 other written policy manuals, or comments by a supervisor. 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 an 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 "wrongful discharge" exceptions to the employment at-will doctrine:

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

In *Continental Air Lines*, 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 708, 711 (Colo. 1987). In the wake of *Continental Air Lines*, countless employees have sued their former employers for allegedly failing to follow an employee termination (or other) policy.

According to the *Continental Air Lines* 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 made an offer to the employee of continuing employment (and to follow those procedures exactly), and the employee's initial or continued employment constituted an acceptance of that offer.

Alternatively, under a promissory estoppel theory, employees may be entitled to relief if they can demonstrate that: (1) the employer reasonably should have expected the employee to consider

the termination policy a commitment from the employer to follow the termination procedures; (2) that the employee reasonably relied on the termination procedures to the employee's detriment; and (3) that injustice can be avoided only by enforcement of the termination procedures. *Id.* at 711-12.

In *Lufti v. Brighton Cmty. Hosp. Ass'n*, 40 P.3d 51 (Colo. Ct. App. 2001), the Colorado Court of Appeals rejected a physician's promissory estoppel claim where he claimed that he had agreed to close his internal medicine practice based on his understanding that the bylaws of the hospital would safeguard him from indiscriminate termination. The court pointed out that it was not until after he lost his position that he looked to the bylaws to see if there was any provision that would help his claim. *Id.* at 59. The court also stated that if an employee seeks to rely upon the employer's written policy when asserting a promissory estoppel claim, the employee must accept the entire policy, and not just those portions that help the employee's position. *Id.*

Given this line of cases, it is vital for Colorado employers to review the wording of their employee handbooks and employment policies to avoid language implying that a certain procedure must be followed or that any reason or condition must exist before termination can occur. Likewise, it is important to delete references that imply an employee is not employed at the will of the company, such as referring to employees as "permanent." Finally, employers should review who is given certain policy statements.

2.1.1. Disclaimers

One of the best defenses against an implied contract or promissory estoppel claim of wrongful discharge is an express, conspicuous, written disclaimer stating that the employee handbook, and any other statements by the employer, do not change the employee's at-will status. Such disclaimers can show that an employer did not intend to create a contract and that the employee could not have reasonably relied on statements of the employer as an enforceable contract or promise. *See, e.g., Healion v. Great-West Life Assurance Co.*, 830 F. Supp. 1372, 1375 (D. Colo. 1993); *Ferrera v. Nielsen*, 799 P.2d 458, 461 (Colo. Ct. App. 1990). Carefully drafted handbooks that expressly state that the policies they contain are not intended to create an employment agreement and 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 it is vital to have an employee sign an acknowledgment form repeating the disclaimer language of the employee handbook at the time the employee receives a copy of the handbook. For examples of adequate disclaimers, see *Kerstien v. McGraw-Hill Cos., Inc.*, 7 Fed. Appx. 868 (10th Cir. 2001) (employment manual which stated that it was “given to you for your information and guidance” and that “it does not represent a contract with employees and it is not meant to impose any legal obligation” on the employer had a sufficient disclaimer); *Middlemist v. BDO Seidman, LLP*, 958 P.2d 486 (Colo. Ct. App. 1997) (disclaimer in personnel guide which stated it was “not intended as, nor does it constitute a contract of employment” and that “[c]ontinued employment is at the will of the individual and the firm” was sufficiently clear and conspicuous to notify employees of their at-will status); *George v. Ute Water Conservancy Dist.*, 950 P.2d 1195 (Colo. Ct. App. 1997) (disclaimer in all caps on a separate page of employee handbook was a clear and conspicuous disclaimer; thus, handbook was not considered a contract placing limits on an employer’s right to discharge employees); compare *Anderson v. Exxon Coal U.S.A., Inc.*, 110 F.3d 73 (10th Cir. 1997) (employee handbook listing specific causes for discipline and providing a progressive disciplinary system created an implied contract between employee and mining company, but the mining company had the right to fire employee who tested positive for drugs because the handbook stated that a positive drug test was grounds for disciplinary action or termination). For a sample disclaimer and employee acknowledgement form, see Appendix A. For a sample application form containing disclaimer language, see Appendix B.

2.1.2. Vague Assurances

Another common defense for employers defending against breach of contract or promissory estoppel claims is that the promises allegedly made by the employer were too vague or indefinite to be enforced. Policies or statements that are merely vague assurances by the employer are insufficient to establish an enforceable contract or promise. See *e.g., Jones v. Denver Pub. Sch.*, 427 F.3d 1315, 1325 (10th Cir. 2005) (single assurance by employer that it would “work around” the employee’s suspended drivers license was insufficient to support promissory estoppel claim); *Kerstien*, 7 Fed. Appx. at 874 (oral assurances from supervisor that plaintiff would be put back on the job if he accepted a final warning and that it was supervisor’s policy to treat people fairly were too vague to support a breach of contract claim); *Orback v. Hewlett-Packard Co.*, 97 F.3d 429, 433 (10th Cir. 1996) (employer statement of company philosophy could not be considered a contract offer because it was too vague); *Hoyt v. Target Stores*, 981 P.2d 188, 194 (Colo. Ct. App. 1998) (employer statements that its internal policy was to “keep fair and consistent policy

throughout the store” was mere description of company policy at that time, and thus, did not support an underlying contract); *Mariana v. Rocky Mountain Hosp. & Med. Serv.*, 902 P.2d 429, 434 (Colo. Ct. App. 1994) (employer statements promising a promotion in six to twelve months and a career with the company were insufficient to constitute an implied contract).

2.1.3. After-Acquired Evidence of Misconduct

Another defense to breach of implied contract and promissory estoppel claims is the “after-acquired evidence” doctrine. In *Crawford Rehab. Servs., Inc. v. Weissman*, 938 P.2d 540 (Colo. 1997), the Colorado Supreme Court declared that if an employer obtains evidence of resume fraud after an employee has been terminated, the evidence is a complete bar to breach of implied contract and promissory estoppel claims based on termination procedures in employee manuals. However, to use this defense, “an employer must prove that the employee’s fraud was material and that a reasonable, objective employer would not have hired the employee if it had discovered the misrepresentation at the outset.” *Id.* at 549. The Colorado Court of Appeals also stated in *Weissman* that such evidence may bar or cut off tort claims as of the date an employer discovers the fraud. 914 P.2d 380 (Colo. Ct. App. 1995), *affirmed on other grounds*, 938 P.2d 540 (Colo. 1997).

2.1.4. Statute of Limitations and Damages

Generally, Colorado’s three-year statute of limitations applies to implied contract and promissory estoppel claims. Colo. Rev. Stat. § 13-80-101. Recoverable damages include lost pay and, in cases involving a willful breach, emotional distress damages. *Decker v. Browning-Ferris Indus. of Colo., Inc.*, 931 P.2d 436, 447 (Colo. 1997). Absent a contractual provision providing for the recovery of attorneys fees and costs to a prevailing party, attorneys fees and costs are not recoverable on a contract claim. *Lyons v. Teamsters Local Union No. 961*, 903 P.2d 1214, 1222 (Colo. Ct. App. 1995).

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 an employee may be entitled to relief from a discharge if the employee 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. Public policy types of claims also may arise when former employees allege that they were fired in retaliation for filing a workers' compensation claim. See *Lathrop v. Entenmann's, Inc.*, 770 P.2d 1367 (Colo. Ct. App. 1989).

2.2.1. Scope of Public Policy Claims

Since the Colorado Supreme Court recognized the public policy exception to the at-will doctrine in 1992, employees' lawyers have tested the limits of the exception by bringing creative public policy wrongful discharge claims. Recent indications from the Colorado courts, however, suggest that the courts may be unwilling to further expand the exception. See, e.g., *Coors Brewing Co. v. Floyd*, 978 P.2d 663 (Colo. 1999) (rejecting claim of former security employee who alleged he was discharged after engaging in illegal investigation and other conduct for the employer, but failed to refuse to engage in the conduct); *Crawford Rehab. Servs., Inc. v. Weissman*, 938 P.2d 540 (Colo. 1997) (rejecting claim of former employee who asserted she was terminated for trying to enforce her right to take rest breaks under Colorado Wage Order); *Jaynes v. Centura Health Corp.*, 148 P.3d 241 (Colo. Ct. App. 2006) (rejecting claim based on policy from private American Nurses Association publication); *Slaughter v. John Elway Dodge*, 107 P.3d 1165 (Colo. Ct. App. 2005) (rejecting claim based on Fourth Amendment because it does not cover searches and seizures conducted by private parties); *but see Ziegler v. Inabata of Am., Inc.*, 316 F. Supp. 2d 908 (D. Colo. 2004) (holding that the public policy exception not only covers commission of crimes, but also violations of rules of professional conduct and civil wrongs); *Rocky Mountain Hosp. & Med. Serv. v. Mariani*, 916 P.2d 519 (Colo. 1996) (recognizing claim where a CPA alleged she was fired for refusing to produce or endorse misleading financial accounting information, in violation of professional ethics code); *Jones v. Stevinson's Golden Ford*, 36 P.3d 129 (Colo. Ct. App. 2001) (recognizing claim where employer allegedly directed employee to upsell fuel injector flushes on every vehicle the employee worked on, in violation of Colorado's Motor Vehicle Repair Act); *Hoyt v. Target Stores*, 981 P.2d 188 (Colo. Ct. App. 1998) (recognizing claim where former employee was fired for exercising right to be paid for travel time).

2.2.2. Statute of Limitations and Damages

Public policy discharge 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.

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., Gloston v. ITT Fed. Servs. Intern. Corp.*, 2007 WL 1830486 (D. Colo. 2007); *Decker v. Browning-Ferris Indus. of Colo., Inc.*, 931 P.2d 436, 446 (Colo. 1997); *Farmer v. Cent. Bancorporation, Inc.*, 761 P.2d 220, 221-22 (Colo. Ct. App. 1988); *cert. denied* (Sept. 6, 1988).

Although the law is not clear, express promises of fair treatment 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., Stahl v. Sun Microsystems, Inc.*, 19 F.3d 533, 536 (10th Cir. 1994); *Decker*, 931 P.2d at 446²; *but see Valdez v. Cantor*, 994 P.2d 483, 487 (Colo. Ct. App. 1999) (rejecting express covenant of good faith and fair dealing claim where employer assured employee that she would be treated fairly but eliminated her position and replaced it with another position). To the extent such a claim exists, it depends on an

² Sometimes 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*, 931 P.2d 436. However, in *Decker*, the parties submitted to the jury the issue of whether the company had breached an express covenant of good faith and fair dealing. The company apparently had objected to the claim being submitted as a tort claim, rather than a contract claim. *See id.* at 440. The Colorado 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* 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, the Court later refused to review the Court of Appeal’s *Soderlun* decision, which held promises of fair treatment unenforceable. *See Soderlun v. Pub. Serv. Co.*, 944 P.2d 621, 621-23 (Colo. Ct. App. 1997), *cert. denied*, (Oct. 20, 1997). The Supreme Court has explained in an even more recent case that Colorado recognizes only two exceptions to at-will employment, wrongful discharge in breach of an implied contract and wrongful discharge in violation of public policy. *See Crawford Rehab. Servs., Inc. v. Weissman*, 938 P.2d 540, 547 (Colo. 1997).

underlying enforceable contract. *Soderlun v. Pub. Serv. Co.*, 944 P.2d 621, 621-23 (Colo. Ct. App. 1997), *cert. denied*, (Oct. 20, 1997).

The bottom line? Employers should train their supervisors to be fair, but not *promise* to be fair.

2.3.1. Disclaimers

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 employee's "at-will" status. *McFarland v. Bank One Colo.*, Civ. Ac. No. 97-S-3239 (D. Colo., Memorandum Opinion and Order dated Dec. 30, 1997) (discharged bank employee's 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. See *e.g.*, *Rawlings v. Riverside Med. Ctr.*, 1995 WL 352916 (Minn. Ct. App. 1995). As a result, wise employers should declare in their disclaimers that statements of fair treatment are a goal only, and are not enforceable as a contract or covenant. See Appendix A. And, employers should raise the disclaimer as a defense against any such claim.

2.3.2. Vague Assurances

Vague assurances by an employer should be not only unenforceable under a breach of contract theory, but also under a theory of breach of a covenant of good faith and fair dealing. See *Vasey v. Martin-Marietta Corp.*, 29 F.3d 1460, 1466 n.2 (10th Cir. 1994) (rejecting express covenant claim because 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 were unenforceable, vague assurances); *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); *Soderlun v. Pub. Serv. Co.*, 944 P.2d 621, 621-23 (Colo. Ct. App. 1997), *cert denied*, (Oct. 20, 1997)

(affirming dismissal of plaintiff's claims based on company code of conduct regarding fairness and trustworthiness because statements were too indefinite to support wrongful discharge claims and plaintiff could not have reasonably relied upon such statements as a matter of law); *George v. Ute Water Conservancy Dist.*, 950 P.2d 1195, 1199 (Colo. Ct. 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" too vague to enforce); *Schur v. Storage Tech. Corp.*, 878 P.2d 51, 55 (Colo. Ct. App. 1994) (promise of fair treatment in handbook did not alter at-will nature of employment nor create a contract claim).

2.3.3. Statute of Limitations and Damages

To the extent claims for breach of a covenant of good faith and fair dealing exist, they are contract claims. *Decker, supra*. Hence, Colorado's three year statute of limitations would apply and contract damages would be recoverable. See Section 2.1.4.

2.4. Statute of Frauds

Discharged employees often claim that oral promises were made to them guaranteeing job security. When this occurs, employers should raise the defense of the "statute of frauds," because an alleged employment contract guaranteeing more than one year of employment must be in writing to satisfy the Colorado statute of frauds. Colo. Rev. Stat. § 38-10-112(1)(a); *Whatley v. Crawford & Co.*, 15 Fed. Appx. 625 (10th Cir. 2001) (at-will employment contract, along with oral contract which included terms that could have been completed in less than a year, including availability of a step program and the establishment of a new office, was unenforceable because entire contract could not be performed within one year).

3. TORTIOUS INTERFERENCE WITH CONTRACT CLAIMS AGAINST INDIVIDUAL SUPERVISORS

Many employees not only sue their employer for wrongful discharge, but also sue their individual supervisor for the same discharge on a theory of tortious interference with contract. To state such a claim, an employee must prove: (1) that a valid contract existed between the employee and the employer; (2) that the supervisor knew or should have known of this contract; (3) that the supervisor intended to induce and caused a breach of the contract by the employer; and (4) that the employee was damaged as a result. *Trimble v. City & County of Denver*, 697 P.2d 716, 725-26 (Colo. 1985). Colorado has adopted the Restatement approach, which requires that conduct be both

intentional and improper for it to be actionable. *Telluride Real Estate Co. v. Penthouse Affiliates, LLC*, 996 P.2d 151 (Colo. Ct. App. 1999); Restatement (Second) of Torts §§ 766-67 (1979). Employees with at-will agreements are covered under this theory. See *Jandro v. Foster*, 53 F. Supp. 2d 1088, 1099 (D. Colo. 1999); *Bithell v. W. Care Corp.*, 762 P.2d 708, 712 (Colo. Ct. App. 1988). The employee must prove malice or other wrongful means, such as fraud, physical violence, threat of civil suit, or threat of criminal prosecution. See *Corry v. Analysts Int'l Corp.*, 215 F.3d 1336 (10th Cir. 2000); *Electrolux Corp. v. Lawson*, 654 P.2d 340, 341-42 (Colo. Ct. App. 1982), *overruled on other grounds by Jet Courier Serv., Inc. v. Mulei*, 771 P.2d 486 (Colo. 1989).

In general, supervisors acting within the scope of their official duties are not liable under such a theory. However, if a former employee can prove that the supervisor was motivated solely by a desire to induce the corporation to breach its contract with the employee, the employee may prevail. *Cronk v. Intermountain Rural Elec. Ass'n*, 765 P.2d 619, 623 (Colo. Ct. 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.

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. Rest. Servs., Inc.*, 906 P.2d 66, 68-70 (Colo. 1995). In *Lufti v. Brighton Cmty. Hosp. Ass'n*, 40 P.3d 51 (Colo. Ct. App. 2001), the court rejected a tortious interference claim against the chief executive officer of a hospital where the hospital had an agreement with the plaintiff's employer to provide doctors as independent contractors to staff its emergency room and the plaintiff was removed from the emergency room rotation. The agreement stated that the hospital could require the removal of any physician at any time, and nothing in plaintiff's employment agreement specifically referenced removal.

4. DEFAMATION AND REFERENCE CHECKS

Defamation is a common law tort based on the publication of false or derogatory statements about a person. If an employer (1) makes a false statement of fact about an employee, (2) which tends to injure the employee's reputation, and (3) that statement is published to a third person, the employee may state a claim for defamation. False statements about employees' ability to perform their jobs are *pro se* defamatory, which means that damages are presumed. Libel pertains to written statements, *Continental Cas. Co. v. Sw. 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. Ct. App. 1986).

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 defenses available to employers.

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

The qualified privilege defense is often a more effective 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: (1) have a legitimate interest in the subject of the statement; (2) the statements can only be made to others having a legitimate interest in the subject matter; and (3) the employer's statement must be made in good faith and without malice. For example, in *Graziani v. Epic Data Corp.*, 305 F. Supp. 2d 1192 (D. Colo. 2004), a third party who told the plaintiff's former employer of the plaintiff's attempts at embezzlement was not liable for defamation, because the information related to an important interest of both parties, one of whom wanted to avoid wrongfully paying money out and the other wanting to avoid losing profits. Similarly, in *Patane v. Broadmoor Hotel, Inc.*, 708 P.2d 473 (Colo. Ct. App. 1985), the court found that statements made by a hotel manager to other employees that a former desk clerk was fired for stealing money, when it was later discovered that a different employee had stolen the money, did not automatically subject the employer to liability for slander because employees share a common interest in information regarding turnover of other employees.

Under certain circumstances, an absolute privilege may exist if an employer has made statements relating to a judicial or quasi-judicial proceeding. See *Hoffler v. Colorado Dept. of Corrections*, 27 P.3d 371, 374-75 (Colo. 2001).

In Colorado, there is a law that protects employers to some extent when giving references about former employees. Under Colo. Rev. Stat. § 8-2-114(2), 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 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.*; see also Colo. Rev. Stat. § 8-2-111.5 (similar statute that protects financial institutions when they disclose information in good faith about theft or embezzlement by employee or former employee).

Although these statutes provide 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. For a sample form, see Appendix C.

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. The key to this claim is the manner in which the private information is obtained. Eavesdropping, wiretapping, and persistent, undesired phone calls may all be covered under this claim. *Quigley v. Rosenthal*, 327 F.3d 1044, 1073 (10th Cir. 2003).

Colorado recognizes three different types of claims for invasion of privacy: (1) appropriation of another’s name or likeness; (2) unreasonable intrusion upon the seclusion of another; and (3) unreasonable publicity given to another’s private life. See *Joe Dickerson & Assocs., Inc. v. Dittmar*, 34 P.3d 995 (Colo. 2001); *Ozer v. Borquez*, 940 P.2d 371 (Colo. 1997); *Doe v. High-Tech Inst., Inc.*, 972 P.2d 1060 (Colo. Ct. App. 1998).

In 1997, the Colorado Supreme Court recognized a claim for invasion of privacy based on unreasonable publicity concerning an employee’s private life. *Ozer*, 940 P.2d 371. 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 made to the public; (3) the disclosure must be one that would be highly offensive to a reasonable person; (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 *Ozer*, 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 still applies: disclose private information only to those who need to know the information.

In July 1998, the Colorado Court of Appeals recognized an invasion of privacy claim based on a theory of unreasonable intrusion upon seclusion. In *Doe*, 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 instructor that the sample would 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. *Doe, supra.*

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, (2) upon the individual's seclusion or solitude, and (3) 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*, 972 P.2d 1060; *see also Pearson v. Kancilia*, 70 P.3d 594, 599 (Colo. Ct. App. 2003) (upholding verdict for former employee whose boss came to her home three times a week to have sex with her, even though she never gave him a definitive refusal).

Although the *Doe* case did not involve an employment situation, Colorado employers, particularly those who do drug testing, need to beware. First, the employer should be sure that a drug test is limited to discovering only information that the employer needs to know. Second, the employer should make sure that the test and consent form are specific enough that employees know what substances or diseases the sample will be tested for. 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.

Recently, claims for invasion of privacy involving digitally stored communications have become a hot topic. Many recent cases have found in favor of employees on these claims. See *e.g.*, *Fischer v. Mt. Olive Lutheran Church, Inc.*, 207 F. Supp. 2d 914 (W.D. Wis. 2002) (unauthorized access of employee's personal Hotmail account was actionable); *but see United States v. Angevine*, 281 F.3d 1130 (10th Cir. 2002) (Oklahoma law) (no reasonable expectation of privacy for college professor who downloaded images to his computer that were located in the computer's memory, given that the college informed him in numerous ways, including a banner on the computer, that electronic information on the computer was not private); *Thygeson v. U.S. Bancorp*, 2004 U.S. Dist. LEXIS 18863 (D. Or. 2004) (no reasonable expectation of privacy for e-mails saved in personal folder or websites accessed).

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 cites omitted). "Mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities are insufficient." *Pearson v. Kancilia*, 70 P.3d 594, 597 (Colo. Ct. App. 2003). The elements of a claim for outrageous conduct are: (1) defendant's extreme and outrageous conduct; (2) defendant's recklessness or intent of causing severe emotional distress; and (3) severe emotional distress to the plaintiff caused by the defendant's conduct. *Id.* Conduct that would otherwise be acceptable may become actionable if the actor is in a position with actual or apparent authority over the victim, or has the power to affect the victim's interests and abuses that power. *Id.* at 598.

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); *Gelman v. Dep't of Educ.*, 544 F. Supp. 651, 653 (D. Colo. 1982) (breach of contract and disability discrimination not outrageous conduct); *Salimi v. Farmers Ins. Group*, 684 P.2d 264, 265 (Colo. Ct. App. 1994) (demotion in violation of policy and procedural manual not outrageous conduct). The Colorado Supreme Court refused to

recognize a claim for intentional infliction of emotional distress where a former employee alleged that after participating in illegal conduct, he was fired to become the employer's scapegoat for its criminal misconduct. *Coors Brewing Co. v. Floyd*, 978 P.2d 663 (Colo. 1999). Other cases brought under this claim include *Enriques v. Noffsinger Mfg. Co., Inc.*, 412 F. Supp. 2d 1180, 1183-84 (D. Colo. 2006) (employer's alleged firing of employee who had been with company for thirty-four years just before he would have become eligible for retirement benefits was not outrageous conduct); *Waskel v. Guaranty Nat'l Corp.*, 23 P.3d 1214, 1217, 1222 (Colo. Ct. App. 2000) (insurance company that brought claims against former employees but obtained no monetary judgment against them and refused to indemnify them did not commit outrageous conduct); *but see Pearson*, 70 P.3d 594 (upholding verdict for employee whose boss subjected her to unwanted sexual jokes, contact, and advances, and who pressured her into a sexual relationship, causing her to believe that she would lose her job if she refused); *Archer v. Farmer Bros. Co.*, 70 P.3d 495 (Colo. Ct. App. 2002) (upholding verdict for employee fired by employer who entered his home without notice and fired him while he was recovering from complications related to a serious heart ailment).

7. MISREPRESENTATION

Colorado courts do not recognize an independent tort action for negligent or intentional misrepresentation based on alleged employment contract obligations. *Bloomfield Fin. Corp. v. Nat'l Home Life Assurance Co.*, 734 F.2d 1408, 1414-15 (10th Cir. 1984); *Wisehart v. Meganck*, 66 P.3d 124, 128 (Colo. Ct. App. 2002); *Centennial Square, Ltd. v. Resolution Trust Co.*, 815 P.2d 1002, 1004 (Colo. Ct. App. 1991). 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.*, Colo. Rev. Stat. § 8-2-104; *Pickell v. Ariz. Components Co.*, 931 P.2d 1184, 1186 (Colo. 1997) (employer's representations that it would provide a much better job than the job plaintiff was induced to leave, as well as the parties' discussions about insurance benefits, pay raises, vacations, and bonuses, created a term of employment, giving rise to plaintiff's promissory estoppel claim); *Berger v. Security Pac. Info. Sys.*, 795 P.2d 1380, 1384 (Colo. Ct. App. 1990) (employer's failure to disclose known risk that job would soon be discontinued supported claim for fraudulent concealment); *but see Nelson v. Gas Research Inst.*, 121 P.3d 340 (Colo. Ct. App. 2005) (rejecting negligent misrepresentation claim where employer convinced employee to relocate by telling him that he would become a principal and key employee, his salary and benefits would not be reduced, and the company would be "creative" with his compensation

package, because employee admitted knowing that the statements referred to potential benefits in the future).

8. ANTI-DISCRIMINATION AND ANTI-RETALIATION CLAIMS - PROTECTED STATUS AND ACTIVITIES

Some of the most often litigated claims arise under statutes that prohibit discrimination against “protected class” members. What is important to understand is that, depending on the circumstances, nearly every employee can claim protected class status on some basis. Adverse employment decisions based on a person’s race, ethnicity, color, gender, sexual orientation, 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).

To comply with these laws, all employers should have clear policies prohibiting discrimination, providing a way to complain about discrimination, and prohibiting retaliation for speaking up. In addition, employers should train all employees to avoid discrimination and retaliation, and repeat that training as appropriate. For a sample anti-discrimination/anti-harassment policy, see Appendix D.

In 2007, the Governor of Colorado signed into law Senate Bill 25, which prohibits discrimination based on an employee’s religion, sexual orientation, or gender identity, or the employer’s perception thereof. Sexual orientation is defined as “a person’s orientation towards heterosexuality, homosexuality, bisexuality, or transgender status or an employer’s perception thereof.” Colo. Rev. Stat. § 24-34-401(7.5). This law protects individuals whose gender-related appearance or gender-related self-image differ from their biological sex. Thus, discrimination against gays, lesbians, bisexuals, and transgendered individuals is now actionable under Colorado law, but not under federal law. Colo. Rev. Stat. § 24-34-402(1)(a). Employers may require employees to follow a dress code, so long as it is reasonable and applied consistently, but the law is silent on what exactly that means. Religious organizations or associations are exempt from these requirements, unless the organization or association is

supported in part by public tax money or borrowing. As with all new laws, there is little guidance on how to implement this amendment, or what the courts will consider to be legal or illegal actions by employers. Therefore, continue to base your employment related decisions on legitimate business reasons, not on assumptions that a homosexual, gay, or transgender employee will pose problems that other employees will not pose.

Employers should note that there are two theories of liability under discrimination laws: disparate treatment and disparate impact. Disparate treatment liability arises due to intentional discrimination, when employees are treated adversely because of their protected class status. Disparate impact (unintentional discrimination), on the other hand, arises when an employer's neutral policy places a greater burden on 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 do not have a disproportionate effect on protected class members.

In a recent Tenth Circuit decision, the court adopted a new inference to protect employers. In *Gladys Antonio v. The Sygma Network, Inc.*, 458 F.3d 1177 (10th Cir. 2006), the court rejected a former employee's discrimination claims because, under the "same-actor inference," when an employee is hired and fired by the same person within a relatively short time span, there is a strong inference that the employer was not motivated by discrimination.

The Tenth Circuit has also recently declared that employers who fail to conduct an investigation and terminate an employee based solely on the recommendations of a biased supervisor may be liable under Title VII. This is so even though the ultimate decisionmaker had no discriminatory intent. *EEOC v. BCI Coca-Cola Bottling Co.*, 450 F.3d 476 (10th Cir. 2006).

8.1. 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 from age-based discrimination. It is permissible to ask applicants to disclose their age if they appear to be under eighteen years of age and age is a bona fide occupational qualification. 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.

Employers may have a defense to claims of age discrimination if a fired employee is replaced by someone close to their age. For example, in *George v. Ute Water Conservancy Dist.*, the Colorado Court of Appeals found that a former employee who was fired and replaced by an individual two years and nine months younger than the former employee could not establish a case of age discrimination. 950 P.2d 1195 (Colo. Ct. App. 1997). Although this case was not brought under the federal ADEA, similar results have occurred under the ADEA as well. See e.g., *Munoz v. St. Mary-Corwin Hosp.*, 221 F.3d 1160 (10th Cir. 2000) (hospital resident who was terminated from residency program and replaced with resident two years his junior had no claim for age discrimination because this was an "obviously insignificant difference"); but see *Greene v. Safeway Stores, Inc.*, 98 F.3d 554 (10th Cir. 1996) (executive fired at age 52 was entitled to have a jury hear his age discrimination claim, even though he was replaced by an older individual; none of the alleged reasons for his firing were ever discussed with him; he was only two years away from vesting in his pension plan, while the replacement employee was told the pension plan would not be available to him).

Employers that want an employee who is 40 or older to release employment claims should keep in mind that the Older Worker Benefit Protection Act requires that the release contain special provisions (such as a consideration period and revocation period) to effectively waive claims for age discrimination. Be sure to let your counsel know when you are offering a separation agreement to an employee who is 40 or older.

8.2. Race, Religion, National Origin Discrimination

Title VII of the Civil Rights Act and Colorado's Anti-Discrimination Act, 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 seem 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 attire. 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).

Recently, the Tenth Circuit upheld a company's termination of a legal Mexican immigrant. *Zamora v. Elite Logistics, Inc.*, 478 F.3d 1160 (10th Cir. 2007). After Elite found out that immigration inspectors were going to come to its warehouse, it hired contractors to determine the employment status of its employees. Zamora, who had been a legal resident of the United States since 1987, had problems with his paperwork, so the company informed him that he had ten days to provide documentation that he was permitted to work in the United States. There was some confusion because someone else had allegedly used the same social security number as Zamora. After the confusion was cleared up, Zamora was told he could return to work, but he refused to do so unless he received a written apology and explanation of why he had been terminated. His supervisor refused to apologize and told him he was fired. The court found that there was no national origin discrimination because there was no evidence to show that the employer's decision to fire Zamora after receiving his ultimatum was related to Zamora's national origin. Furthermore, there was no evidence that Elite was concerned with anything other than complying with the relevant immigration laws when it suspended Zamora pending receipt of his employment documentation.

8.3. 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.

8.4. Physical Traits and Disability Discrimination

The Americans With Disabilities Act (ADA) and Colo. Rev. Stat. § 24-34-402 prohibit disability-based discrimination. The ADA imposes specific limitations on what an employer may do 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 applicant's ability to perform job-related functions, including the applicant's ability to meet attendance requirements. Physical agility tests may be administered as long as 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 require a medical exam until after making a job offer, contingent on the results of the examination. Generally, 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. *Colo. Civil Rights Comm'n v. N. 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 may disparately impact protected class members, such as height and weight requirements.

8.5. Sex, Marital, and Family Status Discrimination

Questions about an applicant's marital and family status tend to have very little relevance to the essential 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, marital status, and family status is needed for benefit or tax purposes, it should be obtained after the applicant has been hired.

In May 2007, the EEOC issued a guidance regarding discrimination against caregivers. Employers who discriminate against employees caring for a child, spouse, or other relative or loved one may be subject to liability under Title VII, the ADA, or the FMLA. The guidance lists various situations which might violate federal law. Some of these situations include treating men with young children more favorably than women with young children, giving a new mother less desirable work or less work based on the assumption that she will be less committed to her work, reducing a pregnant woman's job responsibilities due to pregnancy-related stereotypes, denying a male worker leave to care for his children if leave would be granted to a female worker in the same situation, or refusing to hire someone who has a disabled family member based on the assumption that this would make him a less reliable employee.

A subset of gender discrimination is sexual harassment, which is also prohibited by Title VII and the Colorado Anti-Discrimination Act. Conduct that may constitute sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature. Sexual harassment is especially problematic if the offending behavior is done by a supervisor. According to United States Supreme Court decisions, if employees can show that they suffered a tangible employment action because of a supervisor's sexually harassing conduct, the employer will be strictly liable for the harassment. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). Tangible employment actions include firing, demoting, reducing an employee's compensation, withholding raises or promotions, reassigning the employee with significantly different job responsibilities or reducing job responsibilities, changing benefits significantly, diminishing a job title, and making working conditions so intolerable that an employee feels reasonably compelled to resign.

EEOC: Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, Notice 915.002 (June 18, 1999).

If no tangible employment action has occurred, 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. *Id.* An employer may be liable for its supervisors' conduct, even with an anti-harassment policy and even though it was unaware of the existence of the sexually harassing conduct. *Faragher*, 524 U.S. 775 (city was liable for the sexually harassing conduct of supervisors where officials had not disseminated city policy on sexual harassment among employees and officials did not keep track of the conduct of their supervisors). Thus, employers should develop anti-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, corrective action must be taken.

In another United States Supreme Court decision, Title VII's prohibition against sexual harassment in the workplace was held to apply even when the harasser and the harassed employee were of the same sex. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998). In *Oncale*, the Court emphasized 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." *Id.* at 80. 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 81.

The Court's opinion in *Oncale* 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. The Tenth Circuit rejected a claim under this theory in *Medina v. Income Support Div. of N.M.*, 413 F.3d 1131 (10th Cir. 2005), where a woman claimed that her female supervisor, who was a lesbian, harassed her because she was heterosexual by sending her sexually explicit e-mails and making jokes during sexual harassment training. Although the plaintiff claimed that she was harassed for failing to conform to gender stereotypes, which is actionable, the court found that the plaintiff claimed discrimination because she did not conform to lesbian stereotypes; as a result, the

court rejected her claim because Title VII does not cover sexual orientation. *But see Dick v. Phone Directories Co.*, 397 F.3d 1256 (10th Cir. 2005) (given sexual nature of conduct directed at female plaintiff by other females, plaintiff could maintain claim).

8.6. Right to Marry

An employer's overt 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)(I). There are, however, three exceptions: (1) if one spouse has a supervisory role over the other; (2) if one spouse is entrusted with monies received or handled by the other spouse; or (3) if one spouse has access to the employer's confidential information, including payroll and personnel records. Colo. Rev. Stat. § 24-34-402(1)(h)(II).

8.7. 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 that 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 also been used to protect other kinds of conduct. *See e.g., Gwin v. Chesrown Chevrolet, Inc.*, 931 P.2d 466 (Colo. Ct. App. 1996) (salesperson’s claim that he was fired for demanding a refund from a motivational seminar he attended on his own time was cognizable, even though the company paid half the cost of attending); *but see Marsh v. Delta Air Lines, Inc.*, 952 F. Supp. 1458 (D. Colo. 1997) (writing letter to a newspaper containing harsh criticisms of employer was not protected conduct because employees owe their employer an implied duty of loyalty).

An employee may sue under this statute for wages and benefits that would have been due the employee up to and including the date of judgment had the discriminatory practice not occurred and, in addition, may recover costs and reasonable attorneys’ fees. Colo. Rev. Stat. § 24-34-402.5.

8.8. 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.

8.9. Jury Duty, Voting Time Off, and Political Activity

Colorado 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.

Employers must pay all employees regular wages of up to \$50 per day for the first three days of jury duty. Colo. Rev. Stat. § 13-71-126. Employers must allow employees who are eligible to vote two hours of time off during the time the polls are open, unless the polls will be open for three or more hours when the employee is not at work.

Colo. Rev. Stat. § 1-7-102. Employers may not reduce the employee's wages or salary for this time off. Colo. Rev. Stat. § 1-7-102(2).

It is also unlawful for an employer to make, adopt, or enforce any rule, regulation, or policy that forbids or prevents employees from engaging or participating in politics, running for office, or performing duties of public office. Colo. Rev. Stat. § 8-2-108.

8.10. Arrest and Conviction Records

The EEOC 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 whether the applicant likely committed the crime for which they were 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 conviction is in some way related to the position being applied for. *Id.* The reasoning behind the EEOC's position is that based on statistics, 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 an employer does so and uses an outside "consumer reporting agency," it is important to follow the strict procedures provided in the Fair Credit Reporting Act, which require a separate consent by the applicant (separate from any consent on an application form) and notice before any adverse action is taken. See 15 U.S.C. §§ 1681b(b), 1681k.

Employers may not require a job applicant to reveal any information contained in a sealed criminal record and may not deny an application solely because of an applicant's refusal to disclose information contained in a sealed record. Colo. Rev. Stat. § 24-72-308(1)(f)(l). Public employers may not prevent an applicant from obtaining public employment due to a felony conviction or conviction of another offense involving moral turpitude, except as to applicants applying for positions involving direct contact with vulnerable persons, positions in public or private adult or juvenile correctional facilities, positions with the public employees' retirement association which will have access to financial information, or applicants applying to be peace officers, teachers, or election officials. Colo. Rev. Stat. § 24-5-101.

8.11. 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.

8.12. Patient Safety or Quality of Care

On March 19, 2007, the Governor of Colorado signed into law House Bill 07-1133, which prohibits retaliation against health care workers who in reasonable, good faith, report issues related to patient safety and quality of care. The statute generally covers hospitals, community clinics, rehabilitation centers, nursing care facilities, dialysis treatment clinics, community mental health centers, ambulatory surgery centers, and other similar facilities. Colo. Rev. Stat. § 8-2-123(1)(c). The statute only protects employees who qualify as "health care workers," meaning that they are "certified, registered, or licensed" under Colorado law. Colo. Rev. Stat. § 8-2-123(1)(d). This means that employees such as secretaries, administrative assistants, and custodians are not protected by the new law. Health care organizations may still discipline or terminate a health care worker for reasons unrelated to the worker's report or disclosure of patient care or safety issues. Colo. Rev. Stat. § 8-2-123(4). However, a court may infer a retaliatory motive if an employee is disciplined or terminated shortly after reporting a patient care issue. Thus, thorough documentation of performance or discipline issues is critical.

If the organization provides internal reporting procedures in writing to employees, health care workers are required to follow those procedures before reporting or disclosing patient care issues to others. These procedures should identify to whom reports must be made, how the organization will respond to such reports, and remind employees that the organization does not tolerate any type of retaliation for making a good faith report or disclosure related to patient care or safety.

This new law has been criticized because of its ambiguity. For example, it may be difficult for courts to determine when an employee is lying or lacked a reasonable basis for making a complaint or report. Just because a report is unfounded does not automatically mean the employee lacked a good faith basis for making the report. The courts have not yet interpreted the various terms in the new law, nor have they discussed the potential remedies that might be available to health care workers under this law. Health care organizations should become familiar with the protections available to health care workers under this law, and consider what steps they can take to minimize potential claims from employees.

8.13. Military Service

The Uniformed Services Employment and Reemployment Rights Act (USERRA) is a federal law prohibiting discrimination and retaliation against employees based on past, current, or future military service. 38 U.S.C. § 4311(a). Military service includes active duty, active or inactive duty for training, full-time National Guard duty, and absence from work for fitness-for-duty exams. 38 U.S.C. § 4303(13). USERRA applies to both public and private employers. 38 U.S.C. § 4303(4). Private employers must give employees up to 5 years of unpaid time off. 38 U.S.C. § 4312(a)(2). However, there are many exceptions to this rule which may require employers to give employees more time off. See 38 U.S.C. § 4312. Employers may not require employees to use vacation or other accrued time while on leave. 38 U.S.C. § 4316(d). Employers are required to make reasonable efforts to promptly reemploy employees returning from military service, but are not required to reemploy employees if it would be impossible or cause undue hardship. 38 U.S.C. § 4312. Specific rights of the employee and obligations of the employer will depend on the length of military service. *Id.* Employers are not required to reemploy employees who have been discharged dishonorably or for bad conduct. 38 U.S.C. § 4304.

A recent amendment to USERRA gives some protection to family members of military employees. It gives the military employee and his or her dependents previously covered under civilian employment health insurance the right to immediate reinstatement of benefits without a waiting period and without exclusions for preexisting conditions, other than those determined to be related to military service.

Private employers must allow all non-temporary employees who are members of the Colorado National Guard of the United States reserve forces a leave of absence without pay for up to fifteen days each year to receive military training. Colo. Rev. Stat. § 28-3-609. Such employees are entitled to be returned to their same position or a similar position with the same status, pay, and seniority. *Id.* Such absences may not affect the employee's right to normal vacation, sick leave, advancements, bonuses, and other advantages. Colo. Rev. Stat. § 28-3-610. Employees who are members of the Colorado National Guard are entitled to all of the previously mentioned rights regardless of the length of their absence for service. Colo. Rev. Stat. § 28-3-610.5.

9. FAMILY MEDICAL LEAVE ACT (FMLA)

The FMLA generally applies to all government employers and to any private employers that employ 50 or more employees for 20 or more weeks in the current or preceding calendar year. The FMLA guarantees qualifying employees 12 weeks of unpaid leave each year to tend to various covered occurrences. Those occurrences include time off for: (1) the birth of the employee's child; (2) the placement of a child with the employee for adoption or foster care; (3) the care of the employee's spouse; child, or parent with a serious medical condition; and (4) a serious health condition that renders the employee unable to perform the functions of the employee's position.

If employees can reasonably foresee the need for leave, they must give at least 30 days notice to the employer. If the employee fails to give this notice, the employer may delay the employee's leave by up to 30 days. The employee is not required to describe why they are requesting leave or refer to the FMLA when requesting leave. All the employee needs to do is state that leave is necessary for any one of the provisions covered under the FMLA. This shifts the burden to the employer to ask further questions to find out whether FMLA leave will apply in a particular situation.

Some of the penalties for employers who violate the FMLA include damages in the amount of any wages, salary, employment benefits, or other compensation lost because of the violation, and any monetary losses incurred on the employee's part as a result of the violation, such as childcare. To ensure FMLA compliance, employers should: (1) always provide employees with access to an explanation of their FMLA rights, both in a clearly posted, conspicuous format and in an employee handbook; (2) make sure company policy clearly states that any time off allowed under your company's leave policy and taken for the purposes allowed under the FMLA will run concurrently with the employee's FMLA leave; and (3) provide any employees who request time off for the reasons listed in the FMLA with timely (meaning within a day or two) notice that the time will be considered FMLA leave. For a sample FMLA policy, see Appendix E.

Colorado also has specific laws safeguarding the rights of adoptive parents. Colorado employers who allow paternity or maternity leave for biological parents following the birth of their biological child must also permit adoptive parents such time off when adopting a child. Colo. Rev. Stat. § 19-5-211(1.5). Any other benefits provided by the employer must be available equally to adoptive and biological parents. *Id.* These provisions do not apply to adoptions by the spouse of a custodial parent or to second-parent adoptions. *Id.*

10. FEDERAL AND STATE WAGE ACTS

10.1. Minimum Wage

Under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.*, employers are required to pay covered employees a certain minimum hourly wage. In May 2007, President Bush signed the Fair Minimum Wage Act of 2007, which amended the FLSA to gradually raise the federal minimum wage over the next two years from \$5.15 per hour to \$7.25 per hour. In addition to minimum wages, covered employees working more than 40 hours per week are entitled to overtime pay of 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 FLSA. 29 U.S.C. §§ 206, 207, 213.

Effective January 1, 2008, the Colorado Constitution was amended to raise the Colorado minimum wage from \$5.15 an hour to \$7.02 an hour. This amendment also provides for an annual adjustment to the minimum wage based on inflation. Employers of "tipped employees" - those receiving more than \$30.00 a month in tips - must pay their employees at least \$4.00 an hour and can take no more than \$3.02 per hour in tip income to offset the minimum wage that must be paid to tipped employees. After January 1, 2009, the minimum wage for tipped employees will be calculated by subtracting \$3.02 from the adjusted minimum wage.

In response to the amendment, the Colorado Department of Labor and Employment has proposed Wage Order 24, which further clarifies minimum wage law in Colorado. Under the Order, unemancipated minors may be paid 15% less than the current state minimum wage. The Order also contains further directives relating to the employment of minors.

10.2. Child Labor

The FLSA also sets minimum ages for children to work and regulates what types of positions in which they may be employed. Under the FLSA, most children cannot work before age 16, with 18 being the minimum age for hazardous jobs. Children ages 14 and 15 may only work in jobs specifically authorized by the Secretary of Labor under conditions that do not interfere with their education, health, or well-being. Children ages 16 and 17 may work at any job that does not interfere with their health, education, or well-being, except for those found to be particularly hazardous or detrimental to their health or well-being. See 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).

In 2007, the U.S. Department of Labor issued an Advance Notice of Proposed Rule Making regarding teenage employees. The time for receiving public comments on the Advanced Notice expired on July 16, 2007. This new law would increase the number of jobs classified as particularly hazardous and raise the number of permissible jobs for 14 and 15 year-olds. The Department of Labor has not taken any further action yet regarding the Advanced Notice, but employers who employ minors should make sure to keep themselves posted on developments in this area.

10.3. Wage Payment at Termination

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. Additionally, when an employee is terminated, the employee should receive payment for all wages earned as of that date on the day of termination. If the employer's accounting unit is not operational at that time, wages are due to the terminated employee 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 may result in liability for wages due, as well as a 50% penalty (or up to 10 days of wages) and attorney's fees. *Id.* §§ 8-4-109(3).

For more information regarding Colorado's Wage Payment Act, please refer to *Colorado Wage and Hour Laws* by Jude Biggs, © 2008.

11. IMMIGRATION REFORM AND CONTROL ACT (IRCA) AND COLORADO IMMIGRATION LAWS

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

Under a state law that took effect on January 1, 2007, all employers hiring Colorado employees on or after January 1, 2007, must comply with requirements that vary from those imposed by the federal Immigration Reform and Control Act ("IRCA"). First, the employer must make an affirmation that it has checked the legal work status of each new employee, has not altered or falsified the new employee's identification documents, and has not knowingly hired an unauthorized alien. Colo. Rev. Stat. § 8-2-122(2). This affirmation must be completed within twenty days of hiring the new employee, and employers must keep a written or electronic copy of the affirmation during the course of employment for each employee. For a sample affirmation form, see Appendix F.

Second, employers must keep on file a written or electronic copy of the documents presented for I-9 forms for every employee hired after January 1, 2007. These copies must be kept for the term of employment for each employee. Colo. Rev. Stat. § 8-2-122(2). Under IRCA, employers must keep these documents on file for at least three years or one year after employment ends, whichever is greater. Thus, in order to comply with both laws, Colorado employers must keep these documents not only for the term of employment, but also for three years from the date of hire or one year after termination, whichever date is later. Employers are not required to submit the affirmation and I-9 documentation to any state agency. The employer must, however, make the documentation available upon request by the Colorado Department of Labor and Employment ("CDOLE"). Colo. Rev. Stat. § 8-2-122(3).

The new law allows the CDOLE to audit an employer's compliance with the law. Employers who with "reckless disregard" fail to submit documentation when requested or submit false or fraudulent documentation may be fined up to \$5,000 for the first offense and up to \$25,000 for a subsequent offense.

There are additional requirements for contractors engaged in public contracts with a state agency or political subdivisions which took effect August 9, 2006. They prohibit any governmental agency or political subdivision from entering into or renewing contract agreements with contractors who knowingly employ illegal aliens. These provisions only apply to contracts entered into on or after August 9, 2006. Colo. Rev. Stat. § 8-17.5-101 and 102.

As a condition of entering into a public contract, the law requires prospective contractors to certify that they do not knowingly employ or contract with illegal aliens and that the contractor participated in or has attempted to participate in the E-Verify program (formerly known as the Basic Pilot Program), an automated program

that verifies the employment authorization of all newly hired employees by accessing Social Security Administration (“SSA”) and the Department of Homeland Security (“DHS”) databases. To participate in the program, an employer must register and sign a Memorandum of Understanding that sets forth the responsibilities of the SSA, DHS, and the employer. Colorado Division of Labor: Guide to Public Contracts for Services and Illegal Aliens Law.

Each public contract must also include specific provisions that the prospective contractor shall not (1) knowingly employ or contract with an illegal alien to perform work under the contract; and (2) will not enter into a contract with a subcontractor that fails to certify to the contractor that the subcontractor will not knowingly employ or contract with an illegal alien to perform work under the contract. Public contracts must also include a provision requiring the contractor to use the E-Verify Program to verify the legal status of its employees working under the contract. Colo. Rev. Stat. § 8-17.5-102(2)(b).

Additionally, if a contractor on a public contract discovers that a subcontractor is knowingly employing an illegal alien, the contractor must notify both the governmental body for whom the work is being performed and the subcontractor within three days. Colo. Rev. Stat. § 8-17.5-102(2)(b)(III)(A). The contractor is required to terminate the subcontract within three days of giving notice to the subcontractor, unless during that time period the subcontractor provides information to establish that it has not knowingly employed an illegal alien. Colo. Rev. Stat. § 8-17.5-102(b)(2)(III)(B).

If a contractor violates a provision of the public contract, the governmental body may terminate the public contract. If the contract is terminated, the governmental body can hold the contractor liable for actual and consequential damages that it suffers as a result of the termination. In addition, the governmental body must notify the Office of the Secretary of State which publishes a list of terminated contractors on its website for two years. The statute also authorizes the CDOLE to investigate whether a contractor is complying with the provisions of the public contract, including on-site inspections and requests to review documentation. Colo. Rev. Stat. § 8-17.5-102(5)(a).

12. OCCUPATIONAL SAFETY AND HEALTH ACT (OSHA) AND THE MINE SAFETY AND HEALTH ACT (MSHA)

OSHA attempts to assure safe and healthful working conditions for all employees. See 29 U.S.C.A. § 651(b). OSHA basically imposes two requirements on employers. First, employers must comply with all of the safety and health standards promulgated 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).

Employers must also establish procedures for workers to report injuries or illnesses and instruct workers on how to report. Employers are prohibited from discriminating against workers who do report injuries or illnesses. Under OSHA, employers are required to record injuries or illnesses that are work-related if they result in: (1) restricted work or transfer to another job; (2) medical treatment beyond first aid; (3) days away from work; (4) loss of consciousness; (5) diagnosis of a significant injury or illness; (6) or death. For certain types of injuries or illnesses, such as sexual assaults, mental illnesses, or HIV transmissions, employers are required to protect worker privacy by withholding the employee’s name from certain forms.

Other provisions of OSHA that are relevant to many employers include required Hazard Communication Programs for employers with workers exposed to hazardous chemicals and mandatory safety requirements, such as medical and first aid personnel and supplies proportionate to the dangers of the particular workplace. Many workplaces are subject to additional industry specific provisions.

Penalties and abatement orders may be assessed by the Department of Labor if an inspection of the workplace by an OSHA compliance officer reveals violations. Violations may require payment of a penalty up to \$7,000. 29 U.S.C. § 666(c). Repeated or willful violations may result in a penalty of up to \$70,000. *Id.* § 666(a). Criminal sanctions, including imprisonment and high fines, are possible where the employer acts willfully and causes the death of an employee. *Id.* § 666(e).

Mining companies are subject to special safety requirements. The Federal Mine Safety and Health Act (“MSHA”) requires that the Department of Labor inspect all mines annually to ensure safe work environments for employees. Underground mines are to be inspected at least four times annually, and surface mines must be inspected at least twice annually. Certain other mines may be subject to even more frequent inspections. *See* 30 U.S.C. § 813(i). Regulations establish various other requirements mine operators must comply with, such as immediate notice by the mine operator of accidents or injuries at the mine and training programs for employees.

MSHA also gives employees certain rights, including the right to receive health and safety training, be paid during certain times a mine has been closed by a withdrawal order, be informed of legal proceedings under MSHA, and obtain inspections of mines where there

are reasonable grounds to believe that an imminent danger of an MSHA violation exists. 38 U.S.C. §§ 813, 819, 821, 819. Companies that violate MSHA are subject to civil penalties and mandatory time frames for correcting violations. Knowing or willful violations of MSHA may subject mine operators to criminal penalties. 38 U.S.C. § 820(d).

13. SARBANES-OXLEY ACT

Congress passed the Sarbanes-Oxley Act in response to the corporate scandals that occurred in the early 2000s. The Act contains provisions for civil whistleblower protection, hot line reporting of questionable accounting or audit practices, and ethics for chief financial officers. The Act imposes criminal penalties on all employers who retaliate against a person who provides correct information to law enforcement regarding a federal offense, tampers with records or interferes with official proceedings, or destroys or alters records in federal investigations or bankruptcy proceedings, regardless of whether the employer has publicly traded securities. 18 U.S.C. §§ 1512-13.

Perhaps the most important part of the Act is the new protection given to whistleblowers. Covered employers may not discharge or retaliate against an employee who has provided information to or assisted in an investigation by a federal law enforcement or regulatory agency, a member or committee of Congress, or an internal investigation by the company if the information relates to alleged mail or wire fraud, bank or securities fraud, or violations of SEC rules, regulations, or other federal laws regarding protection of shareholders against fraud. 18 U.S.C. § 1513.

14. NATIONAL LABOR RELATIONS ACT (NLRA)

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 NLRA, employees have a right to engage in organized activities without improper interference. 29 U.S.C. §§ 157-58. Furthermore, because union activity is not as common in Colorado as in other states, employers can easily make mistakes in handling such situations, so they should make sure to contact counsel for guidance with these issues.

The National Labor Relations Board (NLRB) has discretion to decide whether to hear a particular case. The NLRB generally relies on a minimum-dollar standard designed to measure the dispute's impact on commerce. The NLRB also establishes the criteria for creating appropriate bargaining units to carry out collective bargaining under the NLRA. Hot cargo agreements, which include agreements between a

union and employer to cease conducting business with another employer, are prohibited. 29 U.S.C. § 158(e).

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. Colo. Rev. Stat. § 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 the service of another pursuant to a contract of hire either express or implied." *Id.* § 8-40-202(1)(b). The Act contains 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." *Dana's Housekeeping v. Butterfield*, 807 P.2d 1218, 1220 (Colo. Ct. App. 1990). 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 (referral agency which had referred plaintiff to one of its clients to do housekeeping was considered an employer because a major part of its business was providing domestic housekeeping services to clients). Finally, while a written contract may provide evidence that a certain relationship is an independent contractor relationship, the ultimate decision will depend on the actual facts of the relationship. See Colo. Rev. Stat. § 8-40-202(b) outlining the specific criteria for the contract, and Appendix G for a sample contract and checklist.

Although an independent contractor may not be considered an actual employee under the Workers' Compensation Act, that contractor may still be covered as a "statutory employer." See *id.* § 8-41-401. Under the statutory employer section, a business entity that contracts

out certain work to a subcontractor may 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.

In *Finlay v. Storage Tech. Corp.*, 764 P.2d 62 (Colo. 1988), the Colorado Supreme Court provided 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, 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. *Id.* 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.

Recent changes to Colorado workers' compensation laws include giving injured workers the right to select a treating doctor from a list and to change physicians, an increase in the aggregate of all lump sums granted to \$60,000, and increases in awards for certain injuries. H.B. 07-1176, effective January 1, 2008.

16. NON-COMPETE AGREEMENTS

Colorado employers may require employees to sign non-compete agreements, but such agreements are enforceable only in limited circumstances. Colo. Rev. Stat. § 8-2-113 provides that covenants not to compete in future employment are void, except for contracts for: (a) the purchase and sale of a business or a business's assets; (b) protection of trade secrets; (c) recovery of expenses of training and educating employees who have been employed for less than two years; and (d) executive and management personnel or officers and employees who are professional staff to such personnel. Non-compete provisions between physicians that restrict the physician's right to practice medicine are void. *Id.* at (3).

Non-compete agreements which are authorized by statute are only valid if they are reasonable in duration and geographic scope. *Nat'l Graphics Co. v. Dilley*, 681 P.2d 546 (Colo. Ct. App. 1984). To be considered reasonable, the non-compete agreement must not impose

hardship on the employee and must not be broader than necessary to protect the legitimate interests of the employer. *Whittenberg v. Williams*, 110 Colo. 418, 135 P.2d 228 (1943). For example, in *Reed Mill & Lumber Co., v. Jensen*, 165 P.3d 733 (Colo. Ct. App. 2006), the court interpreted a non-compete agreement tied to the sale of a business. There, the court found unreasonable a non-compete agreement that prohibited competition beginning at the termination of employment and continuing for three years thereafter, because the employee worked for the employer for six years after it purchased the company from the former owners, thus, protection from competition was no longer necessary.

Colorado courts construe the exceptions to the non-compete agreement statute narrowly. *Logixx Automation, Inc. v. Lawrence Michels Family Trust*, 56 P.3d 1224, 1230 (Colo. Ct. App. 2002); *Smith v. Sellers*, 747 P.2d 15 (Colo. Ct. App. 1987). The information protected under a non-compete agreement is confidential, trade secret information acquired during employment. General knowledge of business operations is not protected. *Mulei v. Jet Courier Serv., Inc.*, 739 P.2d 889, 892 (Colo. Ct. App. 1987).

Factors courts may analyze when determining the validity of a non-compete agreement in the context of the sale of a business include: (1) the sufficiency of the time period to enable the buyer to take over the business, learn the trade, and be free from competition from the previous owners of the business; (2) the sufficiency of the time period to enable the buyer to establish itself within the industry; (3) any valid reasons as to why the buyer might need an extended period of time to establish itself within the industry; (4) the employee's position in a management or executive position at the time of termination; and (5) any undue hardship on the employee. *Reed Mill & Lumber Co.*, 165 P.3d at 737-38.

The executive and management employee exception to the prohibition on non-compete agreements covers employees who act in an unsupervised capacity and are "in charge." *Atmel Corp. v. Vitesse Semiconductor Corp.*, 30 P.3d 789, 794 (Colo. Ct. App. 2001). When determining whether an employee falls into this category, courts generally focus on the employee's skill, knowledge, and autonomy, rather than the employee's relationships with customers. *Porter Indus. Inc. v. Higgins*, 680 P.2d 1339 (Colo. Ct. App. 1984). The validity of a non-compete agreement is determined at the time the employee signed the agreement, rather than at the time the employee leaves his or her employer. *Phoenix Capital, Inc. v. Dowell*, 2007 Colo. App. LEXIS 1401 (2007). Thus, a non-compete agreement signed by an employee before he or she became a management employee is void. *Id.*; *Mgmt. Recruiters of Boulder, Inc. v. Miller*, 762 P.2d 763, 765

(Colo. Ct. App. 1988); *Accounting Machs., Inc. v. Mergenthaler*, 609 P.2d 1125, 1127 (Colo. Ct. App. 1980). However, an employer may protect itself by requiring employees to sign non-compete agreements after being promoted to management or executive positions. *Phoenix Capital*, 2007 Colo. App. LEXIS 1401.

The rules regarding non-solicitation agreements vary slightly from those for non-compete agreements. A non-solicitation clause which only prohibits the initiation of contact or active solicitation of the employer's employees is valid even if accompanied by an invalid non-compete provision. *Id.*; *Atmel Corp.*, 30 P.3d at 796. However, non-solicitation agreements prohibiting the solicitation of customers are generally unenforceable so long as the employee does not use the employer's trade secrets, because a former employee's ability to solicit previous clients is essential to the employee's ability to earn a living. *Phoenix Capital*, 2007 Colo. App. LEXIS 1401.

17. TRADE SECRETS

Colorado law broadly defines "trade secrets" as "the whole or any portion or phase of any scientific or technical information, design, process, procedures, formula, improvement, confidential business or financial information, listing of names, addresses, or telephone numbers, or other information relating to any business or profession which is secret and of value." Colo. Rev. Stat. § 7-74-102(4). To be considered a trade secret, the company must have taken measures to prevent the information from becoming available to those not selected by the company to have access to the information. *Id.* When analyzing whether sufficient precautions were taken for information to qualify as a trade secret, courts will generally only consider information to be a trade secret if the precautions taken were more than just normal business procedures. *Harvey Barnett, Inc. v. Shidler*, 143 F. Supp. 2d 1247 (D. Colo. 2001). Examples of procedures which may be sufficient to qualify information as a trade secret include informing employees that a trade secret exists, limiting access to a need-to-know basis, and regulating access to areas where the information could be discovered. *Id.*

In determining whether information qualifies as a trade secret, courts consider the following factors: (1) the extent to which those outside of the business know the information; (2) the extent to which those inside the business know the information; (3) the safeguards taken by the company to protect the secrecy of the information; (4) the savings effected and the value to the company of having the information kept secret from competitors; (5) the amount of effort or money spent acquiring and developing the information; and (6) the amount of time and money it would take others to obtain and duplicate

the secret information. *Harvey Barnett, Inc. v. Shidler*, 143 F. Supp. 2d 1247 (D. Colo. 2001). The information does not need to be physically copied or appropriated for a violation of the statute to occur. *Rivendell Forest Prods. v. Georgia-Pac.*, 824 F. Supp. 961 (D. Colo. 1993).

Damages for misappropriation of trade secrets generally include the actual loss caused by the misappropriation and any unjust enrichment not included in the actual loss amount. Colo. Rev. Stat. § 7-74-104(1). In lieu of these measures, damages may be calculated in terms of a reasonable royalty for the disclosure or use of the trade secret. *Id.* A company may also obtain an injunction against the misappropriating party prohibiting further use of the information. Colo. Rev. Stat. § 7-74-103. If the misappropriation is accompanied by fraud, malice, or willful and wanton disregard of the other party's rights, exemplary damages may be awarded. Colo. Rev. Stat. § 7-74-104(2). It is not necessary that the information actually be used or commercially implemented to receive damages. *Sonoco Prod. Co. v. Johnson*, 23 P.3d 1287 (Colo. Ct. App. 2001). If a company chooses to take legal action against a misappropriating party, courts are required to preserve the confidentiality of the trade secret. Colo. Rev. Stat. § 7-74-106.

For examples of information that Colorado courts have found to constitute a trade secret, see *Ovation Plumbing, Inc. v. Furton*, 33 P.3d 1221 (Colo. Ct. App. 2001) (bid on a contract could qualify as a trade secret); *Network-Telecomm. v. Boor-Crepeau*, 790 P.2d 901 (Colo. Ct. App. 1990) (customer lists could qualify as trade secrets). However, general business knowledge taken from one business to the next is not protected. *Frontrange Solutions USA, Inc. v. Newroad Software, Inc.*, 505 F. Supp. 2d 821 (D. Colo. 2007) (mere fact that some names on the defendant's contact list overlapped with the plaintiff's customer list was insufficient to prove that the plaintiff's database was taken in its entirety, particularly where the plaintiff advertised the identities of many of its customers on its website and made information available from other sources as well); see also *Harvey Bennett, Inc. v. Shidler*, 200 F. App'x 734 (10th Cir. 2006) (where former employee working as a swimming instructor, had no prior experience as an infant swimming instructor, received no additional training after terminating her employment, and opened a new infant swimming program with only minor changes, she breached the confidentiality provision of her non-compete agreement, but did not misappropriate trade secrets).

18. 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 loyal and productive workforce. Such an employer also stands in a better position to avoid and defend against employee lawsuits. The keys are investing the resources, developing and implementing personnel policies that are effective and manageable, and 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, acknowledgment 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 anti-harassment policy (that covers sexual, racial, and other forms of harassment) with several options for reporting harassment
- 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
- Consider separation agreements with a release of claims when terminating employees.

APPENDIX A

Handbook Disclaimer/ Acknowledgement Form

Important Notice -- Please Read

While ABC believes wholeheartedly in the guidelines, procedures and benefits described in this manual, they are not terms or conditions of employment and exist solely at the discretion of ABC. This manual supersedes any prior employee handbook or policies, written or oral. In addition, we reserve the right to modify, suspend, or eliminate in whole or in part, the guidelines, procedures and benefits set forth in this manual at any time, with or without notice.

The language used in this manual is not intended to create, nor is it to be construed to constitute, a contract or guarantee of employment. Likewise, no statement (in this manual or elsewhere), oral or written, past or future, is intended to create, nor is it to be construed to constitute, a contract or guarantee of employment. Any statement or representation concerning fair treatment (or similar statement) is a goal only and is not enforceable as a contract or covenant.

Employees are employed "at the will" of ABC, meaning they have no specified term of employment and either the employee or ABC may terminate the employment relationship at any time, with or without cause or notice. Changes in compensation, location, job duties, level of employment or other changes do not modify the right of employees or ABC to terminate the employment relationship at any time, with or without cause or notice.

Please understand that no supervisor, manager, or representative of ABC other than the President of ABC has authority to make any statements or commitments contrary to the foregoing, including making any agreement for employment for any specified period of time. Further, any employment agreement entered into by ABC shall not be enforceable unless it is in writing, is entitled "Employment Agreement," and signed by both the President of ABC and the employee.

EMPLOYEE ACKNOWLEDGMENT FORM

I have received and read this employee handbook and have had an opportunity to ask any questions I may have had about it.

I understand that this handbook supersedes any prior employee handbook or policies, written or oral. In addition, I understand that the guidelines, procedures or benefits in this handbook may be modified, suspended, or eliminated, in whole or in part, at any time, with or without notice.

I understand that the language used in the employee manual is not intended to create, nor is it to be understood to constitute, a contract or guarantee of employment. Likewise, I understand that no statement (in this handbook or elsewhere), oral or written, past or future, is intended to create, nor is it to be construed to constitute, a contract or guarantee of employment. I understand that any statement or representation concerning fair treatment is a goal only and not enforceable as a contract or covenant.

I understand that my employment is "at will," meaning that I have no specified term of employment. I understand that either I or ABC may terminate the employment relationship at any time with or without cause or notice. I also understand that changes in compensation, location, job duties, level of employment or other changes do not modify my right or ABC's right to terminate the employment relationship at any time, with or without cause or notice.

I also understand that no supervisor, manager or other representative other than the President of ABC has authority to make any statements or commitments contrary to the foregoing, including making any agreement for employment for any specified period of time. Further, I understand that any employment agreement entered into by ABC with me shall not be enforceable unless it is in writing, is entitled "Employment Agreement," and is signed by both me and the President of ABC.

By signing below, I acknowledge that I am not relying on any statements outside of this form concerning my employment status.

Signed by _____.

Dated _____.

APPENDIX B

APPLICATION FORM

ABC, INC.
APPLICATION FOR EMPLOYMENT
An Equal Opportunity Employer

Date_____

POSITION APPLIED FOR: (please print)_____

PERSONAL

Last Name First Middle

Street Address

City, State, Zip

Home Phone _____ Business Phone_____

When will you be available for work?_____

Indicate type of employment desired: _____ Full Time_____

Part Time_____ Temporary Date available:_____

Desired number of hours per week_____

Are you legally eligible for employment in the United States?_____

Have you ever been convicted of a felony or misdemeanor, other than a minor traffic offense (A conviction may not necessarily disqualify an applicant from a position with ABC Company) ?

___Yes___ No If Yes, please describe in full: _____

If you are applying for a job that requires driving, have you been convicted of a driving offense in the last_years? If so, please describe: _____

Current Driver's License_____

Have you ever been fired or asked to resign? _____ Yes _____ No If yes, describe the circumstances:

MILITARY

Branch of Service _____

Period of Active Duty: From _____ To _____

Rank at Discharge _____ Describe duties and/or special training _____

EDUCATION

What is the highest grade that you completed? (Circle)

Grade School High School Post High School
 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18

Name and Location	From	To	Degree or Certificate	Date
High School or Equivalence				
College/University				
Other				

Other training, certifications, or professional licensing, etc. _____

Any other skills related to this position that you would like to mention? _____

EMPLOYMENT HISTORY

EMPLOYER _____ Position Title _____

Address _____ City _____ State _____ Phone _____

Start Date (month/year) _____ Starting Salary \$ _____

Leaving Date (month/year) _____ Final Salary \$ _____

Supervisor's Name and Title _____ May we contact? Yes _____

No

Describe your specific responsibilities and duties in this job: _____

Reason for leaving _____

EMPLOYER _____ Position Title _____

Address _____ City _____ State _____ Phone _____

Start Date (month/year) _____ Starting Salary \$ _____

Leaving Date (month/year) _____ Final Salary \$ _____

Supervisor's Name and Title _____ May we contact? Yes _____
No

Describe your specific responsibilities and duties in this job: _____

Reason for leaving _____

EMPLOYER _____ Position Title _____

Address _____ City _____ State _____ Phone _____

Start Date (month/year) _____ Starting Salary \$ _____

Leaving Date (month/year) _____ Final Salary \$ _____

Supervisor's Name and Title _____ May we contact? Yes _____
No

Describe your specific responsibilities and duties in this job: _____

Reason for leaving _____

REFERENCES Give name, address, and telephone number of three references who are not related to you and are not previous employers:

- 1. _____
- 2. _____
- 3. _____

FAMILY MEMBERS OR FRIENDS: Give name, address, and telephone number of any family members or friends who work or have worked at ABC Company in the past three (3) years, and indicate whether the person is currently employed:

- 1. _____
- 2. _____
- 3. _____

OTHER Volunteer work may be relevant. Please list job title, responsibilities, and dates of experience if relevant to the position for which you are applying. Also include supervisor’s name, address, and phone of organization for which you volunteered. _____

APPLICANT’S STATEMENT

I understand that integrity is an essential job function for all positions at ABC Company. I certify that all statements in this Application and during the hiring process are true, complete, and accurate to the best of my knowledge. I understand that any false or incomplete statements by me may be grounds for not being hired by ABC, and that if such statements are discovered after I am hired, they may be grounds for immediate discharge.

I have applied for employment with ABC Company and hereby authorize investigation by law enforcement agencies, and references from persons, previous employers, or any other appropriate forms. Investigations and reference checks may include information as to my job skills and duties, character, general reputation, personal characteristics, professional skills, criminal background, and if applicable, driving record. I hereby release from liability the ABC Company and any prior employer or other reference source for seeking or providing information about me. I also release ABC Company and its employees from any liability related to providing such information following separation from ABC Company.

I understand that any employment relationship with ABC Company is of an “at will” nature, which means that either I or the ABC Company may

end the employment relationship at any time with or without notice or cause. I understand that my "at will" employment relationship may not be changed by any oral or written statements, unless in a written document signed by the President of ABC Company and titled "Employment Agreement." I understand that this application and any other statements, written or oral, past or future, do not give rise to a contract or covenant of employment, express or implied.

I understand that I am required to abide by all rules and regulations of ABC Company.

Signature of Applicant _____ Date _____

APPENDIX C

Release Form for Reference Check

APPLICANT AUTHORIZATION FOR RELEASE OF INFORMATION

I have applied for employment with ABC Company and hereby authorize release of information pertaining to my previous employment and education without liability to either ABC Company or my prior employer or reference source. A copy or facsimile of this authorization shall have the same authority as the original.

Name (please print) _____
Last First Middle

Signature of Applicant _____ Date _____

APPENDIX D

Anti-Discrimination/Anti-Harassment Policy

POLICY PROHIBITING SEXUAL OR OTHER TYPES OF HARASSMENT

The Company seeks to provide a work place free of harassment and discrimination for all employees and prohibit any unlawful harassment, such as sexual, racial, religious or other types of harassment or discrimination.

Sexual harassment is characterized by:

- Making unwelcome sexual advances or requests for sexual favors or other verbal or physical conduct of a sexual nature a condition of employment; or
- Making submission to or rejection of such conduct the basis for employment decisions; or
- Creating an intimidating, hostile, or offensive working environment by such conduct.

Sexual harassment does not include behavior or occasional compliments of a socially acceptable nature. Sexual harassment may take many forms. It may be between men and women or between persons of the same sex. It may be overt or subtle, but it will not be tolerated. One specific form of sexual harassment is the demand for sexual favors. Other kinds of conduct that may constitute sexual harassment include:

- Sexual innuendoes, suggestive comments, jokes or pranks of a sexual nature, sexual propositions, threats;
- Sexually suggestive objects or pictures, suggestive or insulting sounds, leering, whistling, obscene gestures;
- Unwelcome physical contact including touching, grabbing, patting, pinching, brushing the body, assault, coerced sexual intercourse.

Whatever form it takes, sexual harassment can be insulting and demeaning to the recipient. The Company will take appropriate disciplinary action against any employee who violates this policy.

COMPLAINT PROCEDURE - SEXUAL OR OTHER TYPES OF HARASSMENT

If you believe that you have been subjected to sexual harassment (or any other unlawful harassment, such as racial or religious harassment) or if you observe what you believe to be sexual harassment (or any other unlawful harassment, such as racial or religious harassment) of another employee, you should report the circumstances to your supervisor, your supervisor's supervisor, the President, the Human Resource Manager, or the Human Resources Department for investigation. Reports of harassment may be made orally or in writing.

The Company tries to keep complaints, their investigation, and the terms of their resolution confidential, as much as possible. The purpose of this provision is to protect the confidentiality of the employee who files a complaint, to encourage the reporting of incidents of harassment, and to protect the reputation of any employee incorrectly charged with harassment. However, complete confidentiality cannot be guaranteed and some disclosure may be necessary to conduct an investigation.

Investigation of a complaint may be conducted by the employee's supervisor, next level of management or the Human Resources Department, and generally may include interviewing the parties involved and any named or apparent witnesses. No intimidation, retaliation or discrimination for filing a complaint or assisting in an investigation will be tolerated. If an employee is not satisfied with the handling of a complaint, then the employee should bring the complaint to the attention of the Human Resource Manager, or the President.

Any employee who is found after appropriate investigation to have engaged in harassment or inappropriate conduct towards another employee may be subject to disciplinary action, up to and including immediate termination. Likewise, any employee who is found to have retaliated against another employee for filing a complaint or assisting in an investigation may be subject to disciplinary action, up to and including immediate termination.

APPENDIX E

FMLA Policy

Family and Medical Leave Act Policy

Background

Under the Family and Medical Leave Act of 1993 (“FMLA” or “Act”), you are entitled to up to twelve (12) weeks of unpaid leave a year, provided that you have been employed by the Company for at least twelve (12) full months and have worked at least 1,250 hours during that period. Leave will be granted for the following reasons:

- a. For the birth or adoption of a child, or placement of a foster child;
- b. For the care of a spouse, parent or child with a serious health condition; or
- c. For your own health care if you have a serious health condition that makes you unable to perform the functions of your job.

Specifics of Company Policy

1. A “year” for FMLA purposes is a “rolling” year, looking from the present back over the prior year.
2. “Serious health condition” means an illness, injury, impairment or physical or mental condition that involves:
 - a. any period of incapacity or treatment connected with inpatient care (i.e., an overnight stay) in a hospital, hospice or residential medical-care facility;
 - b. any period of incapacity requiring absence of more than three calendar days from work, school or other regular daily activities that also involves continuing treatment by (or under the supervision of) a health care provider; or
 - c. continuing treatment by (or under the supervision of) a health care provider for a chronic or long-term health condition that is incurable or so serious that, if not treated, would likely result in a period of incapacity of more than three calendar days, and for prenatal care.
3. Leave for birth or placement for adoption or foster care must conclude within 12 months of the birth or placement.
4. If you take leave to care for a seriously ill spouse, child or parent, or take leave because of your own serious health condition,

you must supply medical certification (for each period of leave) documenting the necessity for such leave. Second and third opinions and periodic recertifications (at the Company's expense) may be required. Failure to provide required certification may delay approval of leave or justify denial of leave. Please contact the personnel department for the certification form.

5. If the purpose of the leave is to care for a seriously ill family member or yourself, leave may be taken on an intermittent basis, which means taking leave in blocks of time, or by reducing your normal weekly or daily work schedule; however, if you take leave on an intermittent or reduced leave basis, you must provide medical certification showing the need for such leave, including the expected dates for medical treatments and the planned duration of the treatments. In addition, the Company may transfer you temporarily to an available equivalent alternative position. Intermittent leave and reduced leave schedules are not allowed for birth and adoption of children.

6. You will be required to use any accrued vacation or sick leave first during any FMLA leave period. For instance, if you have two weeks of paid vacation leave accrued, you must use that first and then may have up to 10 weeks unpaid leave under the Act (for a total of 12 weeks maximum). If the leave is for your own personal medical need, you must also first use your paid sick leave.

7. Except for unforeseen medical emergencies, you must provide at least thirty (30) days written notice that you need leave under the Act. For unforeseen circumstances, you must provide as much notice as is practicable. You must keep the Company informed in writing of your expected return date and make any requests for extension of leave in writing. Approval of any extensions of leave, likewise, must be in writing.

8. When leave is needed to care for a seriously ill family member or for your own serious illness, and is for planned medical treatment, you must try to schedule treatment so as not to unduly disrupt the Company's operations.

9. You may be required to make periodic reports during FMLA leave regarding your status and intent to return to work.

10. The Company will maintain group health and life insurance coverage for you while on FMLA leave whenever such insurance has been provided before the leave and on the same terms as if you had continued to work. For instance, medical insurance benefits continue provided that your contributions to the medical plan continue

to be made. You should contact the personnel department before going on leave to make arrangements to pay your share of health insurance premiums while on leave.

11. If leave was taken due to your own serious health condition, you must provide written medical certification that you are fit for work before return to work.

12. If you do not return to work from FMLA leave when scheduled, you will be considered to have voluntarily quit your job. In addition, under certain circumstances, you may be required to refund to the Company any payments it made to maintain your health coverage while on leave.

13. Upon return from FMLA leave, you will be restored to your original job, or to an equivalent job with equivalent pay, benefits, and terms and conditions, assuming the position or an equivalent one exists. In addition, you will not lose any benefit that you had earned or were entitled to before using FMLA leave.

The law has a number of other provisions, including provisions concerning "key" employees. Please contact human resources for more detailed information. Please also refer to the poster on the Act at _____.

APPENDIX F

Immigration Affirmation Form

AFFIRMATION

The undersigned hereby affirms his/her compliance with House Bill 06S-1017 and 8 USC 1324a. Specifically, the undersigned verifies, under penalty of perjury, the following:

- A. That [INSERT COMPANY NAME] hired [INSERT EMPLOYEE'S NAME] on [INSERT DATE OF HIRE];
- B. That the undersigned has examined the document(s) (which were offered for employment verification purposes in compliance with House Bill 06S-1017 and 8 USC 1324a) of said employee and retained a copy or copies of said document(s);
- C. That the undersigned has not altered or falsified [INSERT EMPLOYEE'S NAME] the identification document(s) (which were offered for employment verification purposes in compliance with House Bill 06S-1017 and 8 USC 1324a); and
- D. That the undersigned has not knowingly hired an unauthorized alien to work for the above referenced company.

This Affirmation shall be kept with said employee's completed I-9 Employment Eligibility Verification Form for the duration of the employee's employment with our company and, if requested by an authorized government agent, shall be submitted as evidence of compliance with the above-referenced state and federal laws.

Signed:

[INSERT NAME AND TITLE]

Date: _____

APPENDIX G

Independent Contractor Agreement and Checklist

AGREEMENT BETWEEN ABC CO. AND INDEPENDENT CONTRACTOR

This Agreement is between ABC Co. and the business named _____ (“Independent Contractor”).

WHEREAS, Independent Contractor declares that it is engaged in an independent business and has complied with all federal, state and local laws regarding business permits and licenses of any kind that may be required to carry out the said business and the tasks to be performed under this Agreement;

WHEREAS, both parties agree that the Independent Contractor is an independent contractor and not an employee of ABC Co.;

WHEREAS, both parties agree that they have never, and will not, combine their business operations;

WHEREAS, Independent Contractor declares that it is engaged in the same or similar activities for other clients and that ABC Co. is not Independent Contractor’s sole and only client or customer; and

WHEREAS, both parties agree that ABC Co. does not require exclusive work from Independent Contractor (although Independent Contractor may voluntarily choose to work exclusively for ABC Co. for a finite period of time spelled out below).

THEREFORE, IN CONSIDERATION OF THE FOREGOING REPRESENTATIONS AND THE FOLLOWING TERMS AND CONDITIONS, ABC CO. AND INDEPENDENT CONTRACTOR AGREE:

1. SERVICES TO BE PERFORMED. ABC Co. engages Independent Contractor to perform the following tasks or services:

_____.

2. DEADLINE: Independent Contractor shall commence the services described herein on _____ and shall fully complete said services on or before _____. Independent Contractor shall dictate the time of performance of services rendered to ABC Co., subject to this deadline.

3. TERMS OF PAYMENT: ABC Co. shall pay Independent Contractor a fixed amount of _____ for the services described in paragraph 1 above. This amount is fixed, does not constitute salary, wages, or benefits and is unaffected by the amount of time the Independent Contractor spends on the services described above. Independent Contractor will submit monthly invoices to ABC Co. for services

rendered. ABC Co. will remit payment for genuine invoices within 10 days after receipt of such invoices. Checks tendered by ABC Co. shall be made payable to the business name of Independent Contractor.

4. **INSTRUMENTALITIES:** Independent Contractor shall supply all equipment, tools, materials and supplies to accomplish the designated tasks, except as follows:

If Independent Contractor borrows any ABC Co. equipment, tools, materials or supplies, it shall pay a reasonable rental fee.

5. **NO TRAINING:** ABC Co. shall not provide any type of training to Independent Contractor or its employees. Rather, Independent Contractor is responsible for training its own employees.

6. **GENERAL SUPERVISION:** Independent Contractor retains the sole right to control or direct the manner in which the services described herein are to be performed. Subject to the foregoing, ABC Co. retains the right to prescribe plans, specifications and/or alterations for the work and may stop the work if the Independent Contractor fails to follow ABC Co.'s specifications or breaches this Agreement.

7. **NO PAYROLL OR EMPLOYMENT TAXES:** No payroll or employment taxes of any kind shall be withheld or paid with respect to payments to Independent Contractor. Rather, Independent Contractor is solely responsible for paying all payroll and employment taxes affecting it and/or its employees including, but not limited to, FICA, FUTA, federal personal income tax, state personal income tax, state disability insurance tax, state unemployment insurance tax, and state worker's compensation insurance tax.

8. **NO BENEFITS:** No benefits, including but not limited to health insurance benefits, retirement plan benefits, vacation pay or sick pay, shall be provided by ABC Co. to Independent Contractor. Independent Contractor is not required to attend employee or staff meetings or participate in any employment-related activities or benefits.

9. **NO WORKERS' COMPENSATION / UNEMPLOYMENT COMPENSATION:** No workers' compensation or unemployment compensation insurance has been or will be obtained by ABC Co. on account of the Independent Contractor or its employees. Rather, Independent Contractor agrees to provide workers' compensation coverage and unemployment compensation for its own employees, subcontractors and anyone directly or indirectly employed by

Independent Contractor or its subcontractors. Independent Contractor certifies that its employer identification number for such coverage is _____.

10. **LIABILITY INSURANCE:** Independent Contractor shall maintain insurance that will fully protect Independent Contractor, ABC Co. and ABC Co.'s customers from any and all claims for damage to property or personal injury, including death, made by anyone that may arise from the services provided under this Agreement, either by Independent Contractor and its employees, any subcontractor, or by anyone directly or indirectly engaged or employed by either of them. Independent Contractor further agrees to maintain such automobile liability insurance that will fully protect Independent Contractor, ABC Co. and ABC Co.'s customers for bodily injury and property damage claims arising out of the ownership, maintenance, or use of owned, hired, or non-owned vehicles used by Independent Contractor, its employees or subcontractors, while providing services under this Agreement.

11. **CERTIFICATION:** Independent Contractor certifies that any and all employees of Independent Contractor are lawfully authorized to work in the U.S. and that Independent Contractor maintains all appropriate authorization-to-work records, including but not limited to I-9 forms. Independent Contractor certifies that it complies with all federal, state and local laws applicable to its business.

12. **INDEMNITY:** Independent Contractor shall be entirely and solely responsible for its actions and the actions of its employees and subcontractors. Independent Contractor agrees to indemnify and hold harmless ABC Co. against all claims, demands, suits, awards and judgments, made or recovered by any persons or agencies due to the actions of Independent Contractor or its employees and subcontractors during the rendering of services under this Agreement.

13. **TERMINATION:** This agreement shall end on _____ and may not be terminated earlier, except for cause, and with ___ days prior written notice from one party to the other.

Agreed this ____ day of _____, 2008.

ABC CO.

By: _____

Name

Title

STATE OF _____)

COUNTY OF _____)

Subscribed and sworn to before me this ____ day of _____, 2008, by _____ as _____ for ABC Co.

Witness my hand and official seal.

My commission expires:

Notary Public

INDEPENDENT CONTRACTOR

By: _____

Name

Title

STATE OF _____)

COUNTY OF _____)

Subscribed and sworn to before me this ____ day of _____, 2008, by _____ as _____ for _____.

Witness my hand and official seal.

My commission expires:

Notary Public

Independent Contractor Checklist

In order to provide services to _____ Company, each Independent Contractor must provide the following:

1. Signed and notarized Independent Contractor Agreement;
2. Business name, address, telephone number, fax number, and email address;
3. Tax identification number (preferably not an individual social security number);
4. Proof of incorporation or other business organization;
5. Names, addresses, telephone numbers and name of contact for other customers;
6. Proof of insurance for workers' compensation, unemployment compensation, personal liability, property damage and automobile related property damage and personal injury;
7. Proof of business licenses and degrees, if applicable;
8. Stationery and business card;
9. Copy of blank business check;
10. Sample advertisements, including yellow page ads;
11. Certification that Independent Contractor is not also employed as an employee by a similar business doing similar work; and
12. Certification that Independent Contractor pays any social security, worker's compensation, unemployment insurance and related employment taxes or benefits, of any of its employees.

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. Their attorneys have expertise in virtually every area of labor and employment law. Described below are the various types of work they handle.

Personnel Counseling

Holland & Hart attorneys regularly advise employers with respect to all aspects of the employment relationship. They draft and review employee handbooks and personnel policies and procedures. They consult with employers regarding matters of discipline and, if necessary, discharge. They 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. They prepare employment agreements, and where necessary, separation agreements and releases. In all of these matters, it is the firm’s goal to help employers comply with the myriad of laws and regulations governing the employment relationship and avoid costly and expensive litigation.

Employment Discrimination

Holland & Hart attorneys 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. They 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.

Holland & Hart’s 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. Firm lawyers regularly speak at seminars and institutes and have written extensively on fair employment topics.

Wrongful Discharge

Holland & Hart attorneys have substantial experience litigating wrongful discharge cases on behalf of management. Firm lawyers have handled many of the precedent-setting decisions in the Rocky Mountain region on issues of implied contract, promissory estoppel, and employment torts, and have been instrumental in defining the parameters and limitations on such claims.

They 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.

Holland & Hart attorneys 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

Holland & Hart attorneys 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. They help employers develop policies and procedures to meet the company's particular needs and litigate about such issues when necessary.

Wage-Hour Matters

Holland & Hart attorneys 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. They regularly advise employers with respect to compliance with the FLSA, including determining whether a particular position is exempt or non-exempt. They also assist employers during DOL audits and litigate government and private wage suits on behalf of employers.

Union Organizational Campaigns

They work with firm 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. They 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.

Holland & Hart attorneys 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. They also have experience in representing employers in filing objections to NLRB elections, where necessary.

Collective Bargaining

Holland & Hart attorneys handle collective bargaining for a number of employers, in a variety of industries. In addition to actually conducting the bargaining, they 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

Holland & Hart attorneys 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

They have substantial experience in handling the legal and practical problems confronting employers during strikes or picketing. Firm 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

Holland & Hart attorneys 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

Holland & Hart attorneys have handled numerous elections under the Colorado Labor Peace Act, involving union security clauses.

Employee Safety and Health

Holland & Hart attorneys represent numerous types of employers with respect to compliance with and litigation under the federal Occupational Safety and Health Act. Firm clients have ranged from heavy industry (smelters, oil drilling, pulp processing, high rise construction) to retail and service and light manufacturers.

They also have substantial experience with the statutes that govern safety and health in the mining industry, including the Mine Safety and

Health Act. Finally, they also have expertise in the defense of “black lung” and other occupational disease claims.

Unemployment Insurance and Workers’ Compensation

Holland & Hart attorneys 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

Holland & Hart attorneys 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 the firm, Holland & Hart labor attorneys 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 the firm’s practice.

Transactional Matters

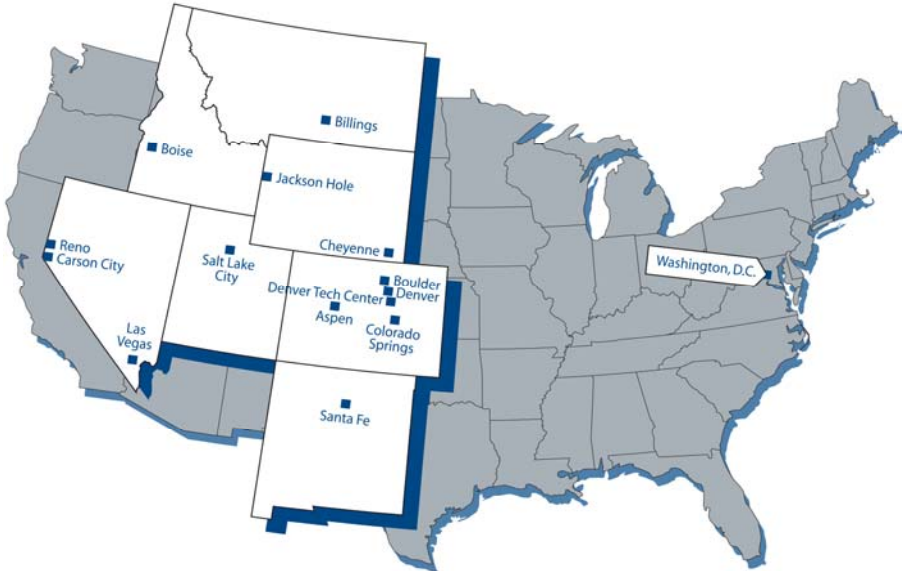
Holland & Hart attorneys regularly advise the firm’s corporate attorneys and their clients with respect to the labor and employment aspects of transactions, including issues ranging from successorship to the federal WARN Act to vacation pay matters.

ERISA and Other Employee Benefits Matters

Holland & Hart lawyers have litigated a wide variety of ERISA issues based on their own expertise and relying upon the Employee Benefits Group. They also frequently 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. They work closely with the Employee Benefits Group to assure firm clients that their benefits questions are answered fully and completely.

Holland & Hart LLP

In 1947, Denver attorneys Steve Hart and Joe Holland left established local practices to form a new, distinctly client-focused law firm. Over the years, Holland & Hart has grown to be the largest law firm in the Mountain West Region, with over 400 attorneys in 15 offices including Colorado, Wyoming, Idaho, Montana, Nevada, New Mexico, Utah, and Washington D.C. Holland & Hart provides legal counsel to individuals and companies of all sizes, from emerging businesses to large public corporations located throughout the country and internationally.





Aspen

600 East Main Street
Suite 104
Aspen, CO 81611
[970] 925-3476

Billings

401 North 31st Street
Suite 1500
Billings, MT 59101
[406] 252-2166

Boise

101 South Capitol Boulevard
Suite 1400
Boise, ID 83702
[208] 342-5000

Boulder

One Boulder Plaza
1800 Broadway, Suite 300
Boulder, CO 80302
[303] 473-2700

Cheyenne

2515 Warren Avenue
Suite 450
Cheyenne, WY 82001
[307] 778-4200

Colorado Springs

90 South Cascade Avenue
Suite 1000
Colorado Springs, CO 80903
[719] 475-7730

Denver

555 17th Street
Suite 3200
Denver, CO 80202
[303] 295-8000

www.hollandhart.com

Denver Tech Center

8390 East Crescent Pkwy
Suite 400
Greenwood Village, CO 80111
[303] 290-1600

Jackson Hole

25 South Willow Street, Suite 200
P.O. Box 68
Jackson, WY 83001
[307] 739-9741

Las Vegas

Hughes Center
3800 Howard Hughes Parkway
Suite 1000
Las Vegas, Nevada 89169
[702] 669-4600

Reno

200 South Virginia Street
Eighth Floor
Reno, NV, 89501
[775] 686-2492

Salt Lake City

60 East South Temple
Suite 2000
Salt Lake City, UT 84111
[801] 799-5800

Santa Fe

110 North Guadalupe
Suite 1
P.O. Box 2208
Santa Fe, NM 87504
[505] 988-4421

Washington, D.C.

701 Pennsylvania Avenue NW
Suite 250
Washington, D.C. 20004
[202] 393-6500



Jude Biggs

[303] 473-2707

jbiggs@hollandhart.com

Holland & Hart LLP, Denver and Boulder

Attorneys at Law

1800 Broadway, Suite 300

Boulder, CO 80302

www.hollandhart.com

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