Chapter Ten

DISCIPLINE AND DISCHARGE OF EMPLOYEES
# DISCIPLINE AND DISCHARGE OF EMPLOYEES

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DISCIPLINE AND DISCHARGE
OF EMPLOYEES

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I. INTRODUCTION

More and more often, employers who discipline or discharge an employee find themselves in the midst of litigation over the action. Decisions made by employers during the discipline process can either protect the employer in the event of litigation or build a case for the terminated employee. It is essential that employers handle discipline and discharge in a way that reduces exposure to claims. This Chapter provides basic guidelines and considerations regarding the discipline and discharge process.

II. AUDITING TERMINATION PROCEDURES

A. Initial Considerations. Evaluating termination procedures should begin well before an employee is terminated. That is, the employer can begin to protect itself when employees are hired by having them sign a written disclaimer of permanent employment or employment for a specific period of time. The waiver should state that representations to the contrary must be in writing and signed by the employer or a specific officer of the employer, such as the company president or CEO. The disclaimer should also state that employment is at-will.

1. Arbitration or Jury Waiver Clause. Employers may consider having employees sign an arbitration clause or a jury waiver clause as a condition of employment during the hiring process. A jury waiver clause helps employers avoid the uncertainty of litigating employment-related claims before a jury. Under a jury waiver agreement, employees retain all substantive and procedural rights to sue their employers, except the right to request a jury, and all potential statutory remedies. Bench trials (trials by a judge) are usually shorter and much less expensive than jury trials. Additionally, a study released by the Department of Justice shows that employers fair better in verdicts returned by judges than juries. Finally, the decision of a trial judge is subject to full review on appeal, unlike an arbitrator’s decision, which is subject to extremely limited review. Employers should be aware that state law regarding arbitration clauses and jury waiver clauses varies. For more information on the enforceability of jury waivers, please see the Personnel and Supervisory Policies Chapter of the SourceBook.

In AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011), the U.S. Supreme Court in a 5-4 decision held that an arbitration agreement in a consumer contract that prohibited class-wide arbitration was enforceable. The Court’s decision reversed that of the Ninth Circuit, which held that the agreement prohibiting class action waivers was unconscionable under California state law. Although Concepcion involved a consumer contract, some federal appeals courts have applied it in the employment context. See, e.g., Green v. SuperShuttle Int’l, Inc., 653 F.3d 766 (8th Cir. 2011) (holding that under Concepcion, the Federal Arbitration Act (FAA) pre-empted the plaintiffs’ state law challenges to class action waivers in their franchise agreements with the defendant).

Additionally, in Murphy Oil U.S.A., Inc. v. NLRB, 2015 WL 6457613 at *3 (5th Cir. Oct. 26, 2015), the Fifth Circuit, following its decision in D.R. Horton, Inc. v. NLRB, 737 F.3d 344 (5th Cir. 2013), held that the employer in that case “committed no unfair labor practice by requiring employees to relinquish their right to pursue class or collective claims in all forums by signing the arbitration agreements at issue here.” In D.R. Horton, the Fifth Circuit overruled the National Labor Relations Board’s (NLRB’s) decision that class action waivers violate the National Labor Relations Act (NLRA), holding that the Board failed to give proper weight to the Federal Arbitration Act.
(FAA), which requires lawful arbitration agreements to be enforced as written. The court held that neither the FAA’s “saving clause” nor a contrary congressional command precluded application of the FAA’s mandate requiring arbitration agreements to be enforced. However, the court did agree with the NLRB that the language of this particular agreement could lead employees to reasonably believe “that they were prohibited from filing unfair labor practice charges” in violation of the NLRA. Other federal courts have followed the Fifth Circuit in rejecting the NLRB’s position that class action waivers violate the NLRA. See, e.g., Owen v. Bristol Care, Inc., 702 F.3d 1050 (8th Cir. 2013) (rejecting the Board’s analysis in D.R. Horton and upholding the validity of a mandatory arbitration agreement containing a class action waiver, ordering the arbitration of an employee’s collective action under the Fair Labor Standards Act (FLSA)).

Even though federal courts have rejected its position, the Board continues to take the position that an employer violates the NLRA when it requires employees to sign an agreement that precludes them from filing joint, class, or collective claims regarding wages, hours or other working conditions against the employer in any forum, arbitral or judicial, even though the Fifth Circuit and other federal courts have rejected this analysis. See Murphy Oil USA, Inc., 361 NLRB No. 72 (2014) enforcement denied, 2015 WL 6457613 at *3 (5th Cir. Oct. 26, 2015 (invalidating mandatory arbitration agreement, concluding that the “reasoning and result” of the decision in Horton were correct). For more information on class action waivers as they relate to arbitration clauses, please see the Alternative Dispute Resolution Chapter of the SourceBook. For information regarding employers’ and employees’ rights under the NLRA, please see the NLRA’s Impact on the Workplace and Coping with Unions Chapters of the SourceBook.

2. Avoid Implied Contracts. Train interviewers to avoid making promises or implied promises of tenure, longevity, or continued employment. Avoid making promises or implied promises of job tenure in handbooks, personnel policies, or written work rules. See the Employment Contracts and Noncompete Agreements Chapter of the SourceBook for more information.

3. Avoid For Cause Statements in Termination Policies. Termination policies should not refer to discharge “for cause” and should not limit management’s absolute right to discharge employees. Review any statements of the potential grounds for discharge to ensure they give the employer flexibility and provide notice to the employee.

4. Document Performance. Identify potential problems early. Establish and police employee evaluation systems. Give honest evaluations, including weak points; circulate those evaluations only to those with a “need to know.” Evaluations should offer specific examples and explain the conclusions. Evaluations may be the basis for a wrongful discharge suit if they do not support the reason for the discharge by establishing a pattern of employee conduct.

5. Establish, Distribute, and Enforce Standards of Conduct/Nondiscrimination Policies. Establish, distribute, and enforce a general nondiscrimination policy that addresses all forms of prohibited discrimination, including harassment.

6. Establish a Complaint Procedure. Establish a specific complaint procedure (consider requiring all complaints be reduced to writing but maintain some flexibility with this) that provides alternative avenues for complaints, that does not require an employee to complain only to his or her immediate supervisor (in case the supervisor is the problem), and that assures the employee that she or he may use the complaint procedure without fear of retaliation. A complaint procedure is a particularly effective method for dealing with potential whistleblowers because it gives them a place to air their grievances.

7. Train Supervisors and Managers. Ensure that supervisors and managers are sensitive to potential wrongful discharge claims and are trained regarding the use of personnel documents to avoid litigation.

8. Review Terminations. Appoint an individual to review all factors relating to terminations to ensure consistency. Evaluate the strength of the evidence and whether policies are being ap-
plied consistently. Consider whether the employee has had a chance to tell his or her side of the story.

9. Be Candid Regarding the Reason for Discharge. Candidly state the reason for discharge, but avoid defamation. Keep the explanation factual and brief. If the reason for discharge is documented, ensure the documented reason is the real reason because any subsequent change in the stated reason may allow a plaintiff to argue that the employer's proffered reason is pretextual.

10. Designate Reference Providers. Designate a particular individual to respond to inquiries by subsequent potential employers. Many employers have this individual limit the information provided to a confirmation of the individual’s employment dates and their position. However, in light of the laws in some states that protect employers from liability for defamation for truthful statements made in good faith to a potential employer seeking a job reference on an applicant, and in light of an increasing effort to hold employers liable who fail to disclose information about potentially dangerous employees to subsequent employers, some employers provide additional information where appropriate. Additionally, if the former employee has signed a release that includes an agreement regarding references, employers should consider providing additional information.

11. Insurance Coverage. Check liability insurance coverage and make sure that the carrier is given timely notification of any potential claims.

B. Discipline Considerations.

1. Performance Appraisals. Performance appraisals often figure prominently in litigation, so employers should conduct appraisals in a manner that reduces litigation. If an employer decides to discharge an employee, performance appraisals should support the termination. Supervisors must give honest performance appraisals that are recorded accurately and in a timely fashion. Providing the employee the opportunity to comment on a performance appraisal, in writing, may help avoid a later claim that the appraisal was unfair or inaccurate, or that the employee never received it.

Guard Against Defamation. Sensitive information, such as unflattering performance evaluations, should be kept secure and shared only with those who “need to know” the information because of their job duties.

Guard Against Discrimination. The performance evaluation may become evidence to support a claim of discrimination under either a disparate impact or disparate treatment theory of discrimination. To avoid disparate impact claims, employers must ensure that their performance appraisal system is administered even-handedly. Employers should continually evaluate the process to ensure no protected groups are disadvantaged by its application.

To guard against disparate treatment claims, employers must give accurate appraisals, even if the truth hurts. An employer’s failure to criticize poor work by a member of a protected group can backfire. For example, in Vaughn v. Edel, 918 F.2d 517 (5th Cir. 1990), the employer did not criticize an African-American employee’s poor work for fear she would sue. When the employee was discharged, she claimed she had not been given the same opportunity to improve as had white employees and successfully sued for discrimination. See also Guy v. Cent. Locating Servs., Ltd., 389 F. Supp. 2d 843 (N.D. Ohio 2005) (employer’s “use of Plaintiff’s work performance to determine whether he would be laid off, where that work performance was potentially tainted by race-based discrimination in training, creates an issue of fact as to whether race was a motivating factor in the decision.”) However, in Cullom v. Brown, 209 F.3d 1035 (7th Cir. 2000), the Seventh Circuit held that the employer (the VA) did not retaliate against an employee in violation of Title VII by giving him inflated performance evaluations so that he would not file another EEOC charge, since the VA told the employee that his work was deficient and provided him training and guidance to help improve his performance. The court noted, “[o]verrating an employee may be a misguided way of avoiding controversy, but it is not an adverse act, let alone a material one.” Id.
at 1041 (emphasis in original). The court further held, “as policy matter, the VA's behavior is indefensible. It certainly would have been better if the VA had had the fortitude to rate [the employee] accurately (although in doing so it would have probably been risking another EEO complaint). But Title VII liability does not turn on ill-advised personnel decisions ... And while honesty may be, as the district court put it, ‘the best policy,' it is not for a federal court to say that for job evaluations it is ‘the required policy.'” Id. at 1044. For more information regarding discrimination claims, see the *Overview of Employment Discrimination Claims and the Administrative Remedies Process Chapter* of the SourceBook.

2. **Progressive Discipline.** Consider using a system of “progressive discipline.” Note, however, that at least one state supreme court has held that a progressive discipline policy included in an employee handbook created an issue of fact for a jury to determine whether that policy altered the employee's at-will employment status. See *Dillon v. Champion Jogbra, Inc.*, 819 A.2d 703 (Vt. 2002). The Court held that an at-will relationship was inconsistent with the existence of the complex discharge procedure the company adopted. Employers should review the law of the states in which they have employees when developing progressive discipline policies. But see *Labounty v. Crystal Rock Spring Water Co.*, 2004 WL 5460374 (Vt. Super. Ct. Apr. 29, 2004) (Trial Court Order) (no provision in the employee manual required the company to apply the progressive discipline steps in a fair and consistent manner; instead, the section describing the system stated clearly that the company could skip or modify one or more steps as appropriate. Accordingly, the court found the employee to be employed at will).

While some conduct (such as theft) may call for immediate termination, agencies, juries, courts, and other adjudicators are sympathetic to employees who are discharged without warning. When employees have been given a succession of oral and written warnings, and perhaps a disciplinary suspension or decision-making leave prior to discharge, discharge may be unnecessary or easier to defend.

Progressive discipline begins with verbal counseling. All counseling, however, whether verbal or written, should be witnessed and subsequently documented.

3. **Diffusing Potentially Violent Situations.** A fair and consistently applied disciplinary policy can be the first step in preventing a potentially violent situation. Many potentially violent employees feel that they have been treated unfairly, and this feeling becomes the catalyst for violence. To help ensure the fairness and consistency of the disciplinary message, plan a strategy and stick to it before delivering the disciplinary message. Do not get bogged down in lengthy discussions with an unhappy employee. Consider using a neutral manager to discipline and/or terminate those workers who may be hostile to the human resources manager or immediate supervisor. Never blame the disciplinary action on other management personnel or co-workers. Use a compassionate tone when discussing the disciplinary measures.

It is generally advisable to have two managers attend the meeting. The more senior manager should deliver the disciplinary message. This may reduce the likelihood of debate because it puts the employee in a different situation from his or her everyday work atmosphere. The second manager could be from human resources. Limit the attendees at the disciplinary meeting to avoid humiliating employees in front of co-workers.

In taking disciplinary action against an employee, the employer should not refer to a disability or potential disability, nor should the employer ever call the individual “crazy.” Refer only to the conduct at issue. If the employee indicates that the conduct is caused by a disability, consider whether granting the employee leave to seek treatment is more appropriate than discharging him or her.

If the purpose of the meeting is to discharge the employee, consider allowing the discharged employee a brief opportunity to discuss his or her feelings. Consider having a psychologist, psychiatrist, or other outplacement professional available for outplacement counseling when
appropriate. Give the terminated worker the professional's telephone number in writing. Use employee assistance programs to help in counseling and future job placement. In a time when many employers must “right size” their organizations with layoffs, it may be desirable to use a location away from the place of business, such as an outplacement firm, for all post-termination interactions. Benefits counseling should be available at the termination location. Do not send the employee to another place to get the information. This allows time for hostility to build. OSHA has developed a workplace violence website, https://www.osha.gov/SLTC/workplaceviolence/, which includes various types of information on workplace violence, including a directive providing guidance for investigating and dealing with workplace violence. For a more detailed discussion of the directive, please see the OSHA Chapter of the SourceBook. For a more detailed discussion of workplace violence procedures, see the Personnel & Supervisory Policies Chapter of the SourceBook.

**Documentation.** Documentation should be consistent. An employee should not be written up for a minor violation if other employees are not written up for the same type of violation. Otherwise, the employer may appear to be building a case against a particular employee.

4. **Common Discipline/Discharge Pitfalls.**
   - Constructive discharge (forcing an employee to quit by making conditions intolerable).
   - Reduction in hours.
   - Transfer to another supervisor.
   - Avoiding criticism or poor evaluations.
   - Insistence that the employee “voluntarily quit.”
   - Acting out anger or frustration.
   - Coming up with false rationales and explanations to soften the blow (such as “someone else wants me to do it”).
   - Expressing dissatisfaction to others.
   - Mislabeling employees based on early performance, which could cause employees to live down to expectations.
   - Failure to establish an internal system to ensure consistency of actions between supervisors of various departments and among employees supervised by the same supervisor. Consistency in management and discipline decreases the likelihood of a disparate treatment claim, helps avoid retaliation charges, and supports an employer’s defense against future charges.

5. **Practical Tips for Reducing the Risk of an Employee Lawsuit.** Avoiding litigation may not be easy to do since lawsuits are easy to bring. However, companies can prepare for litigation by following careful steps in dealing with employees. A successful defense begins with good company policies that are consistently followed and applied.

   Helpful steps include:
   - Be considerate of all employees; treat employees fairly and with respect.
   - Educate supervisors about protected categories of employees.
   - Establish guidelines for dealing with employees: criteria for excessive absenteeism, how to deal with work performance problems, and what actions justify immediate discharge.
   - Follow established guidelines; do not vary actions based on the identity of the employee.
   - Set up a review procedure for personnel decisions. A review of disciplinary or termination decisions may safeguard against a problem before it occurs.
• Confirm all necessary facts, date and documents to support decision. Be sure no sensitive areas are raised (age, sex, etc.).
• Be consistent.
• Give particular consideration to long term employees.
• Consider whether an affected employee has some type of protected status (i.e., did he/she just have an on-the-job injury).
• Be fair. All personnel actions should be reviewed for how a jury would feel about the action.
• Limit information about personnel actions to only those with a clear business need to know.
• Discuss disciplinary issues with employees in private (with a management witness if possible); do not berate employees in front of co-workers. An embarrassed, humiliated or angry employee is more likely to fight back, and that may include a lawsuit.
• Document disciplinary actions, even verbal reprimands.
• Investigate all sides to a story and, if multiple employees are involved, treat them equal opportunities to present their side of the case.
• Consider the possibility of severance pay in exchange for a release.
• Be considerate of the employee during the termination interview and in all circumstances surrounding the employee’s departure.
• Limit reference information to neutral reference only (i.e., dates of employment and position held) unless a signed release is obtained.
• Include “at-will” disclaimers everywhere: in handbooks, on acknowledgment pages signed by employee, on employment applications and anywhere else feasible.

C. Is a Polygraph Appropriate? Probably not. The Employee Polygraph Protection Act of 1988 (EPPA) bars most private employers from using polygraph tests for pre-employment screening and places substantial restrictions on the use of polygraphs for current employees. See 29 U.S.C. § 2001, et seq.; 29 C.F.R. § 801.1 et seq.; Watson v. Drummond Co., 436 F.3d 1310 (11th Cir. 2006) (holding that union that requested discharged plaintiffs be given the option of taking a polygraph test to prove their innocence and expedite their reinstatement did not exert sufficient control over the employer to be considered an employer under the Act). See also Jury Says Contractor for DEA Liable For Forcing Workers to Take Polygraphs, 81 Daily Lab. Rep. (BNA) A-3 (April 28, 2015) (discussing jury determination that a Drug Enforcement Agency (DEA) contractor is liable for damages to nine former translators who alleged their employer forced them to undergo illegal lie-detector tests at the DEA’s request, threatening to fire those who refused to cooperate or failed the tests (Taylor v. Metro. Interpreters and Translators, Inc., S.D. Cal., No. 3:13-cv-01892, jury verdict 4/21/15; Bates v. Metro. Interpreters and Translators, Inc., S.D. Cal., No. 3:12-cv-00460, jury verdict 4/21/15; Duran v. Metro. Interpreters and Translators, Inc., S.D. Cal., No. 3:13-cv-01891, jury verdict 4/21/15. The jury set the damages at $4 million and determined that the contractor was responsible for 60 percent and the DEA for 40 percent of that amount).

Most private sector employers do not find it realistic to use polygraph tests because of these restrictions. For example, the person to be tested must be given prior notice of numerous specifics regarding the nature of the test, must sign a written statement informing him or her of numerous rights and remedies under the law, must be provided an opportunity to review the specific questions to be asked, and must be allowed to terminate the test at any time. The Department of Labor (DOL) may impose penalties for the failure to follow these restrictions.

Questions on religious, political, racial and sexual matters and union beliefs are prohibited. Polygraphs generally should not be administered even if an employee volunteers to take the examination to exonerate himself, since the law not only prohibits employers from indirectly suggesting a
polygraph, but also makes it unlawful for any employer “to use, accept, refer to, or inquire concerning the results of” any lie detector test not administered pursuant to an exception and in conformance with all the procedural specifications. See Polkey v. Transitecs Corp., 404 F.3d 1264 (11th Cir. 2005) (holding that the Act prohibits an employer from requesting or suggesting that the employee submit to a polygraph).

1. “Ongoing Investigation” Exemption. The Act prohibits employers from discharging, disciplining, discriminating against, or denying employment or promotion to an employee solely on the basis of the results of the test or for refusing to take the test, except pursuant to the ongoing investigations exemption, and then only when there is other supporting evidence. Ongoing investigation means that the investigation is of a current, specific, and identifiable incident in which company money or property is missing and in which there are identifiable suspects. Employers may test employees whom they reasonably suspect of workplace theft if these employees had access to the property involved. See Schiro v. Southern Printing, Inc., 2007 WL 186797 (M.D. Fla. Jan. 22, 2007) (whether employer had reasonable suspicion of employee was question for jury to decide).

Before the test can be administered, the worker must be given a signed, written statement that specifically describes the incident under investigation, the basis for testing particular employees, and the basis of the employer’s reasonable suspicion, in addition to other requirements.

In Watson v. Drummond Co., 436 F.3d 1310 (11th Cir. 2006), the court held that an employer did not violate the Act when, at the request of union representatives, it gave discharged employees the option of choosing between taking a polygraph examination and being reinstated if they passed, or arbitrating their discharges. “We conclude that when the polygraph exam was offered to an employee pursuant to a request therefor by the employee or his or her agent in order to benefit the employee by providing an opportunity to prove his or her innocence, then the employer has not violated § 2002(1).” The court also held that the employer was not required to provide plaintiffs, who declined to take polygraph tests, with written statements of the alleged misconduct because that requirement applies to examinees, not employees. Watson, 436 F.3d at 1315. Additionally, the court held that the employer’s conduct, even if it fell within the Act’s prohibition, qualified for the “ongoing investigation” exemption because the decision regarding the employees’ discharges (all of whom were discharged for either stealing or having someone steal company property) remained open until the grievance procedure prescribed by the collective bargaining agreement covering their employment was concluded. See also Laney v. Getty, 19 F. Supp. 3d 737 (E.D. Ky. 2014) (granting summary judgment on plaintiff’s claim he was discharged for refusing to take a polygraph where since it was clear he would have been discharged “without any mention of a polygraph.” However, the court later granted summary judgment to the former employee on his claim that the employer violated the EPPAs prohibition on requesting or suggesting an employee take a polygraph test, rejecting the employer’s argument that its conduct fell within the ongoing investigation exemption. The court noted that this exemption is limited and did not apply to the employer’s questioning of the plaintiff on a number of subjects before his discharge, finding the questioning to be a “fishing expedition” that did not fall within the exemption).

While the Act does not prohibit medical tests to determine the presence of controlled substances in the body, the regulations state that the “ongoing investigation” exemption does not allow an employer to give an employee a polygraph test to learn whether she or he has used drugs or alcohol. This is true even when possible substance abuse leads to economic loss such as an accident caused by an intoxicated employee driving a company vehicle.

2. Exemption for Manufacturers and Distributors. The Act permits limited use of polygraphs by employers authorized to manufacture, distribute, or dispense certain controlled substances. Regulations provide that this exemption does not apply to common or contract carriers and warehouses, whose possession of the controlled substance is in the usual course of their business and who are not required to register with the DEA.
3. Exemption for Employers Providing Security Services. Section 7(e) of the Act permits testing of prospective employees of companies whose primary business purpose consists of providing armored car, security alarm, and security guard services for the protection of “facilities, materials, or operations having a significant impact on” the health or safety of a state, a political subdivision, or the national security of the U.S., or “currency, negotiable securities, precious commodities, or instruments or proprietary information.” This exemption only permits testing of prospective employees employed to protect facilities, materials, operations, or assets as described in the regulations. Some types of employees, such as custodial and maintenance employees, would not be covered by the exemption.

4. Exemption for Public Employers. The Act exempts federal, state, and local governments and does not apply to certain testing administered by government agencies for national defense or security reasons. The Eleventh Circuit has held that the national defense exemption does not apply to private contractors. See Polkey v. Transesco Corp., 404 F.3d 1264 (11th Cir. 2005).

5. Polygraph Act Remedies. Federal courts have the power to award legal and equitable relief for violations of the Act, including reinstatement, promotion, lost wages and benefits, and attorneys' fees. Additionally, the DOL may seek civil fines of up to $10,000 against employers who violate the Act.

6. Notices to be Posted. The law requires all employers engaged in (or affecting) commerce post and maintain a notice where notices to employees and applicants are customarily posted that sets forth the pertinent provisions of the Act. Copies of the notices are available at local offices of the Department of Labor, Wage and Hour Division.

D. Surveillance of Employees Suspected of Wrongdoing. In certain situations, an employer may desire to place an employee who is suspected of criminal activity against the employer under surveillance. Although it is generally permissible to place employees suspected of wrongdoing under video surveillance1 or to hire a “spotter” to masquerade as an employee and observe employees, see Long v. Mango’s Tropical Cafè, Inc., 972 F. Supp. 655 (S.D. Fla. 1997), employers must be very careful before they attempt to conduct audio surveillance upon employees either through the use of wiretaps or other recording devices. Audio surveillance is generally prohibited by both federal and state law. Additionally, surveillance of employees may violate federal labor laws. For a further discussion of federal and state laws relating to surveillance of employees, see the Potential Liability in the Electronic Workplace Chapter of the SourceBook. For a more detailed discussion of employers’ rights and obligations under federal labor laws, please see the NLRA’s Impact on the Workplace and Coping with Unions Chapters of the SourceBook.

E. Invasion of Privacy Under State Law. The interception of employees’ conversations or even searching their desks or lockers may also constitute invasion of privacy under state law for which employees may recover damages. For more information regarding this issue, see the Employment Litigation Causes of Action and Potential Liability in the Electronic Workplace Chapters of the SourceBook.

III. THE ACTUAL TERMINATION

A. Termination: Implementing a Decision. Employers may consider suspension pending investigation. Suspension allows the employer to avoid mistakes and irrational decisions. It also gives the employer time to collect information necessary to determine the appropriate action and to support the ultimate decision.

Screening, review and discussion of preliminary decisions provides the opportunity for input from higher management and review of documentation to ensure the termination decision is supported.

1 Some states, such as Connecticut and Georgia, prohibit video surveillance of employees under certain circumstances. Accordingly, employers must consult their state’s laws to determine what is prohibited before engaging in this type of surveillance.
Screening also permits the employer to ensure the discharge is consistent with company policies and comparable cases. In some cases, it may be appropriate to question the supervisor regarding the reasons for the proposed discharge and question witnesses and the employee at the screening stage, to ensure the termination is appropriate and that all facts have been considered. This is also the time to review the pre-termination checklist and obtain input from labor counsel, if appropriate.

**B. Handling the Termination.** Conduct the termination meeting privately. Have at least one trustworthy management witness with a “duty to know” at the termination conference. When stating the reason for the termination, avoid false reasons, such as “economic layoff.” Consider whether any reason should be given. Consider possible defamation and defamation by self-publication claims and whether the statement of the reason will make it more or less likely the employee will file a complaint. See the discussion of this issue in the *Employment Litigation Causes of Action* Chapter of the SourceBook.

Consider whether the reason for termination should be given to the employee in writing. Note that in the public sector, a written reason may be required. Additionally, some state laws may require written reasons for the termination.

Consider giving the employee the opportunity to speak. Properly handled, this may reduce animosity between the employer and the employee and head off a potential lawsuit.

Consider the Weingarten right to an employee representative. This right applies to nonsupervisory employees who request a representative in an investigatory interview the employee reasonably believes may lead to discipline, if the employee is a union member. *See IBM Corp.,* 341 N.L.R.B. No. 148 (2004) (petition for review withdrawn and case dismissed, *Schult v. N.L.R.B. (In re IBM Corp.),* 2004 WL 2595890 (D.C. Cir. Nov. 2, 2004)), overruling *In re Epilepsy Foundation of Northeast Ohio,* 331 N.L.R.B. No. 92 (2000). For a further discussion of Weingarten rights, see the *Coping with Unions* Chapter of the SourceBook.

Make sure the employee obtains information and documents needed to receive benefits, if any, including Consolidated Omnibus Budget Reconciliation Act (COBRA) continuation coverage. For more information on COBRA, please see the *Employee Benefits: Select Topics* Chapter of the SourceBook. Additionally, consider offering separation and outplacement counseling/benefits.

Consider terminating the employee at the end of a shift, reducing interaction with other co-workers. Tell the employee how future job reference inquiries will be handled – this will help the employee deal with job interviews. The employer should not, however, promise the worker it will not disclose truthful information to prospective employers, because it may have a legal obligation to do so. Consider requiring a signed release from the former employee and prospective employer before giving references.

In addition, consider whether the post-meeting memorandum should be kept confidential, at the direction of counsel, and/or in anticipation of litigation (work product).

Some states require a final paycheck be presented when the employee is discharged, while other states require payment to discharged employees by the next regular payday. Additionally, in other states, when the employee must receive a final paycheck depends on whether the employee resigned voluntarily or was discharged. Because state laws vary, employers must check the laws of the states in which they have employees.

If permitted by state law, consider mailing the terminated employee’s last paycheck to their home. Allowing the employee to return for the check could create an opportunity for confrontation. All supervisors and employees should be given written instructions to notify management and security immediately if a former employee is seen loitering at the employer’s place of business. This notification should be made verbally and in writing. A photograph of a hostile or threatening individual can be circulated, but be aware of potential defamation concerns. Alert security in writing of potential problems and the procedures they should follow.
Disclose the reason for the discharge only to those with a clear business need to know.

Managers who suspect they are terminating a potentially violent employee should notify security or the police. Consider obtaining a written agreement not to return to the workplace from the potentially violent employee. This will help law enforcement deal with the returning disgruntled individual. Most states have trespass after warning laws. Having such an agreement allows the police to take immediate action when called. Security should be standing by in a discrete location unless the situation demands active participation.

Additionally, consider escorting all terminated workers to their locker or work area and assist in cleaning out their space. The escort policy should be applied consistently otherwise the employer may face a defamation claim by an ex-employee who is escorted from the job. Additionally, be aware that the employee could have a weapon on the premises. Remember that the employee is already in an emotional state having just been terminated. It may be appropriate to tell the individual that any personal belongings will be collected and sent to their home. Arrange appropriate transportation for any employee who appears too distraught to drive properly.

Be sure to change all locks to which the employee had a key, even if the keys are recovered from the employee, since he or she could have made copies. Put computer lockout procedures in place.

When appropriate, keep in touch with the disgruntled former employee. Periodically, a member of management who is on friendly terms with the individual can call the former employee or those close to the individual. Find out if the employee has found other employment. Determine his or her mental state. Document all information for future management decisions.

C. Employer Mistakes - How Employers Unwittingly Help Employees Prove “Pretext.” In discriminatory discharge cases, it usually is not very difficult for a plaintiff to establish a prima facie case of discrimination or for the employer to furnish a legitimate nondiscriminatory reason for the discharge. Accordingly, the issue most often litigated is whether a plaintiff can demonstrate that the employer’s stated reason for discharge is a pretext for discrimination. A plaintiff usually tries to prove pretext by showing that the employer’s asserted justification for discharge is false. Management mistakes can make a plaintiff’s job of proving pretext much easier, even if discrimination was not the reason for discharge. The following is a list of common management mistakes that may help a plaintiff prove pretext:

• It is important to treat similarly situated individuals in a consistent manner. When discharging someone ask the following questions: What is the company policy? How has it been applied in the past, either by me or someone else? How can I credibly explain different treatment?

• Examine what the manager was doing before the spotlight was on him or her. Does the personnel file tell the same story about the employee as the manager? Is there “an empty file” issue?

• Words are a window to the mind. Examine whether the manager’s past comments reflect what he or she is now saying about the employee (for example, about the employee’s performance, conduct, etc.) Examine whether the manager’s comments demonstrate bias or prejudice.

• Timing is everything. Examine whether the manager’s actions coincide with recent protected activity by the employee. Also determine whether the manager has information about the employee (for example, knowledge of a disability, serious health condition) that can be identified by the employee as a protected reason for the manager’s adverse actions.

• Employers frequently try to avoid difficult discharge decisions by classifying the discharge as a “layoff.” Calling a discharge as a layoff can be dangerous if a true layoff did not occur. A plaintiff will be entitled to conduct discovery on the layoff and the reason for his or her inclusion in the layoff. If discovery shows a layoff did not occur, that may be enough for a reasonable juror to determine the employer’s reason is a pretext for discrimination.
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- Neither state nor federal discrimination laws require an employer to have more than one reason for discharging an employee. If the reason for discharge is an employee's conduct, it is unnecessary for the employer to identify anything else as a reason. Many employers gild the lily by identifying a number of reasons, which make them susceptible to proof that one or more of the reasons is false.

IV. RELEASES

Consider obtaining a release from a terminated employee in exchange for consideration such as additional pay. An effective release should include the following:

- A clear release of each protected right (with an explanation of the terms and consequences written in plain language).

- An acknowledgment that the employee consulted with or had the opportunity to consult with an attorney. There is no bright-line test for determining a sufficient amount of time for an employee to consider a release and consult with an attorney before the employee is considered to have signed the release knowingly and voluntarily. In Constant v. Continental Tel. Co., 745 F. Supp. 1374, 1382 (C.D. Ill. 1990) the court held that three days was adequate time because the employee was able to obtain legal advice with which he was satisfied at the time. To be safe, employers should give employees more than three days to better ensure the release will be found to be "knowing and voluntary."

- An acknowledgment that the release was signed "knowingly, voluntarily, freely, of my own volition and after such consultation with counsel as I deemed appropriate." See Torrez v. Public Service Co., 908 F.2d 687 (10th Cir. 1990), in which the court held that an employee did not waive his discrimination claims against his former employer by signing a release form. The reviewing court stated that release agreements are effective waivers of claims under § 1981 and Title VII only when the "totality of the circumstances" indicates that the employee who signed the agreement made a "knowing and voluntary" waiver of his discrimination claims. But see Madrid v. Phelps Dodge Corp., 211 F. App'x 676 (10th Cir. 2006) (finding that the seven factors set forth in Torrez, were "clearly met" and affirming the trial court's dismissal of plaintiff's claims based on release he signed).

A. Employees Over 40 Years of Age. For a release to be knowing and voluntary under the Age Discrimination in Employment Act (ADEA) (which protects those 40 and over), it must meet the requirements set forth above and must recite that:

- The individual is not waiving rights or claims that arise after the date the agreement is executed;

- The consideration is in addition to that to which the individual is already entitled;

- The individual is advised in writing to consult with an attorney prior to executing the agreement;

- The individual is given a period of at least 21 days within which to consider the agreement; and

- The agreement gives the individual seven days following execution to revoke his or her agreement.

The employer has the burden of proving that the release was knowing and voluntary according to the Older Workers Benefits Protection Act (OWBPA), which amended the ADEA in 1990.

Discharged employees may bring age discrimination suits even though they received and kept the extra money specified as consideration for their signing of invalid releases of possible ADEA claims. The U.S. Supreme Court reversed an award to an employer who claimed that the employee had ratified a defective release by failing to return or offer to return the release money that she received.
See Oubre v. Entergy Operations, 522 U.S. 422 (1998). The Court held: (1) that the release was not enforceable as to the employee's ADEA claims because the release did not comply with the requirements of the OWBPA; (2) the employee's retention of the severance pay did not ratify the release as to the ADEA claims; and (3) the employee was not required to return the money as a precondition to filing suit on her ADEA claims.

The EEOC subsequently issued regulations that state that a penalty or liquidated damages provision in a release of ADEA or OWBPA claims is invalid. The EEOC regulations pick up where Oubre left off and restate the Court's "no tender back" position. The regulations also state that an employer cannot include any provision in a settlement agreement that limits an individual's right to challenge the agreement. Prohibited provisions include tender back provisions and requirements that the individual pay damages or the employers' attorneys' fees incurred in defending the suit if the individual files suit challenging the agreement.

If an employer includes a liquidated damages provision (a provision that if either party breaches the agreement, the breaching party will pay a certain amount, which is a good faith estimate of the actual damages resulting from the breach) in a settlement agreement, the agreement should clearly state that the liquidated damages provision does not apply to ADEA or OWBPA claims. The Eighth Circuit has held that a release of claims signed by an employee as part of an involuntary termination program was not valid under the OWBPA because it was not written in a manner calculated to be understood by the person signing the release. See Thomforde v. IBM Corp., 406 F.3d 500 (8th Cir. 2005). The release in Thomforde included a covenant not to sue and stated that the employee agreed to pay the employer's attorneys' fees if he sued in violation of the covenant. The agreement also attempted to exclude ADEA claims from the attorneys' fee provision of the covenant not to sue. The court held that the release was confusing and could not be understood by a reasonable employee. Accordingly, it refused to preclude the employee's ADEA lawsuit.

For a further discussion of the ADEA please see the Age Discrimination in Employment Act Chapter of the Sourcebook.

B. Covenants Not To Sue. Employers may consider including a covenant not to sue in the release. (See the discussion of the Thomforde case, above, for an example of a release rendered unenforceable by confusing provisions, including using the terms "covenant not to sue" and "release" interchangeably.) If such a provision is included, an employer may file a counterclaim for its attorneys' fees and costs incurred in defending against a suit in breach of the covenant not to sue. The Sixth Circuit Court of Appeals upheld this approach in Astor v. IBM Corp., 7 F.3d 533 (6th Cir. 1993). In drafting releases and covenants not to sue, the agreement should expressly provide that the employer is entitled to attorneys' fees in the event of a breach of the release. When an agreement provides for a release of claims but no covenant not to sue, courts have been less willing to enforce counterclaims. As discussed above, however, employers will want to refrain from using covenants not to sue in a release of ADEA or OWBPA claims, or, if such provisions are included, ensure that the agreement is clear and easy to understand.

C. Restrictive Covenants. Consider including restrictive covenants (e.g. covenants not to compete, solicit customers, or solicit employees). Note, however, that some states, such as California, prohibit noncompetition agreements. Thus, employers should check the laws of the states in which they have employees before utilizing a restrictive covenant. See the Employment Contracts and Noncompete Agreements Chapter of the SourceBook for a further discussion of these issues.

V. POST-TERMINATION CONSIDERATIONS

A. Be Wary of Defamation Claims. Avoid giving defamatory or derogatory reasons for termination to anyone not in a need to know or privileged position. An ex-employee may bring a defamation claim if an employer gives information to prospective employers without a release. Employers should also be aware, however, that a subsequent employer may sue the former employer for
negligent referral if the employee commits the same type of wrongful conduct she or he committed at the previous job. Some state laws protect employers who provide truthful references in good faith to prospective employers. See, e.g., Kenney v. Gilmore, 393 S.E.2d 472, 473 (Ga. App. 1990). For a further discussion of defamation claims, see the Employment Related Causes of Action Chapter of the SourceBook.

B. The Replacement Employee(s). An employee who is replaced by someone outside the protected category may use this fact to bolster a discrimination claim. Distributing the employee’s duties to other employees or replacing him or her by someone in the same protected category may make it more difficult to prove discrimination, but may not completely preclude a claim. See O’Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308 (1996) (holding that an age discrimination plaintiff does not have to prove she or he was replaced by someone outside the protected category to establish a prima facie case of discrimination).

C. The Opportunity For Appeal. Consider allowing the employee the opportunity to appeal the termination to a higher official within the organization. Doing so may provide the employer with helpful evidence.

D. Recording Recollections: Witness Statements. Any written records of witness interviews should be prepared immediately and should accurately reflect what the witness said. Do not include legal conclusions or personal opinions in these records. (Legal conclusions may include terms such as “unauthorized action,” “violation,” “negligent,” or “wrongful.”) All written records should be dated when they are made and not at some later point in time. The records should reflect when they were written – for example whether they are notes taken contemporaneously with the meeting or whether they were written immediately after the meeting. The document should identify the writer and all persons in attendance at the meeting. The documents should contain verbatim statements to the extent possible, and not summaries of what the attendees said.

Consider obtaining signed statements from witnesses, especially crucial witnesses and those who may change employment in the near future. Avoid any appearance that the statements were obtained by coercion or undue influence. Be aware that the employer will probably be required to produce any written records and witness statements if the employee sues over the discharge.

Maintain consistency regarding the reason for the termination decision. In Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000), the U.S. Supreme Court held that a discrimination plaintiff may be able get to a jury by showing that the employer’s reason for the adverse employment action was false. Previously, some courts held that a plaintiff had to show both: (1) the reason for the action was false; and (2) some additional evidence of discrimination. The Supreme Court overruled these cases. The U.S. Supreme Court also held, however, that proof the employer gave a false reason for the employment action will not always be enough for the employee to get to a jury. The Court pointed out that it is possible a plaintiff will present a “weak issue of fact as to whether the employer’s reason was untrue” while the employer presents “abundant and uncontroverted evidence that no discrimination had occurred.” Such cases will not get to a jury. This decision further emphasizes the importance of giving a truthful, consistent reason for discharge.

VI. DISCIPLINE AND DISCHARGE – LITIGATION

A. The Consequences. Litigation can be costly. A successful plaintiff may recover back pay, front wages, compensatory damages, punitive damages, mental distress, and attorneys’ fees. Even if the employer wins, the cost of defending a wrongful discharge suit can be considerable. The employer will probably find it difficult to recover its attorney’s fees from the plaintiff. Additionally, litigation involves numerous “soft costs” such as the drain on management time and the effect on employee morale. Furthermore, if the employer is unsuccessful and a court orders it to take certain actions as part of the order in favor of the employee, the cost of monitoring these actions and retraining supervisors can be extensive. There may be individual liability for some claims, so the cost to the individual supervisor may be significant.
B. Settlement Considerations. Settlement may or may not be beneficial to an employer. Considerations include the cost of proceeding with the action compared with the cost of settlement. The employer should also consider the effect of a settlement on employee morale and whether the employer wants to support the decisions of the managers involved. Other factors include whether reinstatement is an option, whether the case can be settled for nonmonetary consideration, whether the settlement amount realistically can be expected to remain confidential, how a settlement will be perceived by other employees, and whether settlement is likely to encourage future claims.

VII. PRE-TERMINATION CHECKLIST

A. Is the Employee an At-Will Employee or Has Some Exception Been Created? In most states, the employment relationship is “at-will” except as modified by statute and court decisions. This means generally that an employer can fire an employee, in the absence of an employment contract, for any reason as long as it is not an illegal reason, such as termination based upon race or any other protected category. Similarly, the employee is free to resign at any time. Accordingly, in most states an “at will” employee who has been discharged cannot sue unless an exception to the at-will rule applies.

B. Exceptions to the Basic At-Will Rules.

1. Overview of Exceptions to Employment-At-Will. The exceptions to the rule of “employment-at-will” include contractual limitations. The employer and employee may have entered into a contract that states that employment is for a specific duration, or that the employer can only terminate the employee for “just cause.” Employers should guard against inadvertently creating employment contracts in employee handbooks or by making promises to employees regarding the duration of their job. For more information, please see the Employment Contracts and Non-compete Agreements Chapter of the SourceBook.

2. Public Policy Exception. Additionally, some courts have created public policy exceptions to the employment at-will doctrine. In states that recognize this cause of action, the requirements for stating such a claim include elements such as: (a) a clear public policy existed and was manifested in a state or federal constitution, statute or administrative regulation, or in the common law; (b) dismissing employees under circumstances like those involved in the plaintiff’s dismissal would jeopardize the public policy; (c) the plaintiff’s dismissal was motivated by conduct related to the public policy; and (d) the employer lacked overriding legitimate business justification for the dismissal. See, e.g., Dohme v. Eurand Am., Inc., 130 Ohio St. 3d 168, 174 (Ohio 2011) (citations omitted) (“to satisfy the clarity element of a claim of wrongful discharge in violation of public policy, a terminated employee must articulate a clear public policy by citation to specific provisions in the federal or state constitution, federal or state statutes, administrative rules and regulations, or common law. A general reference to workplace safety is insufficient to meet the clarity requirement”); Adcock v. Newtec, Inc., 939 S.W.2d 426 (Mo. App. 1996) (holding that a wrongful discharge claim in violation of public policy is only available to at-will employees, not contractual employees).

a. Implied Covenant of Good Faith and Fair Dealing. Additionally, in some states, courts have held that in all employment contracts (written or oral) there is an “implied” agreement that each side will deal with the other “fairly” and in “good faith.” See, e.g., Banko v. Apple, Inc., 2013 WL 6623913 at *6 (N.D. Cal. Dec. 16, 2013) (“Every contract contains an implied-in-law covenant of good faith and fair dealing that ‘neither party will do anything which will injure the right of the other to receive the benefits of the agreement.’”) (citations omitted). For more information, please see the Employment Contracts and Trade Secrets Chapter of the SourceBook.

b. Public Employers. A public (governmental) employer's ability to discharge an employee may be limited by civil service or similar laws or by constitutional restrictions (such as due
process requirements).

3. Equal Employment Opportunity (EEO) Grounds. Discrimination statutes make it illegal for an employer to discharge or otherwise discriminate against an employee because the employee belongs to a statutorily protected class (such as age, race, or sex). When making a termination decision, employers should consider the following areas of potential discrimination:

- Sex discrimination/sexual harassment;
- Pregnancy/abortion and child-related considerations;
- Race, color, national origin, and/or religious discrimination;
- Disability discrimination;
- Marital status discrimination;
- Discrimination based upon veteran status or military participation;
- Alienage or citizenship discrimination;
- Discrimination based on status as a debtor or bankrupt under the Bankruptcy Code. 11 U.S.C. § 525(b); and
- Discrimination because the employee's wages have been garnished. 15 U.S.C. § 1674(a).

Although discrimination on the basis of sexual orientation is not prohibited by federal law (at least with regard to private employers), many states and municipalities have enacted laws prohibiting sexual orientation discrimination. For a more detailed discussion of this issue, please see the Sex Discrimination Chapter of the SourceBook. Additionally, the Eleventh Circuit has held that a governmental entity's termination of a transgender employee based on her nonconformity with gender stereotypes constituted sex discrimination in violation of the 14th Amendment's Equal Protection Clause. See Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011). President Obama has issued an Executive Order (EO) prohibiting federal contractors from discriminating on the basis of gender identity and sexual orientation, and the OFCCP has issued a final rule implementing the EO, which took effect April 8, 2015. See OFCCP’s Final Rule Prohibiting LGBT Discrimination by Federal Contractors Takes Effect April 8, 2015, http://www.fordharrison.com/ofccps-final-rule-prohibiting-lgbt-discrimination-by-federal-contractors-takes-effect-april-8-2015. This EO is discussed in more detail in the Sex Discrimination and Federal Contractors Chapters of the SourceBook.

4. Protected Concerted Activity. The federal labor laws, specifically the NLRA, and most public sector labor laws, apply to employers regardless of whether their workforce is unionized (airlines and railroads are covered by the Railway Labor Act instead of the NLRA). Section 8(a)(1) of the NLRA prohibits acts by the employer against employees who engage in “protected concerted activities” – these need not be union-related.

Section 7 of the NLRA gives employees the right to “engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . .” Protected, concerted activities involve employees acting together to affect wages, hours, or other terms and conditions of employment. In Meyers Industries, Inc., 268 N.L.R.B. 493 (1984), the NLRB held that “concerted activity” requires action with or on the authority of other employees. For a detailed discussion of protected concerted activity, please see the Coping with Unions and NLRA’s Impact on the Workplace Chapters of the SourceBook.

5. Federal and State Laws Protecting Whistleblowers and/or Prohibiting Retaliation. A variety of laws protect employees who choose to “blow the whistle” on employer wrongdoing. In addition to the federal laws discussed below, many states have enacted laws protecting whistleblowers, some of which are quite broad in scope.
a. The Civil Service Reform Act and the Whistleblower Protection Act. The First and Fourteenth Amendments to the United States Constitution prohibit federal, state, and local governments from retaliating against employees who blow the whistle on matters of public importance. Federal employees are protected by the Civil Service Reform Act of 1978 (CSRA), which prohibits various employment actions, such as the discharge of whistleblowers. The Whistleblower Protection Act of 1989 (WPA) and its 1994 amendments expanded the CSRA. The CSRA, as amended by the WPA, provides the “exclusive remedial scheme” for civil service employees to seek relief for whistleblower claims. This means that an employee who pursues a claim under the WPA may not be able to sue under other statutes. See, e.g., Grisham v. United States, 103 F.3d 24 (5th Cir. 1997) (the CSRA established an “exclusive remedial scheme” that barred plaintiff’s subsequent First Amendment claims); Gergick v. Austin, 997 F.2d 1237, 1239 (8th Cir. 1993) (the CSRA is an “exclusive remedial scheme” and the WPA cannot be used to supplement or replace CSRA remedies).

In Haddle v. Garrison, 525 U.S. 121 (1998), the U.S. Supreme Court essentially created a new cause of action for whistleblowers. If an employee is “deterred” from testifying in a federal investigation by two or more individuals acting together, the employee may sue for damages under 42 U.S.C. § 1985(2).

b. Whistleblower Protection Act. The Whistleblower Protection Enhancement Act (WPEA) of 2012 strengthens the WPA and provides more protection to federal employees who disclose certain types of information, including fraud, waste and abuse in federal agencies. The regulations are found at 5 C.F.R. Part 1201 and Part 1209.

(1) Clarification of Types of Disclosures Protected. In response to administrative agency and court decisions narrowing the definition of protected disclosures, the WPEA clarifies that disclosures are not excluded from protection because:

- the disclosure was made to a supervisor or to a person who participated in the wrongdoing;
- the disclosure revealed information that had been previously disclosed;
- of the employee’s or applicant’s motive for making the disclosure;
- the disclosure was not made in writing;
- the disclosure was made while the employee was off duty; or
- of the amount of time which has passed since the occurrence of the events described in the disclosure.

Additionally, the WPEA provides that a disclosure is not excluded from protection even if it is made during the normal course of an employee’s duties, as long as the employee can show that he or she was subjected to retaliation because of the disclosure.

(2) Disclosures Concerning Policy Decisions. The WPEA also states that a protected disclosure does not include a communication concerning policy decisions that lawfully exercise discretionary authority unless the employee or applicant making the disclosure reasonably believes that the disclosure evidences: any violation of any law, rule or regulation; gross mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety.

(3) Standard for Determining Reasonable Belief. Under the WPEA, a determination of whether the employee/applicant making the complaint reasonably believed the conduct complained of was a violation of a law, rule, regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety must be made by determining whether a disinterested observer with knowledge
of the facts known by or available to the employee/applicant could reasonably reach such a conclusion.

(4) Clarification that Agency Nondisclosure Policies Do Not Override Whistleblower Protections. The Act also requires any nondisclosure policy, form or agreement (including one contained on an agency web site) to include the following statement:

These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive Order relating to

(1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling Executive Orders and statutory provisions are incorporated into this agreement and are controlling.

(5) Other Provisions of the WPEA:

- Exclude certain intelligence agencies from the Act's protections;
- Include Transportation Security Administration employees, including federal airport screeners, within coverage of the Act; and
- Protect employees who disclose censorship related to research, analysis or technical information.

The Merit Systems Protection Board (MSPB) has determined that the provisions of the WPEA apply retroactively. See In re Nasuti, 568 F.App' x 887, (Fed. Cir. 2014) (noting that it had remanded the case to the MSPB to determine whether the WPEA applies retroactively, and the MSPB determined that it does).

c. OSHA. Individuals who have made safety-related complaints are protected under the Occupational Safety and Health Act (OSH Act) § 11(c), and § 1977.12 of the Occupational Safety and Health Administration (OSHA) Regulations. Individuals who exercise their rights under the OSH Act regarding toxic substances are protected from discharge. An employer that violates this section may be liable for attorneys' fees and costs. The OSH Act does not pre-empt state criminal prosecutions. See People v. Pymm, 563 N.E.2d 1 (N.Y. Ct. App. 1990). For additional information regarding the OSH Act, see the OSHA Chapter of the SourceBook.

d. Title VII. Title VII, 42 U.S.C. § 2000e-3, protects individuals who have opposed unlawful employment discrimination. See Smalley v. Eatonville, 640 F.2d 765 (5th Cir. 1981). Retaliation claims under Title VII are discussed in more detail in the Overview of Employment Discrimination Claims and the Administrative Remedies Process Chapter of the SourceBook.

e. FLSA. Individuals who have filed claims or have participated in investigations of violations of the FLSA are protected under that act. See 29 U.S.C. § 215(a)(3). In 2011, the U.S. Supreme Court held that oral complaints are covered by the FLSA's anti-retaliation provisions, resolving a split of authority among the federal appeals courts on this issue. See Kasten v. Saint-Gobain Performance Plastics Corp., 563 U.S. 1 (U.S. 2011).

f. NLRA. Individuals who have filed charges or given testimony under the NLRA are protected. See 29 U.S.C. § 158(a)(4).

g. Federal and State Law Protecting the Public Interest. State laws vary in the extent to which they protect whistleblowers for acting in the public interest. OSHA has authority to investigate whistleblower complaints under a number of federal whistleblower laws and has developed a Whistleblower Protection Program website that lists these laws and provides other information, http://www.whistleblowers.gov/.
• **Affordable Care Act (ACA).** The Affordable Care Act (ACA), 29 U.S.C. § 218C protects employees who report violations of any provision of Title I of the ACA, including but not limited to discrimination based on an individual's receipt of health insurance subsidies, the denial of coverage based on a preexisting condition, or an insurer's failure to rebate a portion of an excess premium.

• **The Consumer Financial Protection Act (CFPA).** The CFPA, 12 U.S.C. § 5567, protects employees who blow the whistle on reasonably perceived violations of any provision of the Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (DFA) or any other provision of law that is subject to the jurisdiction of the Bureau of Consumer Financial, Protection, or any rule, order, standard, or prohibition prescribed by the Bureau.

• **The Sarbanes-Oxley Act (SOX).** The Sarbanes-Oxley Act (SOX), 18 U.S.C. § 1514A, (discussed in more detail below) protects employees of certain companies who report alleged mail, wire, bank or securities fraud; violations of the SEC rules and regulations; or violation of federal laws related to fraud against shareholders. The Act covers employees of publicly traded companies and their subsidiaries, as well as employees of nationally-recognized statistical rating organizations.

• **The Consumer Product Safety Improvement Act (CPSIA).** The CPSIA, 15 U.S.C. § 2087, protects employees who report to their employer, the federal government, or a state attorney general reasonably perceived violations of any statute or regulation within the jurisdiction of the Consumer Safety Product Safety Commission (CPSC). CPSIA covers employees of consumer product manufacturers, importers, distributors, retailers, and private labelers.

### h. SOX

The Sarbanes-Oxley Act of 2002 (SOX), 18 U.S.C. § 1514A, as amended, prohibits retaliation against covered employees for reporting information or assisting in a federal fraud investigation. Whistleblower protections under SOX were expanded when the DFA was signed in 2010. The DFA, discussed in more detail below, added additional protections and incentives for whistleblowers. OSHA released final regulations revising the procedures for handling SOX whistleblower claims that became effective March 5, 2015.

#### (1) Supreme Court Finds SOX Protects Employees of Privately Held Contractors

In *Lawson v. FMR LLC*, 134 S. Ct. 1158 (2014), the U.S. Supreme Court held that § 1514A protects employees of privately held contractors and subcontractors who perform work for the public company (as well as employees of the publicly traded company). In Lawson, the Court stated, “[w]e hold, based on the text of § 1514A, the mischief to which Congress was responding, and earlier legislation Congress drew upon, that the provision shelters employees of private contractors and subcontractors, just as it shelters employees of the public company served by the contractors and subcontractors.” The Court noted that in the Enron scandal that prompted the SOX Act, contractors and subcontractors participated in Enron's fraud and its cover up. When employees of those contractors attempted to bring misconduct to light, they encountered retaliation by their employers. “The Sarbanes-Oxley Act contains numerous provisions aimed at controlling the conduct of accountants, auditors, and lawyers who work with public companies. … Given Congress' concern about contractor conduct of the kind that contributed to Enron's collapse, we regard with suspicion construction of § 1514A to protect whistleblowers only when they are employed by a public company, and not when they work for the public company's contractor.” *Id.* The Court held that nothing in § 1514A's language confines the class of employees protected to those of a designated employer. “Absent any textual qualification, we presume the operative language means what it appears to mean: A contractor may not retaliate against its own employee for engaging in protected whistleblowing activity.” The Court noted that the retaliation prohibitions in § 1514A – discharge, demotion, suspension, threats, harassment, or discrimination in the terms and conditions of employment – are commonly actions an employer takes against its own employees and that contractors ordinarily cannot take adverse
actions against employees of the public company with whom they contract. Further, the Court found that the remedies for retaliation include reinstatement and back pay, which are the types of remedies provided to employees. Thus, the Court held that “the most sensible reading of § 1514A’s numerous references to an employer-employee relationship between the respondent and the claimant is that the provision’s protections run between contractors and their own employees.” But see Gibney v. Evolution Mktg. Research, LLC, 25 F. Supp. 3d 741, 747-48 (E.D. Pa. 2014) (limiting Dawson to situations in which the alleged fraud is perpetuated by the public company, not situations in which the publicly held company is the victim of fraud).

(2) Amendments by the DFA. The DFA amended SOX to provide that the law protects employees of subsidiaries and affiliates “whose financial information is included in the consolidated financial statements” of covered publicly traded companies. The DFA amended the SOX administrative procedures so that claimants now have 180 days to file a complaint with OSHA (previously they only had 90 days). The DFA also revised SOX by providing that the filing period starts on the date on which the violation occurred or the date on which the employee became aware of the violation. Previously the filing period started on the date on which the violation occurred, regardless of when the employee became aware of it. The DFA also bars the use of predispute arbitration agreements for SOX whistleblower claims. Specifically, the DFA provides that the rights granted under SOX “may not be waived by any agreement, policy, form, or condition of employment, including by a predispute arbitration agreement.” The DFA also contains a separate provision stating that “[n]o predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under [the whistleblower provisions of SOX].” Additionally, the DFA provides that parties to a SOX retaliation claim have a right to trial by jury. 18 U.S.C. § 1514A(b). The DFA also created three new federal causes of action for whistleblowers: (a) protection for employees who report potential violations of the Commodity Exchange Act (CEA) to the CFTC (7 U.S.C. § 26); (b) protection for employees who report potential violations of federal banking laws to their employers, the Bureau of Consumer Financial Protection (CFP), or other government authorities (12 U.S.C. § 5567); and (c) protection for employees who report potential violations to the SEC or cooperate with an investigation, make any disclosures “required or protected” under any statute or rule dealing with securities (including SOX), or provide law enforcement officials with “any truthful information relating to the commission or possible commission of any Federal offense” (18 U.S.C. § 1513(e)). Protection for employees reporting information to the SEC is discussed in § IV(B)(4)(h), below.

(3) Types of Whistleblowing Activity Protected. SOX protects two types of whistleblowing activity. First, SOX protects employees who provide information or aid in the investigation of conduct the employee reasonably believes to be a violation of federal laws or regulations relating to fraud against shareholders. To be protected, this information must be disclosed to a federal regulatory or law enforcement agency, a member or committee of Congress, or a person with supervisory authority over the employee or who has the authority to investigate or terminate the misconduct. Second, SOX also protects an employee who files, causes to be filed, testifies, participates in or otherwise assists in a proceeding regarding an alleged violation of federal laws or regulations relating to fraud against shareholders. See 18 U.S.C.S. § 1514A.

(4) Reasonable Belief. The Eighth Circuit has held that for a complaint to be protected activity under SOX, the plaintiff’s belief that the alleged misconduct violates the law must be both objectively and subjectively reasonable. See Pearl v. DST Systems, Inc., 2010 WL 27066 (8th Cir. Jan. 7, 2010) (holding that evidence showed that plaintiff’s belief that

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2 Responsibility for handling administrative complaints under SOX has been delegated to OSHA.
employer was understating earnings was not objectively reasonable because the plaintiff's information came from an unidentified source, he did not consult with anyone before reporting the alleged understatement, and he never obtained any additional factual information). In Pearl, the plaintiff acknowledged that he did not know whether a SOX violation had occurred, thus he did not have a subjective belief that a violation occurred. Accordingly, the court found that the plaintiff's complaint was not protected activity under SOX. See also Wiest v. Lynch, 710 F.3d 121, 134 (3d Cir. 2013) (finding that the "definitively and specifically" standard (discussed below) applied by the district court in determining the sufficiency of the plaintiff's allegations was too strict, and holding that the plaintiff's belief that the employer violated one of the provisions of § 806 was both subjectively and objectively reasonable).

(5) Sufficiency of Allegations. In Platone v. U.S. Dep't of Labor, 548 F.3d 322, 326-27 (4th Cir. 2008), the court upheld the decision of the Administrative Review Board (ARB) finding that an airline employee did not engage in protected activity under SOX when she complained to her employer about what the ARB described as how the "company spends its money" or its "ability to collect a debt." The court held that the complainant must "definitively and specifically" allege a violation of the law in communications with management. See also Van Asdale v. International Game Technology, 577 F.3d 989 (9th Cir. 2009) ("to constitute protected activity under SOX, an employee's communications must 'definitively and specifically' relate to one of the categories of fraud or securities violations listed under section 1514A(a)(1)"); Harkness v. C-Bass Diamond, LLC, 2010 WL 997101, 2010 U.S. Dist. LEXIS 24380 (D. Md. March 16, 2010) (in-house counsel's complaints about being excluded from important meetings and events were not protected activities under SOX because they did not involve the reporting of fraud or other illegal conduct).

However, the ARB subsequently retreated from its holding in Platone, holding that the heightened pleading standard established by the U.S. Supreme Court in motions to dismiss under Federal Rule of Civil Procedure 12(b)(6) does not apply to SOX whistleblower claims made under OSHA's administrative procedures. See Sylvester v. Parexel Int'l LLC, 2011 WL 2165854 (DOL May 25, 2011). In Sylvester, the ARB held that "Rule 12 motions challenging the sufficiency of the pleadings are highly disfavored by the SOX regulations and highly impractical under the Office of Administrative Law Judge (OALJ) rules." Because the complaint filed in Sylvester was very explicit, the ARB had no need to articulate the legal standard for analyzing the sufficiency of complaints that are filed with the OALJ. It addressed that issue in Evans v. U.S. Environmental Protection Agency, 2012 WL 3255132 (ARB 2012). In Evans, the ARB held that "in deciding a Fed. R. Civ. P. 12(b)(6) facial challenge, fair notice is the proper legal standard for any complaint filed by the complainant or required by the Administrative Law Judge (ALJ) in administrative whistleblower proceedings before the DOL. More specifically, a sufficient statement of the claims need only provide (a) some facts about the protected activity, showing some 'relatedness' to the laws and regulations of one of the statutes in our jurisdiction; (b) some facts about the adverse action; (c) a general assertion of causation; and (d) a description of the relief that is sought." Id. at *6. In decisions issued after Sylvester, the ARB has asserted that the definitively and specifically standard conflicts with the language of § 806. See, e.g., Zinn v. Am. Commercial Lines, Inc., 2012 WL 1102507 (ARB March 28, 2012) ("[T]he 'definitive and specific' standard employed in prior ARB cases is inconsistent with the statutory language of Section 806."). The Third Circuit has concluded that the ARB's rejection of the Platone standard is entitled to Chevron deference; thus, the court rejected the definitive and specific standard the lower court had relied on in dismissing a plaintiff's SOX complaint. See Wiest v. Lynch, 710 F.3d 121 (3d Cir. 2013). The court also held that the lower court erred in requiring that an employee's communication reveal the elements of securities fraud, including intentional misrepresentation and materiality. Id. at 133. Additionally, the court held that the lower court erred in concluding that to constitute protected activity, the information
contained within an employee's communication must implicate "a reasonable belief of an existing violation." *Id.* The court held, "[i]t would frustrate [the purpose of SOX, which is to combat corporate wrongdoing] to require an employee, who knows that a violation is imminent, to wait for the actual violation to occur when an earlier report possibly could have prevented it." *Id.* The Third Circuit held that the reasonable belief test is the appropriate standard for analyzing the plaintiff's communications, which he claimed were protected activity under SOX. "As explained in Sylvester, that standard requires that an employee's communication reflect a subjective and objectively reasonable belief that his employer's conduct constitutes a violation of an enumerated provision in Section 806." *Id.* at 137. The court found that certain of the plaintiff's complaints were protected activity, while others were not. See also *Nielsen v. AECOM Tech.*, 762 F.3d 214 (2d Cir. 2014) ("Thus, relief pursuant to § 1514A turns on the reasonableness of the employee's belief that the conduct violated one of the enumerated provisions—which is contrary to the 'definitively and specifically' standard." However, the court held that the employee's allegations in that case were insufficient to meet this standard.); *Rhinehimer v. U.S. Bancorp Investments, Inc.*, 787 F.3d 797 (6th Cir. 2015) (rejecting the "definitively and specifically" standard and adopting the "emerging rule that the employee's reasonable belief is a simple factual question requiring no subset of findings that the employee had a justifiable belief as to each of the legally-defined elements of the suspected fraud. … Based on the totality of these circumstances, the evidence was more than sufficient to sustain the jury's finding that Plaintiff reasonably believed that the trades constituted unsuitability fraud.").

(6) Remedies. SOX authorizes an award to a prevailing employee of make-whole relief, including reinstatement with the same seniority status that the employee would have had but for the discrimination, back pay with interest, and compensation for any special damages sustained, including litigation costs, expert witness fees and reasonable attorneys' fees. See 18 U.S.C. § 1514A(c)(2).

(7) Criminal Provisions of SOX. In addition to civil penalties, SOX makes it a crime punishable by a fine and up to 10 years in prison to knowingly retaliate against any person, including interfering with the person's lawful employment or livelihood, for providing truthful information relating to the commission or possible commission of a federal crime to a law enforcement officer. This provision protects every employee, including those employed by nonpublicly traded companies, from adverse action based on reporting a criminal matter to local, state, or federal law enforcement.

Additionally, SOX makes it a crime punishable by a fine and up to 20 years in prison to knowingly alter, destroy, conceal or falsify any record, document, or tangible object with intent to impede, obstruct or influence the investigation or administration of any matter within the jurisdiction of any department or agency of the U.S. or any bankruptcy case under Title 11 of the U.S. Code.

i. DFA – "Securities Whistleblower Incentives and Protection." Section 922 of the DFA created a new § 21F in the Securities Exchange Act that offers whistleblowers "bounties" for reporting suspected securities law violations directly to the SEC. The program requires the SEC to pay whistleblowers who voluntarily provide the agency with "original information" a "bounty" in an amount equal to 10 percent to 30 percent of any monetary sanctions exceeding $1,000,000. See 15 U.S.C. § 78u-6(a) and (b). It also prohibits employers from discharging, demoting, suspending, threatening, harassing (directly or indirectly) or otherwise discriminating against an employee for: (1) providing information to the SEC in accordance with the whistleblower incentive provision; (2) assisting in an investigation or judicial or administrative action relating to the information provided; or (3) making disclosures that are required or protected under SOX, the Securities Exchange Act of 1934, § 1513(e) of Title 18, United States Code, and any other law, rule, or regulation subject to the jurisdiction of the Commission. See 15 U.S.C. § 78u-6(h).
This section permits employees claiming retaliation under this provision to bring a lawsuit in federal court. An action must be filed either within six years after the date the violation occurred or within three years after the date “facts material to the right of action are known or reasonably should have been known by the employee,” but not more than 10 years after the date of the violation. Potential remedies include reinstatement, double back pay with interest, litigation costs, expert witness fees, and reasonable attorneys’ fees.

The Fifth Circuit has held that the whistleblower provisions of this section do not apply unless an individual provides information relating to a securities law violation to the SEC. Thus, an individual who made only an internal report of a possible securities law violation was not a protected whistleblower under this provision. See Asadi v. G.E. Energy United States, L.L.C., 720 F.3d 620 (5th Cir. 2013). In Asadi, the court held, “[u]nder Dodd-Frank’s plain language and structure, there is only one category of whistleblowers: individuals who provide information relating to a securities law violation to the SEC. The three categories listed in subparagraph § 78u-6(h)(1)(A) represent the protected activity in a whistleblower-protection claim. They do not, however, define which individuals qualify as whistleblowers.” 720 F.3d at 625. The court noted that the third category of protected activity (making disclosures that are required or protected under SOX, the Securities Exchange Act of 1934 or certain other laws) is not superfluous; “[i]t protects those individuals who qualify as whistleblowers from retaliation on the basis of other required or protected disclosures.” Id. at 628.

The court further noted that construing the Dodd-Frank whistleblower-protection provision to extend beyond the statutory definition of “whistleblowers” renders the SOX anti-retaliation provision, “for practical purposes, moot.” Id. at 628. The court explained that such a construction would render the SOX anti-retaliation procedures moot because it would permit a person who makes a disclosure that is protected by the SOX anti-retaliation provision to also bring a Dodd-Frank whistleblower claim on the basis that the disclosure was protected by SOX. The court held that it is “unlikely, however, that an individual would choose to raise a SOX anti-retaliation claim instead of a Dodd-Frank whistleblower-protection claim” for three reasons. Id. at 628-29. “First, the Dodd-Frank whistleblower-protection provision provides for greater monetary damages because it allows for recovery of two times back pay, whereas the SOX anti-retaliation provision provides for only back pay … Second, individuals who bring a SOX anti-retaliation claim must first file a complaint with the Secretary of Labor and, only if the Secretary of Labor has not issued a final decision within 180 days, may then proceed to file a claim in a U.S. district court … Third, the applicable statute of limitations is substantially longer for Dodd-Frank whistleblower-protection claims.” Id. at 629. Accordingly, the court held that “the whistleblower-protection provision unambiguously requires individuals to provide information relating to a violation of the securities laws to the SEC to qualify for protection from retaliation under § 78u-6(h).” Id. (emphasis in original). The court also rejected the plaintiff’s argument that it should follow the definitions set out in the SEC’s regulations interpreting the Act. The court held that the SEC’s regulation redefines whistleblower more broadly than the statute by providing that an individual is a whistleblower even though he never reports any information to the SEC, so long as he has undertaken the protected activity listed in 15 U.S.C. § 78u-6(h)(1)(A). Additionally, the court found that the regulation defines regulation more broadly for the purposes of the prohibition against retaliation than it does for eligibility for an award, which distinction is not supported by the plain language of 15 U.S.C. § 78u-6. But see Berman v. Neo@Ogilvy LLC, 2015 WL 5254916, at *6 (2d Cir. Sept. 10, 2015) (rejecting the analysis in Asadi, noting that “applying the Commission reporting requirement to employees seeking Sarbanes–Oxley remedies pursuant to subdivision (iii) would leave that subdivision with an extremely limited scope … ‘apart from the rare example of simultaneous (or nearly simultaneous) reporting of wrongdoing to an employer and to the Commission, there would be virtually no situation where an SEC reporting requirement would leave subdivision (iii) with any scope.’”). The court found the statute to be sufficiently ambiguous to warrant Chevron deferral to the SEC’s regulation, which permits an individual to pursue Dodd-Frank remedies
for alleged retaliation for reporting wrongdoing to an employer even though the person did not report the wrongdoing to the SEC before his termination. *Id.* at *9. See also Interpretation of the SEC’s Whistleblower Rules Under Section 21F of the Sec. Exch. Act of 1934, Release No. 75592 (Aug. 4, 2015), 2015 WL 4624264 (clarifying that an individual may qualify for protection from retaliation under the Dodd-Frank Act regardless of whether the wrongdoing has been reported to the SEC, and emphasizing that the requirement for reporting wrongdoing to the SEC applies to the confidentiality and reward provisions of the Dodd-Frank Act.); *Kramer v. Trans-Lux Corp.*, 2012 WL 4444820 (D. Conn. Sept. 25, 2012) (following the SEC’s definition of whistleblower in determining whether the plaintiff was a whistleblower under the Dodd-Frank Act); *Nollner v. Southern Baptist Convention, Inc.*, 852 F. Supp. 2d 986 (M.D. Tenn. 2012) (holding that the Dodd-Frank whistleblower-protection provision extends to protect certain individuals who do not make disclosures to the SEC).

**j. Whistleblower Protection for Employees in the Financial Services Industry.** Section 1057 of the DFA creates a new private right of action for employees in the financial services industry who suffer retaliation for disclosing information about fraudulent or unlawful conduct related to the offering or provision of a consumer financial product or service. Protected activity includes providing information to an employer, the Bureau of Consumer Financial Protection (CFP), or other governmental authority relating to a violation of the laws under the jurisdiction of the CFP, testifying or filing a proceeding under any consumer financial law or refusing to participate in any activity that the employee reasonably believes to be a violation of law subject to the CFP’s jurisdiction. Aggrieved employees are required to file a complaint with the Secretary of Labor within 180 days of an alleged violation.

**6. Miscellaneous Employment Protections.** Various federal and state laws may limit an employer’s ability to discharge an employee.

**a. Jury Duty.** Under federal law, it is illegal for an employer to discharge, threaten to discharge, intimidate, or coerce any permanent employee because of the employee’s jury service or the attendance or scheduled attendance in connection with such service in any federal court. § 28 U.S.C. § 1875. An employer who discharges an employee because of the employee’s jury service may be liable to the employee for the amount of wages lost due to the discharge and may be ordered to reinstate the employee. The employer may also be subject to other injunctive relief and a civil penalty of not more than $1,000 per employee per violation. Additionally, the court may award the prevailing employee attorneys’ fees and costs. See *Flynn v. American Fire and Electric Ind. Inc.*, 817 F. Supp. 63 (C.D. Ill. 1993) (prevailing plaintiff may recover attorneys’ fees for privately retained counsel); *but see In re Webb*, 586 F. Supp. 1480 (N.D. Ohio) (attorneys’ fees only available for court-appointed counsel). The employer, however, can recover attorneys’ fees only if the action was frivolous, vexatious, or brought in bad faith. 28 U.S.C. § 1875(d)(2).

A claim by an employee alleging wrongful discharge under this statute can be brought in state or federal court. See *Aszkenas v. J.B. Robinson Jewelers, Inc.*, 560 So. 2d 1193 (Fla. 3d DCA 1990). Employees are entitled to a jury trial under this statute. *Hill v. Winn-Dixie Stores, Inc.*, 934 F.2d 1518 (11th Cir. 1991), amended 7 I.E.R. Cas. (BNA) 1671 (11th Cir. 1991).

The statute does not require employers to pay employees for the time spent on jury duty, unless the nonpayment is a method of coercion or intimidation. See *U.S. ex rel. Madonia v. Coral Springs Partnership, Ltd.*, 731 F. Supp. 1054 (S.D. Fla. 1990) (court ordered the employer to pay the employee the difference between her pay and jury service pay, to reimburse the court for the cost of the juror’s court appointed attorney, and prohibited the employer from forcing the juror to work nights and weekends to make up for time lost on jury service). *But see Lucas v. Matlack, Inc.*, 851 F. Supp. 231 (N.D. W. Va. 1994) (employer was obligated to continue employee's salary only for 10 days of jury service pursuant to the company’s policy and the collective bargaining agreement). Note, however, that 29 C.F.R. § 541.118 requires employers...
to pay salaried employees for absences from work due to jury duty. Employers may offset any amounts received by the employee for jury duty from the employee's salary.

The statute requires that employees returning to work from jury service be treated as if they had been on a leave of absence, without loss of seniority. 28 U.S.C. § 1875(c). The employee must also be allowed to participate in insurance and other benefits as if he or she had been away on a leave of absence during the term of service. Id.

b. Garnishment. Individuals with one or more garnishments of one debt are protected from discharge under the Consumer Credit Protection Act, Title III (Federal Wage Garnishment Law), 15 U.S.C. § 1674. An employer that violates this law may be fined not more than $1,000 or imprisoned not more than one year. This statute is enforced by the Secretary of Labor, and courts are split on whether the individual employee can sue under the statute. See Stouch v. Williamson Hospitality Corp., 22 F. Supp. 2d 431 (E.D. Pa. 1998) (citing cases and holding that the employee cannot bring his own suit under the statute).

The Federal Wage Garnishment Law only prohibits the discharge of employees for the garnishment of one debt. Employers should be aware, however, that Title VII may prohibit a policy of discharging employees for garnishment of more than one debt if the policy has a discriminatory impact on a protected category of employees. See Wallace v. Debron Corp., 494 F.2d 674 (8th Cir. 1974).

For more information regarding the garnishment of employee wages, please see the Personnel and Supervisory Policies Chapter of the SourceBook.

c. Family and Medical Leave Act (FMLA). The FMLA permits covered employees to receive up to 12 weeks of unpaid leave per year for the birth or adoption of a child, serious health condition of an employee or family member, or a qualifying exigency based on a covered service member's active duty or call to active duty status. The FMLA also provides for 26 weeks of military caregiver leave. If employees are discharged for taking this leave, they may sue for back pay and benefits, reinstatement, attorneys' fees, and actual losses sustained. In addition, employees may recover double damages for willful violations. The Employee Leaves Chapter of the SourceBook contains a detailed discussion of the FMLA.

d. Layoffs and Plant Closings. Individuals are protected under the Worker Adjustment and Retraining Notification Act (WARN) that requires 60 days' notice to employees and state and local governments before layoffs of 50 or more employees. Penalties include payment of 60 days wages and benefits to employees and a $500 per day civil penalty paid to the local government for up to 60 days. Additionally, some states have their own WARN-type statutes that may impose different obligations on employers. For a full discussion of WARN see the Corporate Restructuring Chapter of the SourceBook.

e. Fair Credit Reporting Act (FCRA). Under the FCRA, before taking any adverse employment action against someone based in whole or in part on a consumer report, the employer must provide the affected person with a copy of the report and a written description of the person's rights under the FCRA. For more information regarding the FCRA, see the Hiring Chapter of the SourceBook.

f. Bankruptcy. Pursuant to 11 U.S.C. § 525(b), an employer may not discharge an employee “solely because” the employee “is or has been” a debtor in bankruptcy. See In re Majewski, 310 F.3d 653 (9th Cir. 2002) (holding that § 525(b) only protects employees who have actually filed for bankruptcy. Thus, an employee who is discharged prior to filing is not protected by § 525(b)). Discharge of an employee who has filed bankruptcy may be permissible in some jurisdictions if the employer can prove there is a nonbankruptcy reason for the discharge. See In re Leopard, 272 B.R. 507 (Bankr. M.D. Fla. 2002) (“the mere allegation of discrimination is not sufficient if there exists a sufficient nonbankruptcy justification for termination of employment”); Laracuente v. Chase Manhattan Bank, 891 F.2d 17, 23 (1st Cir. 1989) (termination of debtor bank employee did not violate § 525(b) when record clearly supported the conclusion
that debtor was not terminated for filing bankruptcy, but rather was terminated for her participation in providing loans to family members and her husband’s employees).

7. State Law Protection. In addition to the federal law protections discussed above, some states provide additional protection. Employers should check the law of the state(s) in which they are located.

a. State Laws Prohibiting Discrimination Against Victims of Domestic Violence. Some states have enacted laws prohibiting discrimination against victims of domestic or sexual violence. For example, the Illinois Victims’ Economic Security and Safety Act prohibits discrimination against the victims of domestic or sexual violence and requires employers to give employees who were the victims of such violence, or whose family members were victims of such violence, 12 weeks of unpaid leave. See 820 Ill. Comp. Stat. 180/1, et seq. Additionally, North Carolina law prohibits employers from discriminating against victims of domestic violence. See N.C. Gen. Stat. § 50B-5.5. Section 741.313 of the Florida Statutes requires employers to give employees up to three days of leave in a 12-month period if the employee or a family or household member is a victim of domestic or sexual violence. The leave must be for the reasons outlined in the statute and may be paid or unpaid, at the employer’s discretion. The law also prohibits employers from interfering with, restraining, or denying the exercise or any attempt to exercise the rights provided by the law. Additionally, employers may not discriminate or retaliate against an employee for exercising his or her rights under the law. Thus, before discharging an employee who may be a victim of domestic or sexual violence, employers should check the laws of the states in which they have facilities. For more information see State Law Guide – Employment Rights for Victims of Domestic or Sexual Violence – https://www.legalmomentum.org/resources/state-law-guide-employment-rights-victims-domestic-or-sexual-violence#sthash.2UEiklyh.dpuf.

VIII. CONSTRUCTIVE DISCHARGE

The constructive discharge doctrine, originally developed under the NLRA, allows employees to sue if they feel their employer forced them to resign. To show constructive discharge under Title VII, the employee must prove that his or her working conditions were so difficult or unpleasant that a reasonable person in the employee’s shoes would have felt compelled to resign. See, e.g., King v. AC&R Advertising, 65 F.3d 764 (9th Cir. 1995) (salary reduction, demotion and other cuts in benefits and responsibilities were held insufficient to constitute constructive discharge); Clowes v. Allegheny Valley Hosp., 991 F.2d 1159 (3d Cir. 1993) (supervisor’s overzealous supervision of an older employee’s work did not support a claim of constructive discharge); McCann v. Litton Systems, Inc., 986 F.2d 946 (5th Cir. 1993) (slight decrease in pay, coupled with some loss of supervisory responsibilities, held insufficient to constitute constructive discharge).

The U.S. Supreme Court has held that a constructive discharge may be a tangible employment action if a supervisor’s official act precipitates the constructive discharge. See Pennsylvania State Police v. Suders, 542 U.S. 129 (2004). However, where an official act does not underlie the constructive discharge, it will not be treated as a tangible employment action for the purposes of the Faragher/Ellerth affirmative defense.

IX. EFFECT OF PREVIOUS ADMINISTRATIVE DETERMINATION

Employers may find themselves subject to various administrative complaints for discharging an employee. The discussion below details how the various proceedings may interact in a discharge situation.

A. Unemployment Compensation Proceedings. Employers should respond cautiously to inquiries on routine unemployment compensation forms because the initial response may be used against the employer later. Evidentiary hearings may be conducted and tape-recorded in some
jurisdictions. Such a proceeding provides early discovery opportunities for the employee and employer. Because testimony in such a hearing is made under oath, it may be admissible in later litigation. Courts look to the following elements to determine whether a party is barred from re-litigating an issue in a subsequent proceeding: (1) same parties; (2) same issues; (3) adequate opportunity to litigate the issue at the administrative proceeding; (4) issue in question was actually litigated and determined; and (5) the findings on the issues were necessary to an administrative determination.

Some state statutes address the preclusive effect of agency determinations. See, e.g., Tenn. Code. Ann. § 50-7-304(k) (No judgment, conclusion, or final order made with respect to unemployment claim may be conclusive in any separate or subsequent action in another forum).

B. Civil Service Proceedings. For public sector employers with civil service, evidentiary hearings may be conducted when a discharged employee appeals his or her termination. This provides both the employer and employee an early opportunity to gather evidence that may be used against the other party in a subsequent lawsuit. If a civil service decision in favor of the employer is reviewed in the state courts, it may preclude certain subsequent claims. See Burney v. Polk Community College, 728 F.2d 1374 (11th Cir. 1984) (affirming a dismissal of a Title VII discharge suit where employee claiming discrimination had a full evidentiary hearing before a community college board of trustees and the board’s decision upholding the dismissal was reviewed and affirmed by the state courts).

C. Workers’ Compensation Proceedings. An employee may commence workers’ compensation proceedings or maintain an ongoing workers’ compensation proceeding while litigating a termination claim. In the workers’ compensation proceeding, both the employer and the employee have the opportunity to gather evidence that could be used against the other. Evidence as to the injuries claimed by the employee can have an impact on the exposure and relief sought in a discrimination case. Similarly, any disability determinations in the workers’ compensation case can have an impact on the relief available and the exposure in the termination case. Also, it may be possible to settle both matters simultaneously.

Migrant farm workers are prohibited under the federal Migrant and Seasonal Agricultural Worker Protection Act (AWPA), 29 U.S.C. §§ 1801, et seq., from suing their employers under AWPA if a state’s workers’ compensation law applies and coverage is provided for migrant or seasonal agricultural workers. 29 U.S.C. § 1854(d) provides that a state’s workers’ compensation law is the exclusive remedy for loss as a result of bodily injury or death. However, statutory damages of up to $500 per plaintiff per violation, or up to $500,000 in class action suits, are still available along with other equitable relief when the court finds that a violation of AWPA was intentional. 29 U.S.C. § 1854.

D. Arbitration. If an employer has a collective bargaining agreement providing for arbitration of terminations, the arbitration proceeding may also provide a means for each side to gather information that can later be used to impeach the other party’s position in termination litigation. An arbitration agreement contained in a collective bargaining agreement that clearly and unmistakably requires union members to arbitrate statutory discrimination claims is enforceable as a matter of federal law. See 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456 (2009). Thus, such an agreement should preclude an employee from filing a lawsuit under Title VII or other anti-discrimination laws. However, if the agreement does not specifically address statutory claims, it may not preclude an employee from filing a lawsuit over such claims. See Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) (arbitration agreement in collective bargaining agreement did not preclude employee’s right to sue the employer under Title VII because the arbitration provision related only to rights and remedies under the collective bargaining agreement and did not give the arbitrator the authority to resolve statutory claims). See also Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991), and Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001) (holding that claims brought under anti-discrimination laws may be subject to binding arbitration). See the Alternative Dispute Resolution Chapter of the SourceBook for a further discussion of arbitration of employment claims.
An arbitrator’s decision may also be used as evidence in a subsequent Title VII case. See *Becton v. Detroit Terminal of Consol. Freightways*, 687 F.2d 140 (6th Cir. 1982) (an arbitration decision is “persuasive evidence” that just cause existed and is “sufficient to carry the employer’s burden of articulating ‘some legitimate, nondiscriminatory reason for the employees’ rejection’”).

**E. Equal Employment Opportunity Commission (EEOC) Administrative Proceedings.** Once an EEOC charge is filed, the EEOC will attempt to elicit substantial information from the employer including a position statement outlining the reasons for the action and supporting documents. Much of the EEOC file material may become available to counsel for both the employee and the employer in later litigation. Accordingly, the employer should be careful about what documentation is submitted to the EEOC. In some cases, witnesses’ statements may be deemed confidential by the EEOC for the protection of the witnesses. Such a designation may prevent the employee from “discovering” the statements. Neither a determination of “cause” nor “no cause” by the EEOC will preclude further litigation in court.

EEOC determinations may be admitted as evidence in a subsequent trial. See *Smith v. Universal Servs.*, 454 F.2d 154 (5th Cir. 1972) (admitting EEOC determination in nonjury trial). Courts may, however, exclude agency determinations in jury trials because these determinations are likely to confuse and prejudice the jury. See *Paolitto v. Brown E & C., Inc.*, 151 F.3d 60, 64 (2d Cir. 1998); *Hall v. Western Prod. Co.*, 988 F.2d 1050, 1057-58 (10th Cir. 1993) (determination of admissibility is within the trial court’s discretion).

Rejection of an EEOC-conciliated offer of full relief to settle a discrimination charge may not bar a complainant from pursuing a discrimination suit. See *Long v. Ringling Brothers-Barnum & Bailey Combined Shows*, 9 F.3d 340 (4th Cir. 1993).