ABC CHAPTER HANDBOOK ON

PRACTICAL LABOR LAW

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DISCLAIMER: This handbook was last updated in November 2024 by ABC National. Chapter staff should monitor ABC's Newsline for recent changes to a few of the federal rules included in the handbook. The format of this handbook is by its nature general only and is not intended to substitute for legal advice. Chapter staff should not attempt to dispense legal advice. Members should be advised to seek legal assistance from the chapter attorney or ABC National's counsel.

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PART I | ABOUT THIS HANDBOOK

This handbook gives ABC chapter staff and members quick answers to some of the most common labor and employment law questions confronting merit shop contractors in the construction industry.

ABC was founded in 1950 to preserve free enterprise in the construction industry—the right of every firm (general contractors, subcontractors, suppliers and associates) to do business with anyone it chooses (union or nonunion), and to assure that any firm may work side by side with any other firm.

ABC is not "anti-union." A number of ABC's more than 23,000 members are unionized firms. ABC is "pro-competition," believing that all work should be awarded and performed on the basis of merit, regardless of labor affiliation. Competition is the best protection against economic distortions and abuses such as featherbedding, sky-high wages unrelated to productivity, wildcat strikes and jurisdictional disputes created by the closed shop. ABC stands up to illegal union activity and government interference with free enterprise, including coercion, intimidation, secondary boycotts and unproductive work restrictions. ABC is opposed to unlawful discrimination of any kind and supports the right of employees to engage in collective bargaining, or to refrain from union activity, in accordance with applicable law.

Chapter staff often are called upon to answer member questions about union tactics, government investigations and other aspects of labor and employment issues. In order to keep members informed, it is important that each chapter has certain basic information available on these important subjects.

The format of this handbook is by its nature general only and is not intended to be a substitute for legal advice. Chapter staff should not attempt to dispense legal advice. Members should be advised to seek legal assistance from the chapter attorney or ABC National's counsel.

This handbook has been reviewed and edited by ABC's General Counsel, Maurice Baskin, Esq., of Littler Mendelson P.C., Washington, D.C. Questions about its contents should be directed to ABC National staff at (202) 595-1505 or legal@abc.org.

Note: This handbook is intended for informational purposes only and does not constitute legal advice or opinion.

PART II | THE ROLE OF ABC CHAPTERS IN HELPING MEMBERS WITH LABOR ISSUES

Chapter staff may be called upon to play a variety of roles in connection with labor problems confronting members. Chapter executives must be prepared to provide information to members, to direct members to chapter attorneys or to call upon the resources of ABC National. Often, the most important function chapter staff can perform is to recognize the seriousness of labor issues facing a member so as to give timely warning of greater trouble ahead and the need for expert legal advice.

> Note: It is important for chapter staff to remember they are not expected to provide legal advice to members, nor should they ever encourage ABC members to engage in unlawful activity. Chapter staff should help protect ABC's reputation against charges that it is "anti-union" or otherwise advocates disregard for labor laws. At the same time, as an association of construction industry employers, ABC has a right protected by the First Amendment to speak out on behalf of its members to promote free enterprise and the merit shop philosophy. ABC staff should not shirk their obligation to help members in need and to advocate the merit shop principles to government agencies, the courts and the public at large.

Under normal circumstances, ABC chapter staff should confine any direct communications regarding labor issues to the management/supervisory personnel of member firms. Under a federal law called the Labor Management Reporting and Disclosure Act, any person other than an employer who directly or indirectly persuades employees on the subject of labor relations pursuant to an agreement or arrangement with an employer is required to file reports with the U.S. Department of Labor. These reports are intrusive and burdensome and may require disclosure of member payments to chapters under some circumstances. Therefore, most chapters have opted not to become involved in "persuader" activity (i.e., direct communications with member employees).

Under the law, employers are allowed to receive "advice" on labor issues from outside consultants, including chapter staff. Such advice may include materials designed to help the employer communicate more effectively with employees, so long as the employer exercises final control over the distribution.

What, then, can chapter staff do to best assist ABC member employers on labor relations issues? The answers vary depending on chapter size and location, but the following checklist may help:

- Make accurate information available to members on important labor relations issues.
- Know how to access ABC National's resources on labor issues.
- Maintain close ties to a chapter attorney experienced in labor relations issues and establish a hotline program for members to contact the attorney in emergencies.
- Maintain an active Legal Rights and Strategy Committee to advise the chapter board on pending legal issues affecting merit shop construction.
- Make all members aware of the availability of legal assistance funds through the Construction Legal Rights Foundation and assist members as appropriate in completing timely applications for assistance.
- Maintain an active government affairs presence in order to effectively advocate ABC's positions in support of merit shop construction and free enterprise.

- Understand that ABC's mission is not anti-union and that ABC is opposed to all forms of unlawful discrimination. ABC is pro-competition and recommends that all of its members obey all applicable laws.
- Monitor all management training seminars and chapter publications to ensure that ABC's message is properly communicated on labor relations issues.
- Be sensitive to and avoid joint member action that could be misconstrued as anti-competitive conduct, such as price setting, boycotts and bid rigging. At the same time, many joint activities that promote competition and benefit the industry as a whole should be encouraged, such as participation in prevailing wage surveys and apprenticeship training programs.

RESOURCES AVAILABLE FROM ABC NATIONAL

Rapid Response Toolkit for Dealing With Union Organizing. What employers need to know to immediately respond to union organizing. See abc.org/Academy/Rapid-Response-Toolkit-to-Union-Organizing.

Pocket Guide to Dealing with Union Organizing. A quick summary of answers to basic labor law problems designed to fit in a superintendent's pocket for easy and immediate use. See abc.org/Academy/Pocket-Guide-To-Dealing-With-Union-Organizing or nationalconnections.abc.org/Association/ABC-Store.

Chapter Guide to Apprenticeship Programs. Checklists for compliance with apprenticeship regulations and the Employee Retirement Income Security Act, commonly known as the ERISA. See nationalconnections.abc.org/apprenticeship.

Online Blog About Government-Mandated Project Labor Agreements. See TheTruthAboutPLAs.com.

Contact ABC National's "first responders" in government affairs, chapter relations, communications, safety and workforce for immediate assistance in the event of a natural disaster, member jobsite accident, anti-merit shop ad campaign or legislative or legal emergency at rapidresponse@abc.org.

PART III | WHAT TO DO WHEN UNION ORGANIZING STARTS

BASIC NLRB ELECTION PROCEDURES

The federal law governing the manner in which a union may gain the right to be the "collective bargaining representative" of an employer's workers is set forth in the National Labor Relations Act, as amended by the Taft-Hartley Act. Under this law, a union that has been designated by a majority of the employees in an "appropriate bargaining unit" is entitled to recognition by the employer as the sole and exclusive bargaining representative of all of the employees in that unit. Once the union obtains this right to recognition, the employer is required to bargain in good faith with the union over the wages, benefits and all other working conditions of the employees in that bargaining unit.

The following are ways in which the union can achieve recognition of an employer's workers.

VOLUNTARY RECOGNITION

Voluntary recognition of a union as the bargaining representative of employees can occur if an employer intentionally or unintentionally accepts evidence that a majority of the employees have signed union authorization cards or have in some other way indicated they want the union to be their bargaining representative.

Also, a special rule for the construction industry in Section 8(f) of the NLRA allows employers to recognize a union as the bargaining agent, even without proof of support from a majority of employees. This is why unions often ask construction contractors to sign "letters of assent." Section 8(f) agreements are discussed in more detail below.

Once the employer voluntarily recognizes a union as the collective bargaining representative of its employees, the employer is bound by that act and cannot later refuse to bargain in good faith with the union.

Does an Employer Have To Recognize a Union That Offers Evidence That a Majority of the Employees Have Signed Cards?

An employer is not required by law to voluntarily recognize a union, even if the union offers to submit evidence that the majority of employees want it to be their representative. The employer can refuse to look at such evidence and insist that it has a "good faith doubt" about whether the majority of its employees want the union. In that case, so long as the employer does not engage in serious unfair labor practices (such as threatening employees with loss of benefits because of the union or promising them increased benefits if the union goes away), the union's only alternative is to seek a secret ballot election conducted by the National Labor Relations Board. However, under a recent NLRB ruling, employers who wish to contest a union's claim of majority status may be required to promptly file their own election petition. This election process is discussed in more detail below.

What Is a "Pre-Hire" Agreement in the Construction Industry?

Under Section 8(f) of the NLRA, construction industry employers are allowed to voluntarily recognize unions regardless of whether the union represents a majority of the employers' employees, or even before any employees are hired. Under this type of arrangement, an employer is bound to the "pre-hire" agreement signed with a union for the length of the agreement only and can repudiate the agreement and the bargaining relationship at the end of the agreement's term.

What Should an Employer Do if a Union Seeks Voluntary Recognition?

Because the legal rules governing voluntary recognition are very complex, employers put themselves at great risk if they even talk with union representatives or their employees about voluntarily recognizing the union. This is true even if the employer thinks a union would be a good development or if they think their employees really want a union. An employer should seek legal counsel before undertaking any such discussions with a union.

FORMAL NLRB ELECTION PROCEEDINGS

As stated above, even if the union has obtained authorization cards from a majority of employees designating the union as their bargaining representative, the employer may nevertheless refuse to voluntarily recognize the union so long as it does not engage in any serious unfair labor practices. Under a recent NLRB ruling, employers who wish to contest a union's claim of majority status may be required to promptly file their own election petition. While the union could then try to put pressure on the employer to recognize it without an election through recognitional picketing or calling the employees out on strike, in most cases the union will seek a secret ballot election conducted by the NLRB.

How Does the Union Get an NLRB Election?

If the union wants the NLRB to hold a secret ballot election among the employees to prove its majority status, the union must file a petition with the NLRB. In order to file a petition, the union must provide the NLRB with union authorization cards or other evidence that at least 30% of the employees have indicated they want the union to represent them. (As a practical matter, union organizers usually do not file petitions with the NLRB until they have a majority of the employees signed up. The general thinking on their part is that they ought to have a solid base of support as evidenced by signatures from a majority of unit employees before going to the NLRB.)

Does the Union Always Get an Election if It Files a Petition?

The union will not automatically obtain an election just by filing a petition with the NLRB. There may be legal issues concerning the right of the union to have an election at all or issues concerning who is eligible to vote in the election (i.e., what is the "appropriate unit of employees"). If such issues exist, a formal hearing generally will be held on these questions. You should meet with your labor counsel as soon as possible after receipt of a petition for an election in order to identify all legal issues that should be resolved through the formal hearing process if necessary.

When, Where and How Are Elections Held?

Assuming the NLRB does not find a basis for dismissing the union petition, it will direct that a secret ballot election among the employees in the "appropriate unit" be held at a specified time and place—usually at the employer's place of business. The NLRB will officiate at the election.

In 2023, the NLRB changed its election rules to speed up the process. Failure to file the statement of position can result in waiving important rights to present evidence. The statement of position must also be accompanied by a list of names of employees covered by the petition, and potential other employees who might be included in an appropriate bargaining unit, along with their locations and shifts.

After receiving the official NLRB Notice of Hearing, the employer has two business days to post and distribute the official NLRB Notice of the Petition for Election in order to inform employees. Following receipt of the official NLRB Notice of Hearing, the employer is required to file a detailed Statement of Position regarding the union petition if the employer wants to request a hearing on any questions concerning representation.

A pre-election hearing will normally be scheduled following receipt of the official NLRB Notice of Hearing, absent special circumstances or a stipulated election agreement between the employer and the union. Depending on whether a pre-election hearing is necessary, the NLRB typically will schedule the election on the earliest date practicable following receipt of the official NLRB Notice of the Petition.

IT IS STRONGLY RECOMMENDED THAT EMPLOYERS OBTAIN EXPERIENCED LABOR COUNSEL TO ADVISE THEM IMMEDIATELY UPON RECEIVING A UNION PETITION BEFORE RESPONDING TO ANY REQUESTS FOR INFORMATION FROM THE UNION OR THE NLRB.

How Many Votes Does the Union Have To Get To Win the Election?

In order to win the election, the union must obtain the votes of a simple majority of the eligible voters who cast ballots. Either the union or the employer can exercise the right to object to the results of the election on the grounds that it was not conducted fairly or that unlawful activity by the victor occurred before or during the election.

What Are the Advantages of an NLRB Election, as Opposed to a "Card Check" Process?

An NLRB election requires a secret ballot vote among employees in an appropriate unit for bargaining. A secret ballot election has the advantage of providing employers with time to tell employees about the other side of the "union label," and it ensures that employee choices will be made in an atmosphere free of the type of coercion that typically occurs when the union attempts to get employees to sign union authorization cards. Employees frequently sign these authorization cards just to get rid of bothersome or bullying union organizers of fellow employees. Moreover, statistics show, unions that have secured a showing of interest through signed union authorization cards even from as many as 50% or more of the employees very often lose secret ballot elections when the employees have a free secret choice and the employer has taken the time to show employees the other side of the union label. Under a recent NLRB ruling, employers that wish to contest a union's claim of majority status may be required to promptly file their own election petition.

WHY NOT A UNION?

During the time of a union organizational campaign, the union may portray itself as a cure-all for the employees' needs. Employers should be aware of the basic facts about union membership that are not in the best interest of the employees. Here are a few examples:

DUES AND FINANCIAL ASSESSMENTS

The amount the employee pays monthly in union dues, either through a dues check-off or other means, can be substantial. Most union constitutions also provide for the international and/or local union to impose special financial assessments against union members.

LOSS OF INDIVIDUALITY

The most significant psychological impact on the employee is losing the freedom to think and act as an individual. Because the union contract must be written for an entire group, individual needs are often not considered.

STRIKES

The only real weapon the union has to force an employer to agree to its demands is to take the employees out on strike. Strikes are a constant threat to the rank-and-file union member and can seriously affect earnings. Even those individuals who do not want to strike may lose pay if the union calls a strike. Failure to respect union picket lines can lead to union fines. In an economic strike, the employer has the right to maintain its operations and can permanently replace striking employees.

INTERNAL UNION POLITICS

Unions, by their very nature, are political. Rivalry for union leadership positions can cause division and favoritism, and internal rivalries often lead to ineffective union leadership and dissatisfaction in the union ranks.

UNION COURTS: RULES AND REGULATIONS

Few employees realize the power and control a union can have over them. Almost all the union constitutions and bylaws provide for union trials or courts. A union member can be fined, disciplined or expelled from the union for violation of any provision or rule of the unions' constitution and bylaws. Fines levied by such union courts are enforceable in a court of law.

RESTRICTIONS ON ADVANCEMENT

Just as union contract seniority provisions affect management decisions, they sometimes adversely affect ambitious, capable and hardworking, but less senior, employees.

COMPULSORY UNION MEMBERSHIP

Except in states with right-to-work laws, the union is free to negotiate a "union shop" clause in the contract. Such a clause compels every employee to join the union no later than 30 days (seven days in the construction industry) after the beginning of the employment relationship or the effective date of the collective bargaining agreement, whichever is the latter, or lose their job. This union shop clause, along with an automatic union dues check off from the employees' paychecks, are key items unions want in every contract. To get these, the union may be willing to take a strike and sacrifice wage and benefits items of greater interest to the rank-and-file employee.

JOB INSECURITY IN THE UNIONIZED CONSTRUCTION INDUSTRY

Employees who are not union members or do not meet union journeyperson standards should be concerned with how a union hiring hall would affect them. They may find they are not referred to their former employer or are not referred for union work at all due to hiring hall discrimination or the union's qualification requirements. Finally, job security may suffer if their employer is made uncompetitive and loses work due to union wage demands, strikes or work rules, as has happened throughout the construction industry.

DO'S AND DON'TS FOR SUPERVISORS

The NLRA specifically gives employers the right of free speech on labor matters. Employers therefore do have the right to talk to their employees about unions and to express their views on why a union would not be in the employees' best interest. Whether such meetings can be mandatory is unclear due to recent actions of the NLRB restricting mandatory employee meetings. Some states have passed laws prohibiting mandatory employee meetings to discuss "political" issues, including unionization. These laws are being challenged as infringements of the First Amendment and federal labor laws. Employers can state facts and give their opinion on unions in general or in particular. Employers can also present arguments on why a union is not necessary in their firm. Employers do not have the right to threaten, intimidate or coerce employees into adopting the employer's view on unions, or to interrogate or spy on employees to find out about their union activities or how they feel about the union.

Further, employers have the right to continue running their business as normal. As a practical matter, it is advisable to consult with labor counsel before taking any action that would adversely affect a pro-union employee. This is because you may have to prove that the action was not taken because of the employee's union activities.

THE DO'S

The following are some of the key things an employer and its supervisors can and should do in communicating with employees about the union.

- Management can and should talk with employees individually or in groups at any time in any public place or open working area where you would normally talk with employees, but not in any private management office. Whether such meetings can be mandatory is unclear due to a recent decision by the NLRB.

- Management can and should tell employees about any bad experiences they or others they know have had with unions.
- Management can and should talk about what harm they believe (or can show) unions have done to the nation, their geographic region, other divisions of their own operations and other specific firms.
- Management can and should state what they believe (or can show) to be the answer to any union propaganda, argument or claim.
- Management can and should say they think employees should vote no in a union election.

The following are some of the specific things an employer might want to communicate to employees:

- If a majority of employees select the union (an outside organization), the firm will have to deal with the union on all their daily problems involving wages, hours and other conditions of employment.
- In negotiating with the union, the firm does not have to agree to any of the union's economic demands that it believes are not in the best interest of the business.
- If the union gets in, whatever benefits the employees receive will have to be negotiated with the firm. The benefits employees receive after the union gets in could be more than they now receive, but they also could be the same or less.

THE DON'TS

Employers do not have the right to threaten, intimidate or coerce employees into adopting the employer's view on unions, or to interrogate or spy on employees to find out about their union activities or how they feel about the union. Employers are typically responsible for improper actions by their supervisors.

An easy way to remember the things employers and supervisors cannot do or say during a union organizing attempt is to think of the word "TIPS," which cover most of the pitfalls they can encounter before receiving professional guidance:

- **"T" means Threaten.** Management cannot threaten individuals participating in union activities with reprisals such as reducing employee benefits, firing the employee or retaliation of any kind, and, of course, management cannot take such reprisals.
- **"I" means Interrogate.** Management cannot interrogate employees about whether they signed any union card or whether they are supporting the organizing activity, how they intend to vote or what they think about union representation.
- **"P" means Promise.** Management cannot promise wage or benefit increases, promotions or any other future benefit to employees for opposing the union, nor can it give such benefits for this reason.
- **"S" means Spy.** Management cannot spy on union activities to determine who is attending union meetings, or who is signing union cards or supporting the union. This applies to both work time and nonwork time, on and off the firm's premises.

Definitions of unlawful threats, interrogation, promises and/or spying are subjects of highly complex legal rules and decisions that are too complicated and numerous to list here. You should remember, however, that all of the circumstances surrounding a particular conversation or act are considered in determining whether it amounted to illegal threats, promises, spying or interrogation, and that implied threats or promises are just as illegal as direct ones.

Finally, employers should never discriminate against employees based on their support for a union or based on union opposition.

TEST OF “SUPERVISOR” STATUS

In order to implement TIPS, it is important for an employer at an early stage to determine who is on the management team (i.e., which management personnel are considered by the NLRB to be supervisors under the NLRA). Supervisors, as defined by the NLRB, are not eligible to vote, and can commit unfair labor practices as agents of management.

PRIMARY TESTS

Analysis of the statutory definition of supervisor reveals that Congress has set up 12 specific criteria in the nature of types of authority under the Labor Management Relations Act of 1947, also known as the Taft-Hartley Act. These test “authorities,” to be exercised upon other employees and in the interest of the employer, are the authority (1) to hire, (2) to transfer, (3) to suspend, (4) to lay off, (5) to recall, (6) to promote, (7) to discharge, (8) to assign, (9) to reward, (10) to discipline, (11) responsibly to direct by exercising independent judgment rather than routine or clerical in nature and (12) to adjust grievances.

By adding the words “or effectively to recommend such action,” Congress in effect doubled the 12 specific tests. To the authority to hire, for example, is added the further authority “effectively to recommend” hiring, and so on down the list of specific authorities listed above.

An employee must possess only one of the specific responsibilities in the statutory definition to be classified as a supervisor. However, the exercise of such authority must not merely be routine or clerical in nature, but rather require the use of independent judgment. The NLRB clarified its definitions of “assigning” and “directing” work and “independent judgment” in its Oakwood Health Care (2006) decision.

SECONDARY TESTS

In many borderline cases, the characterization of the employee as a supervisor is not immediately clear when measured against the statutory definition. In such cases, the NLRB and the courts have looked into various secondary tests of supervisory status.

Factors that have been regarded as weighing in favor of supervisory status include: (1) the employee’s designation as a “foreman” or “supervisor,” (2) the fact that he or she is regarded by himself or herself or others as a supervisor, (3) his or her exercise of privileges accorded only to supervisors, (4) attendance at instruction sessions or meetings held for supervisory personnel, (5) responsibility for a shift or phase of operations, (6) receipt of orders from management officials rather than from other supervisors, (7) authority to interpret or transmit the employer’s instructions to other employees, (8) responsibility for inspecting the work of others, (9) instruction of other employees, (10) authority to grant or deny leaves of absence to others, (11) responsibility for reporting rule infractions, (12) keeping time records on other employees, (13) receipt of weekly or monthly salary, rather than hourly production wages, (14) receipt of substantially greater pay than other employees, not based solely on skill, (15) failure to receive overtime pay, (16) lack of requirement to record time worked, (17) nonparticipation in regular production work, (18) wearing different work clothes than other employees, (19) assignment of overtime work and (20) percent of time spent in bargaining unit work. Conversely, the absence of these various tests or existence of their opposites tends to weigh in favor of nonsupervisory status.

CHECKLIST FOR RESPONDING TO UNION ORGANIZING

When contacted by a member company that thinks it has a union organizing problem, chapter staff should first tell the member to contact the chapter attorney or other labor counsel. Staff also may suggest that the following responses be considered, subject to the attorney's advice.

CONTACTS WITH THE UNION

Employers should keep the following best practices in mind if a union organizer comes to the premises or telephones to talk with the employer about unionizing workers.

- Management should not look at anything the union wants to show, especially signed union authorization cards, to the employees.
- Management should not discuss any labor contract proposals or any personnel benefits or policies of the firm with the union representative.
- Management should tell the union representative the following magic words and nothing more and ask them to leave: "I have good faith doubt that your union represents a majority of my employees in an appropriate bargaining unit. I insist on holding a properly conducted secret ballot election administered by the NLRB before recognizing your union as their bargaining representative."
- If management receives a letter from a union, do not open it if it appears thick enough to contain union authorization cards. Instead, management should call their labor lawyer immediately.
- If the letter is opened by mistake and cards are present, do not look at them. Call another member of management in as a witness, tell them what has happened and say that you have not looked at the cards, replace the cards in the envelope and seal it and call the firm's labor lawyer immediately.
- If the letter does not contain cards or other evidence that the employers' employees have designated the union as their bargaining representative, but merely contains the union's claim that the union represents them, the employer should respond in writing to the union expressing its good faith doubt in the claim after consulting with its labor lawyer on how to word the letter.
- Under a recent ruling by the NLRB, which has been challenged in the courts, if a union simply claims to represent a majority of the employers' employees, the employer may be required to petition the NLRB to conduct a secret ballot election, or else face a possible bargaining order. Employers are strongly recommended to consult with experienced labor counsel if they receive any demand for union recognition.

CONTACTS WITH EMPLOYEES

- The employer's senior management group should meet to try to find out why the union is attempting to organize employees and exactly what organizing activity they are aware of to date. Chances are some of them will know facts that the chief executive does not know.
- The employer should call a meeting of its supervisors and others who exercise front-line authority for management, usually with labor counsel present, making sure not to include any borderline nonsupervisory staff, such as lead people who might conceivably be legally entitled to inclusion in the bargaining unit with other employees eligible to vote. Brief this group on the situation and find out what they know about it. In addition to group meetings, supervisors should be talked to individually to ascertain exactly what they know of the union activity.
- The employer should clearly state to all supervisors its position with respect to the union drive. Let them know that there is no need for the employees to be represented by a labor union if the management team does its job properly, and that the employer intends to make every legitimate effort to encourage employees not to sign union cards and to vote against the union if and when an election is held.
- Both the supervisors and the members of the senior management team should be instructed as to the legal dos and don'ts discussed in this handbook. They should be told to immediately increase their

personal contacts with workers in their operations and to engage in informal conversations with them at every opportunity. Whether such meetings can be mandatory is unclear due to a recent decision by the NLRB. Once they have been properly briefed, supervisors should make a point of talking to everyone they supervise on at least a daily basis if possible. Whoever is in charge of management's union response campaign should be kept fully informed on anything that the supervisors learn about the organizing attempts or of any changes in attitudes, indications of union coercion, employee huddles, rumors, etc.

- The employer should set up a method for the senior management team and supervisors to report regularly and promptly what they find out in their conversations with employees. All leads and tips should be immediately followed up in this hotline communication network.
- After proper briefing by labor counsel, the employer should set up a series of small group meetings with employees during which a member of high-level management discusses the union organizing drive and the reasons why the employees do not need a union. Whether such meetings can be mandatory is unclear due to a recent decision by the NLRB.
- These meetings should be followed with additional discussions, letters to the employees' homes and messaging through other communication vehicles (posters, buttons, flyers, payroll stuffers, movies, displays, etc.) as deemed necessary and appropriate.
- The employer should meet regularly (at least once a week) with the entire management team during this period in order to determine how well the campaign is succeeding and the issues that need to be covered with employees during the remainder of the campaign.

CONTACTS WITH THE NLRB

It is important for employers to have in place an immediate response plan. Before the legal case is discussed with the NLRB agent and before the employer fills out any NLRB information forms, a labor lawyer should be contacted. ABC's rapid response toolkit is a helpful resource for employers to use in responding to union organizing. See abc.org/Academy/Rapid-Response-Toolkit-to-Union-Organizing.

ROLE OF CHAPTER STAFF

ABC staff should be familiar enough with the disadvantages of unionization and the NLRB election procedures, both of which are described above, to be able to answer the employer's most immediate questions. In this way, members can be prevented from making costly mistakes prior to obtaining counsel. Chapter staff should not purport to give legal advice, but should refer members to experienced labor attorneys. Each chapter should have a relationship with an experienced labor attorney to whom members can be referred on an emergency basis for immediate consultation in the event of union organizing or a petition for election.

One final word of caution to chapter staff: The law requires that detailed public financial reports must be filed if anyone other than the employer or the employer's supervisors speaks directly to employees in order to persuade them on the subject of unions. Therefore, chapter staff should limit their activities to advising employer members as to what can be said or written by the employer, and chapter staff should not communicate directly with the employer member's employees.

PART IV UNION SALTING

LEGAL STATUS OF SALTING

”Salting” is a union organizing tactic that gained attention in 1993, when the AFL-CIO’s Building and Construction Trades Department began its Construction Organizing Membership Education Training program. The COMET program trained thousands of union members to become union salts, whose declared mission was to infiltrate nonunion workplaces with the goal of increasing the costs of doing business in the merit shop.

Under this approach, unions have sent paid and unpaid agents into nonunion workplaces as job applicants, often announcing they are seeking employment in order to organize the employer’s business. If the union applicants are not hired, they immediately file unfair labor practice charges with the NLRB. If they are hired, the union agents frequently engage in disruptive tactics on the job, such as encouraging co-workers to quit, hampering productivity and filing additional charges with various government agencies. These tactics, and their costs to legitimate businesses, have been documented in congressional hearings, but have been protected by the NLRB.

In 1996, the U.S. Supreme Court held in the case *Town & Country Electric v. NLRB* that paid professional union organizers fall within the statutory definition of employees and employee applicants. This means such organizers must be treated like any other applicant (i.e., in a nondiscriminatory manner). As a result of the decision, hundreds of unfair labor practice charges were filed against employers that either refused to hire union organizers or terminated the organizers from employment. These cases led to a number of rulings that clarified to some extent the rules that employers should follow in their hiring practices.

In particular, in 2000, the NLRB issued a decision in a case called *FES, Division of Thermo Power* that spelled out the tests for determining whether an employer has discriminated against union supporters in refusing to hire or consider applicants.

To prove an unlawful refusal to hire, the NLRB’s general counsel must first show: (1) that the employer was hiring, (2) that the applicants had experience or training relevant to the positions for hire and (3) that anti-union animus contributed to the decision not to hire the applicants. Once these are established, the burden shifts to the employer to show that it would not have hired the applicants even in the absence of their union activity or affiliation.

The NLRB also may prove a refusal to consider for employment by showing: (1) that the employer excluded applicants from a hiring process and (2) that anti-union animus contributed to the decision not to consider the applicants for employment. If established, the burden will shift to the employer to show that it would not have considered the applicants even in the absence of union activity or affiliation.

While unions have the right to attempt to organize construction workers, merit shop contractors and their employees also have a right to refrain from supporting union activities and to be free of unwarranted harassment. Employers should fully comply with the NLRA, including the rules against discrimination in hiring and employment. At the same time, by improving communications with employees and understanding the legal dos and don’ts, employers can maintain their lawful nonunion status.

SAMPLE MERIT SHOP HIRING POLICIES

The adoption of legitimate employment policies can sometimes diminish the potential for unfair labor practices. The following policies represent hiring practices that contractors have adopted for legitimate and nondiscriminatory business reasons. If properly instituted and applied consistently and in a nondiscriminatory manner, similar policies may help support defenses against charges of hiring discrimination. No single set of policies is necessarily right for every company; each contractor should determine the best policies to meet the needs of its business.

1. We hire applicants solely based upon merit. We do not discriminate on the basis of union affiliation, race, sex, color, age, national origin, disability or any other protected status.
2. No employee is required to pay dues to any labor organization to join our company.
3. We accept job applications only when we know there are jobs available and when we intend to fill the position(s). When openings become available, we reserve the right to review applications already on file, prior to hiring. Applications remain open for consideration for _____ days. It is the applicant's responsibility to keep our hiring personnel informed of their availability.
4. We hire based on personal contact with individuals so we can make sound business judgments as to the most qualified applicants.
5. Any applicant who falsifies or omits information on the application material to the applicant's qualifications for the job sought is disqualified from being hired unless such falsification or omission is protected by applicable law. If the employee has been hired before the falsification or omission is discovered, they are subject to termination. (This information should be printed on your application form.)
6. We base our hiring decisions on a variety of factors, including skills and ability to perform the job, prior employment with us, employment references as to character and willingness to work, willingness to accept the offered salary and personal interviews.

Alternative option for No. 6: We make all hiring decisions based upon the following order of preference: (1) rehires in good standing; (2) referrals from current managers or employees; and (3) others whose work experience is consistent with the salary and skill level of the position(s) available, with positive employment references and personal interviews.

This outline does not constitute legal advice or opinion. Remember that the NLRB has held that implementation of facially neutral hiring policies with discriminatory intent, or inconsistent enforcement of facially neutral policies, can result in findings of unfair labor practices. Specific salting issues also may be the subject of changing policies at the NLRB.

QUESTIONS AND ANSWERS IN A SALTING CAMPAIGN

The following are some common issues for contractors that arise during a salting effort.

Can I ask an applicant about his or her union affiliation?

No. It is an unfair labor practice to refuse to hire a bona fide applicant because of union affiliation or sympathies, so there is no justifiable reason to raise the issue, according to the NLRB.

Must I hire a pro-union applicant?

No. You simply must not discriminate on the basis of union affiliation or support. For example, if you are not hiring, you need not accept any applications.

Are there legitimate practices I can use to hire productive employees?

Yes. Depending on business justifications, you can limit the consideration time period for applications. The NLRB also has upheld "no moonlighting" policies, nondiscriminatory preferences for former employees and referrals, as well as preferences for applicants whose salary expectations are in line with the amounts being offered by the employer. The keys to legal hiring practices are nondiscrimination and proper business motivation for any challenged policy.

Can I still hire the most qualified applicant?

Yes. It is helpful to have the qualifications you consider important for the job in writing and to list the essential functions of the position.

Can I disqualify an applicant who puts false information on their application?

The law on this issue is not clear, based upon recent rulings from the NLRB and the courts. The answer may depend on the particular type of information that is falsified, and whether it is material to the applicant's qualifications. Labor counsel should be consulted before taking action against an applicant in this circumstance.

Can I discharge a union organizer?

Yes, but not because they are a union organizer. Once hired, any employee is subject to discipline, including discharge, for poor performance or violating company policies. Therefore, your employment policies, including progressive discipline, should be enforced consistently.

SALTING CHECKLIST

DO NOT ask applicants about their union membership, either on a form or in an interview. If an applicant volunteers their union organizer status, tell them it does not affect your hiring decisions.

DO NOT hire nonunion applicants with little experience for skilled jobs, while telling union applicants that no jobs are available.

DO NOT establish discriminatory hiring policies designed to screen out union organizers. Legitimate, nondiscriminatory hiring policies can and should be applied consistently, as further discussed below.

DO NOT threaten, interrogate, make promises or spy on employees or applicants based on their union activity.

DO establish written guidelines for all personnel involved in the hiring process and follow them consistently. Among other policies, employers generally have the right to insist on complete applications, willingness to work at the salary offered, evidence of job-specific qualifications, employment references and personal interviews.

DO hire the most qualified applicants for open positions.

DO train all supervisors on how to handle both the legal and practical problems of dealing with union organizers.

DO establish written work rules and follow them consistently (with adequate documentation) in administering discipline.

SALTING IN APPRENTICESHIP PROGRAMS

In recent years, as salting has become more common and ABC has become more active in apprenticeship training,

some chapters have been confronted with attempts by union organizers to infiltrate nonunion apprenticeship training programs. In general, the recommended response to such apprenticeship salting is like the response to salting in employment generally: Nondiscrimination in both hiring and training and nondiscriminatory enforcement of legitimate training practices and school rules are the best courses of action.

Two types of salts may seek to enter a chapter training program: student organizers and instructor organizers. It is generally recommended that chapter apprenticeship programs follow a policy of nondiscrimination in allowing entry of apprentice applicants into training. This means that applicants must meet standard criteria (and that union journeypersons are typically disqualified by having too much experience for them to seek training as apprentices). Once enrolled, all apprentices can and should be required to adhere to nondiscriminatory school policies, including nonsolicitation policies prohibiting disruption of class time.

In the case of instructors, who may be union (or nonunion) journeypersons, chapters should treat salts as they would any other employee. This means that chapter apprenticeship officials should adhere to the same guidelines that ABC has recommended for member contractors in hiring their workers in the trades. Nondiscrimination remains the best defense against unfair labor practice charges relating to salting.

Chapters should be entitled to enforce nondiscriminatory nonsolicitation policies during class time regarding salting instructors. Any union organizing by a salted instructor should be limited to outside of class time. In addition, all instructors can and should be required to follow the prescribed training curriculum. Finally, as a representative of ABC and its training program, an instructor should refrain from making derogatory statements about the quality of ABC's training or about member employers.

In this regard, the apprentices are in effect the customers of the training program, and there is strong case law holding that instructor employees owe a duty of loyalty to their chapter not to disparage the quality of the employer's product to customers.

In summary, chapters confronted with salting in their apprenticeship programs should adhere to the following guidelines:

DO NOT ask applicants (students or instructors) about their union membership, either on a form or in an interview. If an applicant volunteers their union organizer status, tell them it does not affect your hiring or training decisions.

DO NOT hire nonunion applicants with little experience for instructor positions while telling union applicants that no jobs are available.

DO NOT establish discriminatory hiring or training policies designed to "screen out" union organizers. However, legitimate nondiscriminatory hiring policies can and should be applied consistently.

DO NOT threaten, interrogate, make promises or spy on instructors or apprentices based on their union activity.

DO establish written guidelines for all personnel involved in the hiring process and follow them consistently. Among other policies, employers generally have the right to insist on complete applications, willingness to work at the salary offered, evidence of job-specific qualifications, employment references and personal interviews.

DO hire the most qualified applicants for open instructor positions.

DO train all supervisors in the handling of both the legal and practical problems of dealing with union organizers.

DO establish written school rules and follow them consistently (with adequate documentation) in administering discipline. Prohibiting solicitation of any kind during class time and insisting on adherence to prescribed curricula should be permissible.

PART V | UNION PICKETING

LEGAL AND ILLEGAL UNION PROTESTS

It is generally legal for unions to peacefully hand out truthful fliers, also known as handbilling, on public property.

Unions also may be entitled to peacefully picket (patrolling across entrances with or without signs) in a manner that does not interfere with the rights of neutral parties (such as customers, potential customers, other contractors and members of the public).

Nonconfrontational “bannering” or “rat balloons” outside entrances also have been allowed, where no picketing of neutral parties is ongoing.

On the other hand, the following union actions, depending on the circumstances, are generally illegal:

- Trespassing on private property;
- Making or handing out knowingly false and defamatory statements;
- Blocking entrances;
- Mass demonstrations or similar disruptive conduct (such as using bullhorns in ways designed to disturb or offend neutral individuals);
- “Secondary” picketing (i.e., coercing neutral customers/contractors);
- Picketing with organizational intent for more than 30 days without filing an election petition; and
- Violence.

SECONDARY PICKETING AND RESERVED GATES

Unions have the right to picket contractors with whom they have a labor dispute. However, “secondary” picketing is picketing aimed at “neutral” employers, including customers and subcontractors, and is generally prohibited by the Labor Management Relations Act. The Supreme Court and the NLRB have established a legal doctrine designed to prevent secondary picketing against neutral contractors on a common worksite, known as the reserved gate doctrine.

Under this doctrine, the NLRB requires picket signs to state truthfully against whom any picketing is being conducted. Picketing must be done only at times that the targeted firm is engaged in work at the jobsite. Finally, the picketing must be done as closely as possible to the area in which the targeted firm is working. Under these principles, picketing at entrances reserved for neutral employers is subject to injunction.

To make appropriate use of the NLRB’s reserved gate policy, whenever picketing is anticipated, it is recommended that reserved entrances be established by the owner of the property or the person with control over the use of the property, or a neutral in the labor controversy. Reserved entrances must be clearly separated and must be the only entrances used to enter or leave the project. Block off all unmarked entrances.

The entrances must be clearly marked so that anyone approaching the project or place of business will know which entrance to use. Place entrance numbers on the back of the sign so that people leaving the area will also be able to identify the entrances.

The entrance that employees of the primary or targeted employer (including all members or management) and suppliers use to enter and leave the project or place of business should be posted with a sign that states:

> **GATE ONE**
>
> This entrance is reserved for the exclusive use of employees, business visitors and suppliers of **PICKETED EMPLOYER**.
>
> All other people must use gate two. These restrictions are strictly enforced.

The entrance that all other persons use to enter and leave the project or place of business should be posted with a sign that states:

> **GATE TWO**
>
> This entrance is reserved for the exclusive use of employees, business visitors and suppliers of
>
> **NEUTRAL EMPLOYER 1**
>
> **NEUTRAL EMPLOYER 2**
>
> **NEUTRAL EMPLOYER 3**
>
> All employees, business visitors and suppliers of **PICKETED EMPLOYER** must utilize gate one.
>
> These restrictions are strictly enforced.

Alternatively, the gate two sign can be worded in the negative, to avoid identifying the neutral contractors, as follows:

> **GATE TWO**
>
> This entrance may not be used by **PICKETED PRIMARY EMPLOYER** and its employees.
>
> This entrance is reserved for the exclusive use of employees and suppliers of neutral employers.

The signs should be on 3-foot by 4-foot exterior plywood (or similar material) with a white background and black lettering of one inch. There is no limit to the number of entrances you may establish, provided each is properly marked. It is critically important that these entrances not be misused once they are established.

The entrances must be observed by members of management as well as all other employees.

The final step in making the reserved entrances effective is to contact the union, describe the reserved entrance system to them and assure the union that your employees and suppliers will only use gate One (or whichever entrance or entrances that you are entitled to use). This contact should be in writing with a return receipt requested so it will be easier to prove should litigation be necessary. If the union fails to adhere to the reserved gate system, an unfair labor practice charge should be filed with the NLRB, together with a request for an injunction.

BANNERING AND OTHER FORMS OF UNION PROTESTS

Different rules may apply when a union engages in noncoercive bannering or handbilling, as opposed to picketing. In *DeBartolo v. Building Trades* (1988), the Supreme Court held that unions have greater rights to inform the public of their views about an employer when no coercive picketing is involved. However, false statements or flyers by union agents may be actionable in court under state defamation laws if the statements are made with knowledge of falsity, are defamatory in nature and result in special damage to the employer.

In the 2010 case *Eliason & Knuth* and subsequent decisions, the NLRB extended the Supreme Court's *DeBartolo* holding to protect the right of unions to post stationary, nonconfrontational banners outside jobsites and even in front of neutral customer offices. A federal appeals court, however, held in *Fidelity Interior Construction v. Carpenters* (11th Cir. 2012) that coercive union tactics against neutrals that included both bannering, picketing and other forms of disruption justified a substantial jury verdict against the union under federal secondary boycott laws.

The Supreme Court also has held in the case *Lechmere v. NLRB* (1992) that union banners, handbills and pickets can be kept off private property, so long as such exclusion is enforced in a nondiscriminatory manner, and so long as unions have other means to communicate their message. Proper posting and enforcement of no trespassing policies are important to preserving fundamental property rights on construction sites. Employers should obtain legal counsel wherever a question arises about union claims of access to private property.

Other cases have addressed whether union noisemakers (amplifiers, etc.) are lawful under both the NLRA and local ordinances. The NLRB has upheld the right of unions to set up "rat balloons" outside construction workplaces. Legal counsel should be consulted regarding the legality of particular union tactics under the latest case law.

Even where a union is engaged in picketing or similar activity at an appropriate entrance, there are other legal ground rules that may come into play. First, the NLRB has held under Section 8(b) (7) of the NLRA that unions cannot engage in "organizational" picketing for more than 30 days without filing an election petition. To evade this rule, unions frequently direct their picketing toward an employer's alleged failure to pay "area standards" wages. Where it can be shown that such "informational" picketing is really intended to organize the employer's workers, an injunction can be requested from the NLRB.

VIOLENCE AND MASS PICKETING

Sometimes unions will resort to violence or mass picketing in order to keep merit shop contractors from working. When such acts occur, the contractor should be advised to seek emergency relief in a state court. All state courts have the power to issue injunctions to maintain public order and safety.

Some state courts are more helpful than others and some states have passed laws restricting the use of injunctions in labor disputes. It may be necessary to show that the police are incapable or unwilling to restore order, that mediation has been attempted or that other requirements have been met. The chapter attorney should be familiar with the procedures for obtaining state or (sometimes) federal relief.

It is also important that merit shop contractors assist the construction user in obtaining necessary police support and state, or federal court injunctive relief, by doing the following:

- Notify responsible local police officials that picketing is or soon will be expected. Request police protection.
- Maintain a detailed log of all events on the picket line, including eyewitness accounts, photographs and/or videotapes.
- Contact the international union, where appropriate, to inform them that they will be held responsible for any violence or damage committed by local representatives.
- Consult labor counsel as to the appropriate time for filing a court action seeking injunctive relief against union violence. Do not merely rely on the construction user to deal with the courts.
- Consult labor counsel as to whether civil damages can be sought under recent court decisions applying the Racketeering Influenced Corrupt Organizations Act to union violence and extortion.

PICKET LINE CHECKLIST

The following steps should be considered by any contractor confronted by picketing or handbilling. Jobsite managers should be made aware of these points in advance of any protests so they will know how to respond.

Enforce No Trespassing Policies (Know Your Property Rights)

Under settled law, outside union agents have no right to solicit employees or residents on private property, so long as management has not permitted other solicitors to engage in such on-site activities. Union contracts such as project labor agreements may give unions rights of access, however. Nondiscriminatory enforcement is key. Any union agents who enter a property unlawfully should be asked to leave. If they refuse, the police should be called. Management should not attempt to physically restrain anyone. Standard security procedures should be followed.

Be sure to learn the limits and extent of the property lines of any jobsite's private property, and know who is responsible (owner, general contractor or subcontractor) for enforcing property rights. Be familiar with any conflicting contractual requirements. Have police phone numbers available and make contact with local law enforcement in advance if possible to familiarize them with the situation and ensure a quick response. But first, check with legal counsel.

Maintain Incident Reports/Logs

When union activities occur, make notes of what happens: the number of union agents, what they did, what their signs or fliers said, where they were located, when the activity occurred, their impact on residents or neutrals entering facilities, potential witnesses and any arrests.

Notify Corporate Management Immediately of Any Union Activity

Except in emergency or self-defense situations, contact senior management as soon as possible when union activity begins. This is important not only to help each manager determine the best immediate response to union activity, but also so that senior management can build a case for a possible legal challenge to potentially unlawful union activity.

Be Careful With Cameras

Film potentially unlawful or disruptive union conduct. However, do not film the peaceful distribution of handbills or nondisruptive picketing off private property. (Labor law prohibits surveillance of lawful union organizing activity.) Do film any acts of trespass on private property, any mass demonstrations and any picketing that results in coercion or intimidation of residents or potential customers. For your own safety, do not get close to the picket line (or in it) with the camera. Film in an unobtrusive manner.

Notify the Police and Consider Increased Security

Depending on the scope of union activity at a particular facility and the police response, additional security arrangements should be considered for the protection of residents and property against vandalism and/or intimidation.

Consider Special Entrances for Construction Contractor Employees

Where unions engage in picketing (patrolling entrances, usually carrying signs), labor laws require the pickets to be limited to locations where the primary employer is located or enters a facility. If multiple employers are present, the law permits separate entrances to be established so that pickets can be limited to the entrance being used by the primary employer with whom the dispute exists. Depending on the facility being picketed, separate entrances should be considered, in consultation with legal counsel, as a means of limiting the location of the pickets and keeping them away from neutral residents or employers.

Do Not Threaten or Harass Picketers

Except where they engage in trespass, there is normally no reason to engage in dialogue with picketers or handbillers. Do not engage in shouting matches. Trespassers should be told firmly to leave the property; if they refuse, the police should be called. It also may be advisable to obtain some form of identification from anyone who appears to be in charge of picketers or demonstrators. Otherwise, there is normally no need to communicate with union agents.

PART VI | OTHER UNION PRESSURE TACTICS

DEALING WITH UNION CORPORATE CAMPAIGNS

Recently, in the face of merit shop inroads in many formerly union-dominated sectors of the construction industry, union leaders have begun to fight back with new, sophisticated and, in some instances, illegal pressure tactics designed to coerce owners and construction managers into restricting free competition in construction. Unions have recently sponsored consumer boycotts, mass demonstrations, "greenmail" legal challenges, press attacks, coercive use of pension fund investments and legislative lobbying to achieve their objectives.

The single goal: intimidating public and private construction owners and managers into refusing to deal with merit shop and nonunion contractors, notwithstanding the numerous cost advantages resulting from free market bidding on construction jobs. Most of the unions' efforts have been directed toward pressuring construction users into signing so-called government-mandated project labor agreements, the preferred means by which unions seek to exclude merit shop contractors from construction jobs.

Responses to corporate campaigns vary depending on the union tactics involved. The most successful responses, however, fall into two categories: public relations and litigation.

PUBLIC RELATIONS

Many contractors have successfully responded to union attacks by engaging in more vigorous efforts to positively sell themselves, emphasizing high quality, safety and cost efficiency. ABC chapters can provide considerable assistance to members in this regard, via safety and community service awards (where merited) and via communications to construction users and members of the public.

Some contractors have adopted "counter-campaigns" against unions sponsoring false attacks on them, highlighting negative features underlying the union effort and raising issues of self-interest or falsehoods in the union materials.

LITIGATION

Usually as a last resort, litigation can be an indispensable tool for combating unfair and unlawful union corporate campaigns. The most common litigation responses include:

- Unfair labor practice charges at the NLRB (challenging unlawful secondary boycotts and unlawful interference with employees and customers).
- State court litigation (defamation, interference with contract and mass picketing injunctions).
- Federal court litigation (secondary boycott, antitrust, RICO and other damage actions). The case of *Fidelity Interior Construction v. Carpenters* (11th Cir. 2012) is a good example of how a lawsuit achieved a significant jury verdict and brought an end to a union corporate campaign.

CHECKLIST FOR RESPONDING TO CORPORATE CAMPAIGNS

An assault by a union-sponsored organization on a member's reputation can be a crisis. How management prepares for and responds to that crisis can determine whether the corporate campaign adversely impacts the firm's profits, employees and reputation. Management should:

- Develop a crisis response team. Put together a team that will be responsible for strategy and tactics as you respond to campaigns against the firm. This team should include the president/CEO, key leaders on staff or on the board of directors, and any communications professionals and legal counsel in the firm.
- Designate one spokesperson. In addition to designating one spokesperson (usually the CEO/president), identify a backup for times when this person is unavailable.
- Consider professional spokesperson training. Groups like ABC can help members find professional public relations/media relations training. Some of the tips in this guide are also helpful in preparing someone to be the "voice" of the firm to various publics, including the news media. Local public relations professionals can provide one-on-one spokesperson training as well.
- Devise a plan for communicating with the firm's employees. Employees will likely find out about the campaign against the firm. In fact, in some cases the union sponsors of such campaigns also run corollary campaigns to recruit away workers. Create a plan for how to communicate with the firm's employees on such matters.
- Gather positive information on the firm. Collect and catalog information highlighting positive aspects of the firm, including safety statistics, information on the company safety program and any news coverage or other information on company-led community service activities.
- Develop a company brochure or guidebook. Management is its own strongest advocate. Many of America's most successful construction companies have a brochure or guidebook that describes the company's identity, successes and mission. This can be a vital tool to include in client packets. If done well, it can diffuse the distorted presentation that unions or "social justice" groups provide to clients.
- Do an internal investigation of the firm. Where are its weak spots? Catalog and list all past OSHA violations, legal cases and any other issues with regulatory agencies, personnel and the like. Prepare a defense that explains the what and the why of each situation. Explain what the firm has done to alleviate any problems. This will provide the spokesperson with critical talking points to respond to highly specific questions that may arise from customers or the public as a result of the campaign against the firm. Go online and examine the company's public record of complying with all applicable laws. The DOL maintains a public database on all employers who have been the subject of OSHA investigations and similar matters at osha.gov.
- Become media relations savvy. Effective media relations is an ongoing process. It includes ABC National working with journalists at Engineering News-Record, The Wall Street Journal, national broadcast outlets and state and local media. It also entails each ABC chapter working with journalists for major state and local media outlets, as well as each ABC member working with local and construction trade media to let the public know about the benefits of the merit shop construction workplace. Journalists work on tight deadlines. They have to report on major stories in short segments on radio or television and in limited column space in the newspaper. If a corporate campaign against a member company becomes high profile, it must let the media know that it has something to say. Someone must be assigned to manage this area, just as one would be assigned to handle matters of safety, manpower and training, education, labor and so forth. A series of "no comment" responses to the media in response to questions about charges against your company will often build suspicion and negative publicity against the firm. Email rapidresponse@abc.org for media relations assistance and guidance from ABC National.

CORPORATE CAMPAIGNS AND THE LAW

False statements about commercial products or services have been held to violate several different state laws across the country. Legal actions for such misstatements are usually brought as claims for defamation or "trade libel," injurious falsehood, interference with contract or prospective contract relations or "false light."

Most of these claims, depending on each state's laws, require a showing that the defendant's statements have been false, and that the plaintiffs have been specially "damaged." Some states have enacted consumer protection or unfair business practice laws that are actionable even without a showing of outright falsity, where the statements are deceptive or misleading. A minority of states also recognize an action based upon statements that put someone in a false light (i.e., the statements are true but distorted or out of context).

If a union-sponsored group can be shown to have made knowingly false and defamatory statements resulting in the loss of a contract(s), an action for defamation should be available in state court. In addition, some states have enacted a Deceptive Trade Practices Act, which creates liability against anyone who "disparages the goods, services, or business of another by false representation of fact." This law further states that the defendant need not be a competitor to create potential liability.

Federal law also protects businesses from being disparaged by competitors under the Lanham Act (15 U.S.C. § 1125). Finally, 18 U.S.C. § 1341 makes it a federal crime to make false representations in support of a scheme through the U.S. mail. While there may be a question as to whether a corporate campaign group is acting for a commercial or competitive purpose under the Lanham Act, it may be possible to demonstrate a fraudulent scheme for purposes of 18 U.S.C. § 1341. Finally, the Federal Trade Commission Act (15 U.S.C. § 45) prohibits "unfair or deceptive acts or practices in or affecting commerce," and empowers the Federal Trade Commission to investigate alleged offenders.

JOB-TARGETING PROGRAMS

Another questionable tactic of unions and some unionized contractors around the country has been to establish so-called job-targeting programs, whereby payroll deductions are used to subsidize higher union wages and underbid merit shop contractors.

The DOL has held that it is unlawful for unionized contractors to accept rebates of wages paid on public projects covered by the federal Davis-Bacon Act in the form of job-targeting subsidies. This ruling has been upheld by two federal courts in *Building Trades v. Reich* (D.C. Cir. 1994) and *IBEW v. Brock* (9th Cir. 1994). In another case, *Kingston Electric* (2002), the NLRB held that it is an unfair labor practice for unions to collect job-targeting dues assessments from members in violation of the Davis-Bacon Act. Unfortunately, the NLRB has otherwise deemed job-targeting programs to be protected by federal labor law, even if they conflict with state prevailing wage laws. Nevertheless, in *American Steel Erectors v. Ironworkers* (1st Cir. 2011), a U.S. Court of Appeals upheld a "secondary boycott" claim against a union that combined job-targeting subsidies with other forms of intimidation of neutral companies to shut merit shop contractors out of the construction market. Contractors and chapters that learn of improper collection of job-targeting funds by unions should consider filing appropriate charges with either the NLRB or the DOL.

Ultimately, defeating or surviving job-targeting efforts has proved to be a matter of educating construction users about the inherent unfairness of such programs and demonstrating their adverse impacts on competition, while working harder to overcome unfair advantages conferred by job-targeting subsidies. It also has proven to be difficult for unions and multiemployer union organizations to maintain the necessary coordination and consistency to obtain full control over construction markets. Nevertheless, in some parts of the country, job-targeting programs have adversely impacted competition to the detriment of construction users, merit shop contractors and employees.

SUING UNIONS: THE RISKS AND REWARDS

Employers that have tried to challenge unlawful union actions in the courts once confronted a major roadblock in the form of the NLRB. Under a misinterpretation of a Supreme Court case known as *Bill Johnson's Restaurants v. NLRB* (1983), the NLRB found a variety of good-faith, but unsuccessful, employer suits against unions to violate the law, merely by being litigated. This policy had a distinctly chilling effect on employers that were considering filing suit against union misconduct, as few legal actions are guaranteed of success in the courts.

The Supreme Court addressed this issue in *BE&K Construction v. NLRB* (2002). The court declared invalid the former NLRB standard that had chilled employers' rights to challenge union activities in courts. Since the *BE&K* decision, the standard for what will be a "legal" lawsuit against unions remains unclear, and the NLRB has in recent

decisions attempted to narrow the protections of the *BE&K* ruling. Employers should take care that any litigation filed against a union or its supporters is well supported by facts and law, based on the opinion of experienced labor attorneys. Nevertheless, employers should no longer be punished under the NLRA merely because a lawsuit they have filed in good faith against a union is not successful.

PART VII | GOVERNMENT-MANDATED PROJECT LABOR AGREEMENTS

WHAT IS A GOVERNMENT-MANDATED PLA?

Although a PLA is a contract with varying terms and conditions, most contain provisions that ensure construction contracts are awarded only to companies that agree to recognize unions as the exclusive representatives of their employees on that job; use the union hiring hall and union apprenticeship programs to obtain workers at the expense of their existing qualified, skilled and safe employees; abandon the innovative workforce development and apprenticeship programs they use to differentiate their workforce and drive productivity; pay into union benefit and multiemployer pension plans that the company's employees will never benefit from unless they join a union and meet lengthy vesting requirements; and force their existing employees to pay union dues and/or join a union as a condition of employment.

In the *Boston Harbor* case (1993), the Supreme Court held that government-mandated PLAs were not preempted by federal labor law, so long as the government involved was acting as a "market participant" and not a regulator. However, the court did not rule on other legal theories challenging governmental PLAs, such as state and local competitive bidding laws. Since *Boston Harbor*, a number of state legal challenges have been filed against government-mandated PLAs. The results have been mixed. The majority view of the state courts seems to be that government-mandated union agreements are permitted under state and federal laws, provided that they are not "regulatory" in nature, that they are supported by studies demonstrating legitimate need for the type of construction at issue and are tailored to meet legitimate procurement objectives.

In 2001, President George W. Bush issued federal Executive Orders 13202 and 13208 prohibiting government-mandated PLAs on federal and federally assisted construction projects. This order was upheld by the courts in the case of *BCTD v. Allbaugh* (2002).

In 2009, President Barack Obama rescinded the Bush executive orders and signed Executive Order 13502, which encouraged federal agencies, on a case-by-case basis, to require PLAs on federal construction projects exceeding $25 million in total value and allowed state and local governments procuring construction contracts with federal assistance to mandate PLAs. From FY 2009 to FY 2023, there were 3,222 prime federal NAIC 23-classified construction contracts exceeding $25 million worth a total of $238.45 billion performed in the United States. ABC's efforts ensured that just 12 of these contracts (less than 1%) worth $1.26 billion (0.4% of total value) were built with PLA mandates, and ABC member prime federal contractors won more than 50% of the total contracts awarded during this time period.

In response, President Joe Biden issued Executive Order 14063, superseding the Obama executive order and mandating PLAs on all federal construction contracts of $35 million or more. This order went into effect on Jan. 22, 2024, following the issuance of the Federal Acquisition Regulatory Council's final rule, Use of Project Labor Agreements for Federal Construction Projects. In addition, the Biden administration has pushed PLAs on federally assisted infrastructure, clean energy and manufacturing projects procured by private developers and state and local governments via more than $271 billion worth of federal agency grants programs identified at abc.org/plagrants.

ABC has vigorously opposed the Biden-Harris administration's PLA policies through extensive regulatory comments, congressional hearing testimony, media outreach, grassroots campaigns and ongoing litigation in federal court seeking to block and overturn the FAR Council's final rule.

ABC resources on the final rule are available at abc.org/pla. ABC also crafted an FAQs document answering common contractor questions on how this regulation will be implemented, available at abc.org/bidenplafaqs. In addition, an ABC-led federal coalition website, BuildAmericaLocal.com, and ABC's TheTruthAboutPLAs.com blog has excellent resources for anti-PLA campaigns.

A total of 25 states have passed laws restricting government-mandated PLAs on state, state-assisted and local public works construction projects to varying degrees, while 10 states have passed policies encouraging the use of PLAs on state-procured and financed construction projects.

While all union challenges to state laws ensuring fair and open competition have failed, legal battles over government-mandated PLAs are ongoing at both the federal and state levels.

Also, the Supreme Court held in the *Janus* case that it is a violation of the First Amendment for governments to compel employees to pay dues or fees to a union. Litigation is ongoing to determine whether the court's holding prohibits government-mandated PLAs that force construction workers to join or pay dues to a union as a condition of performing work.

7 STEPS TO COMBATING GOVERNMENT-MANDATED PLAS: A GUIDE FOR ABC CHAPTERS

As government-mandated PLAs have appeared throughout the country, no single strategy or device has emerged that guarantees the preservation of open competition. At the same time, chapters that have implemented to the following strategies have had the greatest success in blocking government-mandated PLAs and preferences, particularly on public projects.

Prepare in Advance. The chapter should establish a committee or task force of staff and members who will be available on short notice to meet with public officials, testify at hearings, etc., and who are familiar with the issues surrounding government-mandated PLAs. Advance preparation also should include meetings and contacts with local procurement officials and politicians and candidates running for office before any talk of government-mandated PLAs occurs.

Coordinate With ABC National. ABC National staff has collected information from around the country—including sample letters, editorials, studies, ad campaigns, talking points, brochures, videos and legal pleadings—connected with every aspect of government-mandated PLAs. Through the Construction Legal Rights Foundation, assistance funds are also available to chapters confronted with this problem. Countless hours and chapter funds can be saved by contacting ABC National at the earliest possible stage and taking advantage of the accumulated experiences of other chapters and national staff.

Get the Facts. When the PLA issue surfaces, there is a great need for research into recent and local PLA cost overruns, delays, safety, labor availability, local and minority hiring and related factors. Independent local studies may be necessary to supplement materials that have been collected by ABC National. Paid economists or academics may be needed to refute pro-union studies. The research process is time-consuming and expensive and should begin early.

Mobilize Grassroots Membership Support. Public officials and/or private developers must hear from someone other than paid staff. Government-mandated PLAs cannot be stopped without genuine outrage vocally expressed by taxpaying contractors and, if possible, their employees. Members must send as many letters, emails and phone calls as possible. Personal attendance at meetings and public appearances, and even public demonstrations, also have proven effective.

Build Coalitions and Involve the Public at Large. It is important to reach out beyond ABC's membership, and beyond the construction industry, to show government officials that government-mandated PLAs are unpopular with taxpayers in general. Coalitions with other like-minded groups are strongly recommended. Again, advance contacts are helpful.

Use Paid and Earned Media Strategies To Reach the Public. Surveys have shown that the public at large typically opposes government-mandated PLAs once they are educated about the issue. Without the use of paid media or a focused public relations campaign generating earned media; however, the issue often does not reach the public. Digital, print, radio, TV and billboard ads have all been used successfully in a number of campaigns against government-mandated PLAs. The use of paid PR consultants also should be considered to help determine the most effective local message and strategy to receive earned media and coverage. Keep in mind that polling, messaging and many ads for all media have already been developed by other chapters and collected for your use by ABC National. Financial assistance can be obtained by contacting the CLRF.

Prepare for Legal Action. There have been many court cases on the government-mandated PLA issue around the country. Some have been successful; some have not. Going to court should be a last resort, as the process is expensive and favorable decisions are hard to achieve. However, the credible threat of legal action still resonates with many public officials, and sometimes litigation is the only way to force politicians to listen. Legal counsel who are familiar with the issue should be selected, and they should be encouraged to make use of the substantial resources collected by ABC National to conserve costs. Financial assistance may also be available from the CLRF. It is important to request assistance at an early stage.

Post-PLA, Monitor Poorly Performing Projects and Prepare for the Next Fight. Even if all the above efforts are unsuccessful and a particular project is performed on a government-mandated PLA basis, the chapter's efforts should not end. Several chapters have turned failure into success by closely monitoring government-mandated PLAs and publicizing their cost overruns, safety problems, delays and other defects. Politicians who feel the pressure from the first PLA are sometimes more reluctant to do the unions' bidding the next time around, or their support of a PLA mandate becomes a hot button issue in their next election. It is also important to send any material on "bad" government-mandated PLAs to ABC National for use in the next battle.

UNION ARGUMENTS AND COUNTERARGUMENTS REGARDING PLAs

A "tradition" of union-only in some geographic areas and on big projects justifies continued reliance on unions.

"Tradition" has been overstated; in any event, today's private construction workforce is 89.3% nonunion; many large projects have been built nonunion or mixed (merit shop and union). Even union contractors and groups representing union firms (Associated General Contractors) oppose government-mandated PLAs; it's not just a union vs. nonunion issue.

PLAs are used in the private sector.

Private owners are not bound by competitive bidding laws; they are spending their own money, not the taxpayers; and most private owners think government-mandated PLAs are a bad idea.

PLA mandates save money.

There is no evidence demonstrating that PLAs save money on taxpayer-funded projects. PLA proponents often present weak arguments that PLAs save money compared to union-only projects without PLAs, but there are no union-only markets in the United States anymore. In contrast, numerous studies show government-mandated PLAs can needlessly increase costs between 12% and 20%. Discouraging nonunion contractors from bidding is inherently likely to reduce the number of bids, increase the prices of bids that are received and reduce the pool of nonunion craft professionals able to build the project.

PLA mandates ensure construction workers are paid a fair wage.

Where PLA mandates are considered by governments, the projects are likely already subject to the federal Davis-Bacon Act regulations or similar state and/or local prevailing wage laws. Such prevailing wage laws require contractors to pay wage and fringe benefits rates typically set by union collective bargaining agreements. In addition, in many instances, the free-market rate is much higher than the government-determined prevailing wage rate, undermining arguments that a PLA is needed to ensure fair wages.

Courts have upheld PLAs.

Some have, some haven't. At the highest state court level, the majority view is to limit government-mandated PLA requirements. Even those courts that have upheld PLAs require state and local governments to demonstrate compliance with the state's competitive bidding laws on a case-by-case basis, setting aside PLAs that needlessly burden competition. See *New York State AGC v. New York State Thruway* (NY 1996); *Callahan v. Malden* (Mass. 1999).

PLAs are not anti-competitive: "Anyone can bid" and "many" nonunion companies have bid on PLA projects.

While all contractors are technically able to bid on a PLA project, they must agree to the union's terms and conditions identified in the PLA. Once contractors understand these terms, most nonunion firms cannot deliver the project on a more efficient nonunion basis because the PLA forces them to get most or all their craft labor from union hiring halls, follow inefficient union work rules and pay into union benefits programs and existing plans. Pro-PLA advocate claims that many nonunion contractors have bid on PLAs have turned out to be untrue or distorted; in any event, it is clear that the number of nonunion bidders is reduced when PLA policies are in place.

Union workers are safer.

Evidence is to the contrary, according to OSHA data, and there have been numerous accidents, injuries and fatalities on PLA projects.

PLAs prevent labor strife, jurisdictional disputes and delays.

The threat of labor strife is extortionary, and very little labor strife has caused real delays in most parts of the country. There are many legal devices available to control labor-based delay, including reserved gates, injunctions, police and performance clauses. Finally, litigation is more likely to cause delays.

PLAs ensure higher-quality workers and guarantee labor supply.

Union workers are not necessarily of higher quality; local union contractors often face labor shortages and forcing reliance on out-of-state contractors. Discouraging contractors that employ almost 90% of the private U.S. construction workforce from bidding on contracts will exacerbate or create a workforce shortage.

Non-bidders are making mere "philosophical" choices and are not really harmed.

Nonunion companies are discouraged from bidding on PLA projects, not for mere philosophical reasons, but because signing a union agreement interferes with the very attributes that have made them more efficient as contractors, requires them to duplicate their fringe benefits costs and discriminates against their employees and apprentices who have chosen not to work under union agreements.

PLAs are not discriminatory and do not violate right-to-work laws.

The issue is not whether they legally require union membership, but whether employees should have to give up their right to refrain from union representation and/or pay fees to unions in order to work on public projects; most minority and women contractors have come out against government-mandated requirements.

PART VIII | STARTING AND MAINTAINING A DUAL SHOP

SINGLE EMPLOYER VS. DUAL SHOP: WHAT IT MEANS

A dual shop or double-breasted operation in the construction industry refers to the creation of two distinct companies, one of which is party to a collective bargaining agreement and one that is not. When properly established and maintained, dual shops may work on a wider variety of projects. Because a broader market is available, the business may be more competitive.

However, unions are obviously less enthusiastic than employers about these arrangements and have attacked dual shop operations from several legal angles. The NLRA, the ERISA and antitrust laws all have been used to limit the conditions under which dual shops may operate. Therefore, employers that seek to operate dual shops must follow stringent legal guidelines imposed by the NLRB and the courts to successfully establish and operate in both the union and merit shop sectors of the market.

Of major concern to contractors is the immediate financial risk of setting up a dual shop. If a dual shop is not properly established, the secondary firm could be held jointly liable retroactively for underpaid wages and delinquent payments to various labor union pension, health and welfare and benefit funds under the parent company's collective bargaining agreement. The secondary firm also could face an NLRB order merging the employees of the secondary firm into the original company's labor contract, with all its costly and restrictive work provisions. Thus, an employer operating or planning to operate as a dual shop must take steps to ensure its two businesses are not viewed as a single firm.

The NLRB and the courts use several theories to extend the provisions of a collective bargaining agreement between a union and a contractor to a business that is related to the union contractor. The most common theory is the single-employer principle, under which two apparently separate companies are considered to be one for labor relations purposes, despite the maintenance of two or more distinct operations. The second theory, which is sometimes discussed interchangeably with the single-employer principle, is the alter ego principle. Under this theory, the use of separate business entities may be considered to be a sham established to circumvent or evade collective bargaining agreements with the union. Consequently, workers in both companies are viewed as employees of the unionized operation, and the labor agreements of that company are applied to everyone.

The principal factors the NLRB weighs in deciding whether sufficient integration exists include the extent of:

- Interrelation of operations;
- Centralized control of labor relations;
- Common management; and
- Common ownership of financial control.

No single factor has been held to be controlling, but the NLRB opinions have stressed the first three factors. The board has declined in several cases to find integration merely upon the basis of common ownership or financial control.

The board has repeatedly applied these four criteria in dual shop situations to determine whether a second, newly created nonunion company is subject to the collective bargaining agreement between the parent company and the union and must recognize that union as a bargaining representative for its employees.

Within this context, the union often claims the new nonunion company is not really a separate employer. The new company must recognize the union and apply the terms and conditions of the collective bargaining agreement between the union and the parent company.

CHECKLIST FOR SEPARATE DUAL SHOP STATUS

Employers seeking advice on how to start or maintain a dual shop should be advised to seek legal counsel. Employers can be told, however, to consider whether they are prepared to set up their companies along the following lines. No single one of these factors is critical to establishing a legal dual shop, but each item that is overlooked by the employer increases the risk that both companies will be found to constitute a single employer.

- Act on lawful motivation.
- Review the geographical jurisdiction of current collective bargaining agreements (if any).
- Consider purchasing an active, ongoing business.
- Determine whether applicable union contracts contain restrictive “anti-dual shop” clauses.
- Ascertain whether at the time the union was originally recognized, or at any time thereafter, it ever represented a majority of the contractor’s employees in the bargaining unit.
- Vest overall policy as well as day-to-day control of labor relations in the secondary firm’s management.
- Delegate absolute control over day-to-day operations to a general manager or superintendent who has no connection with the original business.
- Avoid interchange of rank-and-file employees.
- Engage in a different type of construction.
- Avoid interlocking officer and boards; use strict accounting for salaries of officials who serve both companies.
- Avoid interchange of supervision.
- Use separate office facilities.
- Use separate office clerical personnel.
- Share tools and equipment, if any, on an arms-length, businesslike basis.
- Use separate payrolls.
- Do not refer customers from one business to the other.
- Submit separate job bids.
- Use competitive bidding to award subcontracting work.
- Establish an independent line of credit for the new company; avoid interchange guarantees of performance bonds.
- Use separate bank accounts.
- Avoid insuring the two companies under a single policy.
- Use different time clocks.
- Advertise separately.
- Differentiate vacation policy.
- Use different telephone lines.

“JOINT-EMPLOYER” STATUS IN THE CONSTRUCTION INDUSTRY

A related concept affecting independent business-to-business relationships in the construction industry (and many others) is known as joint-employer status. This refers to businesses who may be entirely separate from each other (unlike dual shops discussed above) but who work together on one or more construction projects. Depending on how much control one company exercises over the other’s employees, claims may arise that both companies are legally responsible for labor liabilities. Common examples where this issue can arise include general contractor-subcontractor projects and the use of staffing companies to provide additional workers to contractors on specific projects.

As of this writing, both the NLRB and the DOL have enacted joint-employer rules that should be consulted. In addition, an increasing number of states have adopted “wage theft” laws targeting the construction industry, which hold general contractors responsible for misclassifications and nonpayment of wages by lower-tier subcontractors and staffing agencies. Employers should seek experienced legal counsel to review subcontracting or staffing agreements and otherwise take precautions to avoid joint-employment claims, where possible, or else accept responsibility for the joint-employment liability that can result.

PART IX DAVIS-BACON AND OTHER WAGE AND HOUR LAWS

COMPLYING WITH THE DAVIS-BACON ACT

On Aug. 8, 2023, the DOL released a final rule, updating the Davis-Bacon and Related Act Regulations, and made drastic ABC-opposed revisions to the rules governing federal and federally assisted construction projects funded by taxpayers. ABC and its Southeast Texas chapter filed a complaint in the U.S. District Court for the Eastern District of Texas, challenging the DOL's final rule. A ruling is expected in 2025.

Meanwhile, AGC filed a separate suit challenging only part of the revised rule, resulting in a nationwide preliminary injunction blocking enforcement of three provisions relating to materials suppliers, delivery truck drivers and subcontracts that fail to include Davis-Bacon specifications. An appeal from that ruling is pending.

Until the outcome of these lawsuits is known, the following summary is intended to advise readers of the Davis-Bacon regulations as currently being enforced by the DOL in 2024-2025.

COVERAGE OF THE ACT

What does the Davis-Bacon Act require?

The Davis-Bacon Act requires covered contractors and subcontractors to pay laborers and mechanics employed on government-funded contracts at wage rates determined by the DOL secretary to be "prevailing" for employees engaged on similar projects in the locality. The statute can be found at 40 U.S.C. §3141, et seq. DOL has published regulations governing enforcement of the law at 29 C.F.R. Part 5. The department's interpretation of the act is also contained in its Field Operations Handbook, which can be found at dol.gov. The DOL substantially revised its Davis-Bacon regulations in 2023 and updated guidance in the online Prevailing Wage Resource Book in 2024. Litigation filed by ABC over the recent changes remains pending. See also ABC's online resources at abc.org/davisbacon.

Which contractors does the Davis-Bacon Act apply to?

The act applies to contractors and subcontractors performing contracts in excess of $2,000 for the construction, alteration and/or repair of public buildings or public works, including painting and decorating, where the United States or the District of Columbia is a direct party to the contract. The act's requirements also have been written into many federal laws that come into play in the construction of hospitals, housing complexes, sewage treatment plants, highways and airports (the Davis-Bacon Related Acts). Contracts for lease agreements with the government may also be covered where the costs of construction under the lease are a significant aspect of the lease. See *Building and Constr. Trades Dept., AFL-CIO v. Turnage* (D.C. Cir. 1988). Agency contract bid specifications are required to put contractors on notice that they are subject to the act, though this does not always occur. In 2022, Congress for the first time imposed prevailing wage (and apprenticeship) requirements on private projects regardless of government funding, as a condition of receiving tax credits under the Inflation Reduction Act. For further information, see abc.org/ira.

Which employees are covered?

The act applies to all "laborers and mechanics" performing construction or repairs at the site of the work. Only these employees must be paid at the prevailing wage rate. The act does not cover supervisors or managers, and typically does not apply to professional and clerical personnel. There are special rules, discussed below, concerning helpers and apprentices.

Where does the act apply vis-a-vis the "site of the work?"

A court of appeals has held that neither delivery drivers nor batch plant operators are covered by the act if they perform all but an incidental portion of their work off the site of actual construction. See *Building and Const. Trades Dept., AFL-CIO v. U.S. Dept. of Labor* (Midway Excavators) (D.C. Cir. 1991); *Ball, Ball & Brossamer v. Reich*, (D.C. Cir. 1994). In 2023, the DOL revised its rules to cover some off-site work performed by truck drivers, but a federal court issued a nationwide injunction against that rule change. See 29 C.F.R. 5.2(i).

DETERMINING THE PREVAILING WAGE RATES

How is the prevailing wage rate determined?

The DOL secretary is responsible for determining the prevailing wage rate for each class of laborer or mechanic in a given locality. The secretary determines the proper rate on the basis of periodic wage surveys, as well as information supplied by contractors, trade associations and unions. If the secretary determines that 50% of employees in a given classification in the area are paid at a certain rate, then that rate will be deemed to be "prevailing." If no single rate is paid to 50% of the employees, then the 2023 regulations (subject to a court ruling otherwise) allow the secretary to calculate the prevailing wage based on the rate paid to 30% of the employees. If no single rate is paid to 30%, then the secretary will calculate a "weighted average" of the wage rates found to be paid in the area. The Government Accountability Office has reported that the DOL's wage survey process is "seriously flawed," but the courts continue to defer broadly to these wage determinations.

Where is the prevailing wage published?

The DOL's Wage and Hour Division publishes general wage determinations for every locality in the country. These area wage determinations can be found online at sam.gov. Separate wage determinations are issued for four categories of construction: residential, building, heavy industrial and highway. Special wage determinations for particular projects also may be attached to the bid specifications for the project.

How are job classifications defined in wage determinations?

Under a 1977 DOL decision in the case of *Fry Brothers Inc.* (WAB 1977), the department applies union work rules and job descriptions to any classification for which the union wage rate is found to "prevail." Often these job duties are not published anywhere, but nonunion contractors are frequently penalized for assuming that their understanding of commonly used craft terms like "carpenter," "electrician" and "roofer" are correct. On the other hand, if the union wage scale does not prevail for a given trade listed in the wage determination, then the DOL will conduct an area practice survey to resolve disputes over which classification should perform the work. Contractors are held to be fully liable for incorrectly determining which job classification should perform each assigned task under the project, and only the position of the DOL, not the contracting officer, controls the outcome.

What about fringe benefits?

The secretary determines what amounts of fringe benefits costs are prevailing in each locality. These are published along with the wage rates. See 29 C.F.R. §5.20-5.32.

What if the published wage rate seems wrong?

DOL regulations permit contractors and other interested parties to challenge published wage rates that the contractor believes to be incorrect. Challengers must be prepared to supply additional wage information to the DOL and should do so in a timely manner (i.e., before contract award or construction starts). Later attempts to contest the published wage rate, such as during a DOL investigation, will be rejected as untimely.

What if the prevailing wage rate changes while a project is still ongoing?

Under 29 C.F.R. 1.6 of the DOL rules enforcing Davis-Bacon's requirements, a wage determination, once incorporated into a contract, generally applies for the life of the contract, with three limited exceptions. The three exceptions are: (1) where there is substantial additional out-of-scope construction not within the scope of the

original contract; (2) where there is an additional time period not previously obligated, such as when an option is exercised; or (3) where the contract is an indefinite-delivery-indefinite-quantity or similar long-term contract, in which case the DOL requires contracting agencies to update wage determinations annually.

PAYING THE PROPER RATES

How do contractors comply with the prevailing wage requirements?

A contractor may fulfill prevailing wage obligations under the act by: (1) paying for both designated wages and fringe benefits in a single cash payment; (2) paying the prevailing wage rate in cash and contributing amounts specified in the wage determination toward "bona fide" fringe benefits; or (3) paying some combination of both wages and fringe benefits that adds up to the total of wages and benefits set forth in the wage determination. For example, if a wage determination lists a basic hourly wage of $30 per hour and a fringe benefit rate of $5 per hour, then a contractor is entitled to pay $35 in cash wages, or $30 in cash plus $5 in any "bona fide" fringe benefit (see 29 C.F.R. §5.31). Under a 2021 executive order, which is currently under review by the courts, government contractors must also pay employees above a minimum wage, and the rate will continue to increase annually as long as the executive order remains in effect. See dol.gov/agencies/whd/government-contracts/eo14026.

How much credit do contractors receive for fringe benefit contributions?

The DOL prohibits employers from using fringe benefit contributions that benefit employees on nongovernment work to discharge the contractor's obligations on Davis-Bacon jobs. This frequently means that contractors receive only an "annualized" (reduced) percentage of credit for fringe benefit contributions, such as health insurance and apprentice training costs (see DOL Field Operations Handbook 15f13). In the past, an exception was made and full credit was allowed for pension or profit-sharing contributions, to the extent that they irrevocably vest on behalf of employees working on government work. This exception was reaffirmed in the case *Tom Mistick & Sons, Inc. v. Reich* (D.C. Cir. 1995). In its 2023 revisions to the DBA rules, the DOL declared that "self-funded" or "unfunded" insurance plans must be approved by the Wage and Hour Administrator before a nonunion contractor will be allowed to take credit for such costs as "bona fide" fringe benefits (see 29 C.F.R. 5.28). Contractors should also be aware that providing such items as tools, bonuses and per diems are generally not considered by the DOL to be bona fide fringe benefits. Again, state prevailing wage laws differ in the amount of fringe benefits they allow contractors to take credit for and the practice of annualizing such credits.

How do contractors receive credit for apprenticeship training costs?

The DOL takes the position that contractors may receive credit for the costs of bona fide apprenticeship programs, including those sponsored by ABC. However, the department limits contractors to receiving credit only for the actual costs incurred for each employee actually engaged in apprenticeship training, on an annualized basis, and only for the classification of labor or mechanic actually performing work on the project. The DOL's position was upheld in the case *Miree Const. v. Dole* (11th Cir. 1991).

Are separate wage rates recognized for helpers?

Under revised rules issued by the DOL in 1982 and 1989, semi-skilled helper classifications were supposed to be recognized as prevailing and were to be paid a wage rate lower than journeypersons if the number of journeypersons and helpers working on projects in the area exceeded the number of journeypersons working without helpers in the area. However, the DOL later reversed course and declared that helpers will be recognized only in the rare situation where their job duties are "separate and distinct" from those of journeypersons and the separate helper classification can be proven to prevail. For all practical purposes, helpers are no longer recognized on federal projects covered by the Davis-Bacon Act (29 C.F.R. § 5.5).

Can contractors pay different wage rates to employees working in multiple job classifications?

Contractors are entitled to pay the prevailing wage rate for the actual hours an employee spends in each of several classifications, but only if the work performed is truly capable of separation into more than one classification, and

only if time records are kept in accordance with actual hours spent in each classification. Contractors should never assume their standard practices and employee cross-training will be accepted by government regulators.

PAYROLL REPORTING REQUIREMENTS

What payroll reports are contractors required to file on publicly financed jobs?

Contractors and subcontractors are required to maintain accurate payroll records showing the wage rates and other contributions for all covered laborers and mechanics. Contractors also are required to submit weekly statements of compliance along with their certified payrolls to the contracting agency (see U.S. Form WH-347). Finally, contractors are restricted—and in many cases, prohibited—from deducting wages from their employees' paychecks on government jobs.

What about union job-targeting (subsidy) programs?

Unionized contractors are prohibited from deducting union job-targeting assessments from their employees' paychecks on Davis-Bacon projects for use in subsidizing private sector work elsewhere. See *BCTD v. Reich* (D.C. Cir. 1994). Nor can unions fine or discipline their members who refuse to let their paychecks on public work be rebated for use in job-targeting programs. See *IBEW Local 357 v. Brock* (9th Cir. 1995). See also *NLRB v. IBEW* (2003).

What are the penalties for not complying with the act?

Contractors that fail to pay the prevailing wage rate, take improper credit for benefit contributions or fail to comply with the payroll reporting requirements may be penalized by having to pay back wages or being debarred from government work. General contractors are held responsible for their subcontractors' delinquencies. Payments due for work already performed also may be withheld pending the outcome of a government investigation. There are also criminal penalties for willful violations of the acts.

Resources for contractors seeking to comply with the DBA and/or the IRA:

- DBA Resources: abc.org/davisbacon
- DOL's Prevailing Wage Resource Book: dol.gov/agencies/whd/government-contracts/prevailing-wage-resource-book
- IRA Resources and Guidance: abc.org/ira

COMPLYING WITH STATE PREVAILING WAGE LAWS

At last count, 29 states, plus the District of Columbia, have prevailing wage laws similar to, though often varying from, the Davis-Bacon Act. Some states cover more work and more types of employees than the federal law. Many states have created different exceptions to coverage, while others have recognized that there is no real need for prevailing wage laws at all.

THE CHAPTER'S ROLE IN AREA WAGE SURVEYS

ABC recommends that chapters and members get involved in the government's wage survey process in order to improve the chances that the prevailing wage determinations will actually reflect market rates. Following are the steps involved in the wage survey process:

- Solicit support from the chapter executive committee and board and establish a prevailing wage committee.
- Establish a good working relationship between the chapter and the local and regional DOL offices.
- Gather information on existing projects to be surveyed.

- Send a letter to members explaining the purpose of the wage survey; enclose survey forms.
- Make follow-up telephone calls to get survey forms returned.
- Maintain confidentiality of wage survey data, preferably using an outside certified public accountant.
- Deliver the data to the DOL's regional wage specialist.
- Follow up with the DOL to ensure continued action.

If necessary, challenge erroneous wage determinations at the Administrative Review Board or in court.

COMPLYING WITH THE FAIR LABOR STANDARDS ACT

The Fair Labor Standards Act contains provisions and standards concerning minimum wages, equal pay, maximum hours and overtime pay, recordkeeping and child labor. These basic requirements mainly apply to employees engaged in interstate commerce. The law provides specific exemptions from these requirements for employees employed by certain establishments and in certain occupations. The act is administered by the DOL's Wage and Hour Division.

This handbook provides general information concerning the application of the FLSA to employees of construction firms. If you have specific questions about the statutory requirements, contact the chapter attorney or the Wage and Hour Division's nearest office. Offices are listed on the DOL's website at dol.gov.

> Note: The laws in many states differ from the FLSA and should be checked carefully to maintain compliance.

COVERAGE OF THE ACT

Unlike the Davis-Bacon Act, which applies only to government contractors, the FLSA applies to all employers in the construction industry that are engaged in interstate commerce or in the production of goods for interstate commerce or are employed by an enterprise engaged in construction or reconstruction, or both.

MISCLASSIFICATION OF "INDEPENDENT CONTRACTORS"

The FLSA does not regulate payments to independent contractors (1099s), but employers should be careful not to improperly assume a worker is an independent contractor when the DOL considers the person to be a covered employee. The government will consider a variety of factors in making this determination, focusing generally on the right to control the means and methods of performing the work. Litigation is ongoing regarding the DOL's "totality of the circumstances," multifactor test for independent contractor status. Employers should monitor ongoing legal developments through ABC's Newsline and other online resources.

Contractors should also closely monitor state and local wage laws that increasingly disallow classification of workers as independent contractors unless they meet a three-part test, as outlined in California's AB 5 and a number of other state laws.

In addition, ontractors should be aware that under several state "wage fraud" or "wage theft" laws, higher-tier contractors in the construction industry may be specifically held responsible for misclassifications and wage underpayments by lower-tier subcontractors and staffing agencies. Misclassification under federal or state laws can result in severe penalties and class action litigation.

MINIMUM WAGE AND OVERTIME PAY

The FLSA requires the payment of minimum wage and further requires payment of at least one and one half times the regular rate of pay to be covered to nonexempt employees after 40 hours of work in a work week. It does not require that an employee be paid each week. The employer may make the wage or salary payment at other regular intervals, such as every two weeks, every half month or once a month. The act does require both minimum wage and overtime pay to be computed on the basis of hours worked each work week standing alone. The employer cannot average the hours of work during two or more work weeks.

The regular rate includes all remuneration for employment, such as attendance bonuses, production bonuses, shift differentials and other extra payment for work actually performed. Payments that are not part of the regular rate include reimbursement for expenses incurred on the employer's behalf; premium payments for overtime work; the premium portion of time and one half paid for work on Saturdays, Sundays and holidays; discretionary bonuses; gifts and payments in the nature of gifts on special occasions; payments pursuant to certain profit-sharing, welfare or thrift and saving plans; and payments for occasional periods when no work is performed due to vacation, holiday or illness. In 2019, the DOL issued a final rule, which clarifies whether certain kinds of benefits or "perks" and other miscellaneous payments must be included in the regular rate used to determine an employee's overtime pay. See dol.gov/agencies/whd/overtime/2019-regular-rate.

HOURS OF WORK

An employee subject to the FLSA must be paid in accordance with its provisions for all hours worked in that work week. In general, "hours worked" includes all the time an employee is required to be on duty or on the employer's premises or at a prescribed workplace, and all the time during which the employee is suffered or permitted to work for the employer.

All hours worked by an employee in more than one job classification for the same employer within the same work week must be combined for the purposes of determining whether overtime pay is due. For example, the hours worked by an employee as a custodian must be added to the hours worked in construction activities. The employee must be properly compensated by the employer for the total number of hours worked.

Of particular significance to the construction industry are rules relating to travel time. For example, time spent by an employee traveling from jobsite to jobsite during the workday is considered to be hours worked, while normal travel from home to work and work to home is not considered hours worked.

In certain situations, an employee is responsible for a truck and its equipment and for having it at the worksite at the proper time. The employer may permit the employee to drive the truck to and from home. In situations of this type, where permission is granted for the employee's own convenience, time spent driving is not considered hours worked. This also is true if the employee elects to carry other employees on the way home and the employee is not required to do by the employer.

Travel time spent carrying heavy, burdensome equipment is hours worked. On the other hand, carrying light hand tools between an employee's home and the worksite, involving no appreciable burden or inconvenience, is not hours worked. When determining this, some consideration must be given to the custom in the industry. For example, it is part of a carpenter's principal activities to carry a toolbox from home to the worksite and time so spent would not be considered hours worked.

A complete discussion of these and other hours worked situations may be found in the Wage and Hour Division's Interpretative Bulletin, Part 785.

EXECUTIVE, ADMINISTRATIVE AND PROFESSIONAL EXEMPTIONS

The FLSA provides a minimum wage and overtime pay exemption (but not from its equal pay provisions) for any employee employed in a bona fide executive, administrative or professional capacity, or in the capacity of outside

salesman or computer professional, as these terms are defined in the Wage and Hour Division's Regulations, Part 541. Contractors should make sure that any employee classified as exempt from overtime meets both the salary basis and job duties tests spelled out in the DOL's regulations. Many states also maintain stricter overtime requirements than the federal government. Contractors in those states must comply with the stricter state law requirements.

CHILD LABOR PROVISIONS

The FLSA provides a 16-year minimum age in occupations other than those non-agricultural occupations declared hazardous by the secretary of labor. An 18-year minimum age applies in such hazardous occupations.

Minors who are 14 and 15 years old may be employed outside school hours for limited hours of work and under other specified working conditions in such occupations as office and sales work, but only performed away from the construction site. Child Labor Bulletin No. 101 provides detailed information on the child labor standards, including the hazardous occupations orders to which an 18-year minimum age applies.

Whenever state and federal child labor standards apply to the same employment, the higher standard prevails. To protect themselves from unwitting violations, employers may obtain employment of age certificates that furnish reliable proof of age for minors employed by them. Any person who violates the child labor provisions or any regulation thereunder is subject to a civil penalty. The act also provides for enforcement by civil or criminal proceedings in the courts.

RECORDS

Employers are required to keep records on wages, hours and other items listed in the recordkeeping regulations (see Regulations, Part 516). Records required for exempt employees differ from those for nonexempt workers.

Special information is required from employees under uncommon pay arrangements or to whom board, lodging or other facilities are furnished. Records of the required information must be preserved for a specific number of years as well as some supplementary items like timecards. Employers should refer to Regulations, Part 516.

ENFORCEMENT

The FLSA provides the following methods of recovering unpaid minimum and/or overtime wages: (1) The administrator may supervise the payment of back wages; (2) in certain circumstances, the DOL secretary may bring suit for back pay and an equal amount in liquidated damages; (3) an employee may sue for back wages and an additional equal sum as liquidated damages plus attorney's fees and court costs; and (4) the DOL secretary may obtain a court injunction restraining violations of the act, including the unlawful withholding of proper minimum wage and overtime pay.

It is a violation of the law to discharge an employee for filing a complaint or participating in a proceeding under the law. Willful violations may be prosecuted criminally. A second conviction for such a violation may result in imprisonment. A two-year statute of limitations applies to the recovery of back wages except in the case of willful violations, for which there is a three-year statute of limitations.

Note: The laws in many states differ from the FLSA and should be checked carefully to maintain compliance.

PART X EQUAL EMPLOYMENT AND AFFIRMATIVE ACTION

EQUAL EMPLOYMENT LAWS GENERALLY APPLICABLE TO CONSTRUCTION

Title VII of the 1964 Civil Rights Act covers all firms that employ 15 or more employees for each working day during 20 weeks per year. The act prohibits discrimination in employment based on race, color, religion, sex (including pregnancy, sexual orientation and gender identity) or national origin. In addition, the Age Discrimination in Employment Act prohibits discrimination based upon age. The Americans with Disabilities Act prohibits discrimination against qualified individuals with a disability. The Genetic Information Nondiscrimination Act prohibits discrimination based on genetic information.

The Equal Pay Act protects men and women who perform substantially equal work from sex-based wage discrimination. Contractors also should be aware of state and local fair employment laws and regulations, many of which prohibit discrimination even by the smallest employers and add more protected categories, such as marital status, political affiliation and personal appearance.

These laws only prohibit discrimination and do not require affirmative action. Beyond nondiscrimination, certain laws impose an affirmative obligation on employers to reasonably accommodate an employee's limitation based on pregnancy or disability, or to accommodate a religious belief or practice. Employers that perform government contracts may be required to implement an affirmative action program (discussed below).

PROHIBITIONS AGAINST SEXUAL AND OTHER HARASSMENT

Title VII of the Civil Rights Act of l964, as amended, prohibits discrimination in employment on the basis of sex (including pregnancy, sexual orientation and gender identity). Courts and the Equal Employment Opportunity Commission consider the ban against sex discrimination to include sexual harassment. The principles applicable to sexual harassment have been extended to apply to harassment based on most other protected categories of employment (race, religion, age, disability, etc.).

EEOC GUIDELINES

The EEOC's guidelines on sexual harassment in the workplace define illegal harassment as unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature when:

- Submission to such conduct is made (explicitly or implicitly) a term or condition of an individual's employment;
- Submission to or rejection of such conduct by the individual is used as the basis for employment decisions affecting such individual; or
- Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment.

Courts have recognized two theories of sexual harassment that can establish a violation of Title VII.

- **Quid Pro Quo:** Sexual favors in exchange for job benefits or avoidance of job detriment.
- **Hostile or Offensive Work Environment:** Verbal, physical or other (e.g., virtual, email or internet-based) conduct of a sexual nature that creates a hostile or offensive work environment.

These two forms of sexual harassment are not mutually exclusive. Even if a complaining employee fails to establish the existence of a hostile work environment, the employee may nonetheless establish a claim of quid pro quo sexual harassment.

Additionally, claims of sexual harassment may be asserted by both male and female employees. Moreover, sexual harassment includes acts by males against females, as well as females against males and same-sex advances or other impermissible behavior.

In *Burlington Industries, Inc. v. Ellerth* (1998) and *Faragher v. City of Boca Raton* (1998), the Supreme Court established an important affirmative defense under which an employer may avoid liability and/or limit damages by showing that the employer exercised reasonable care to prevent and promptly correct any harassing behavior. However, the affirmative defense is unavailable if a supervisor's harassment culminates in a tangible employment action.

Employers should take the following steps to help protect themselves from sexual harassment liability:

- Publish a policy defining and clearly prohibiting sexual harassment.
- Establish a reporting procedure that provides two or more alternative people to whom complaints can be made, to avoid situations where an employee is required to complain to the alleged harasser.
- Encourage employees to report sexual harassment.
- Promptly investigate sexual harassment complaints.
- Take appropriate remedial action in all cases.
- Train all employees, supervisors and non-supervisors to recognize, avoid and report sexual harassment.

HOW TO CONDUCT A CREDIBLE HARASSMENT INVESTIGATION

A prompt and thorough investigation of a sexual harassment complaint is an employer's best defense in a harassment suit. Only by responding promptly and effectively can the employer or individual supervisor ensure relief from liability. In order to provide the opportunity to conduct an investigation, all employers must implement accessible complaint procedures that are readily available to all employees. Such complaint procedures should (1) publicize the individuals designated to take complaints who are unbiased and trained in the area of sexual harassment; (2) maintain confidentiality to the fullest extent possible; and (3) stress the importance of documentation of all aspects of the complaint and investigation process.

Step 1: Interview the complainant.

Step 2: Memorialize the complainant's fact statement.

Step 3: Interview the alleged offender.

Step 4: Give the accused the opportunity to submit a written statement summarizing his or her position with respect to the individualized allegations made by complainant and identify all persons who can corroborate his or her version of events.

Step 5: Review the statements of both the complainant and the accused to identify points of agreement and disagreement. Separately list facts in dispute for continuing investigation.

Step 6: Re-interview the complainant to discuss the accused's version of events and to highlight the facts in dispute.

Step 7: Interview witnesses offered by the complainant and the accused.

Step 8: Meet with line management, human resources management and legal counsel to review the results of the investigation and determine if further investigation is required; if not, determine how to conclude the investigation.

Step 9: If the investigation reveals that harassment occurred in violation of company policy, determine what disciplinary action should be imposed.

Step 10: Communicate the results of the investigation as appropriate to the parties and to management personnel involved in the parties' chain of command.

SAMPLE EEO POLICIES

OUR EQUAL EMPLOYMENT POLICY

Our firm has, on many occasions, expressed support and commitment to the principle of equal employment opportunity. It is our policy to recruit, hire, train and promote individuals, as well as administer any and all personnel actions, without regard to race, color, religion, creed, age, sex (including pregnancy, sexual orientation and gender identity), national origin or ancestry, marital status, status as a disabled or Vietnam-era veteran, union affiliation, status as a qualified individual with a disability and other protected categories in accordance with applicable laws. Our firm will not tolerate any unlawful discrimination and any such conduct is prohibited.

Our firm also prohibits any harassment based on the legally protected categories set forth above. Harassment is verbal or physical conduct that denigrates or shows hostility or aversion toward an individual because of these protected attributes, and that (1) has the purpose or effect of creating an intimidating, hostile or offensive working environment as defined by law; (2) has the purpose or effect of unreasonably interfering with an individual's work performance; or (3) otherwise adversely affects an individual's employment opportunities.

All employees, regardless of position or title, will be subject to discipline, up to and including discharge, should the firm determine that an employee is engaged in unlawful harassment. The firm will promptly and thoroughly investigate the facts and circumstances of any harassment claim.

If you feel you are being unlawfully harassed, report this to your supervisor immediately, or if you prefer, report the problem to your department head, the personnel director or another member of company leadership. No one will be subject to, and the firm prohibits, any form of discipline or retaliation for reporting incidents of unlawful harassment or pursuing any such claim.

OUR POLICY AGAINST HARASSMENT

It is illegal and strictly against the firm's policy for any employee, male or female, to harass another employee by making or subjecting any person to unwelcome sexual advances or unwelcome requests for sexual favors, or to engage in any unwelcome other verbal or physical conduct of a sexual nature, where:

- Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, or submission to or rejection of such conduct is used as the basis for an employment decision affecting the individual exposed or subjected to such conduct; or
- Where such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment.

Our policy against harassment is not limited to sexual harassment, but includes unlawful harassment on any other protected trait, characteristic or basis. The firm will not condone or tolerate the harassment of its employees by their co-workers, supervisors or any individual under our control. All employees, regardless of position or title, will be subject to discipline, up to and including discharge, should the firm determine that an employee is engaged in the harassment of another individual. The firm will promptly and thoroughly investigate the facts and circumstances of any claim of harassment.

If you feel that you are being subjected to sexual or any other form of unlawful harassment, you should report this to your supervisor immediately or, if you would prefer to discuss the matter with someone else, report the problem to the supervisor's superior or to the human resources director. No individual will be subject to, and it is the firm's

policy to strictly prohibit, any form of discipline or retaliation for reporting incidents of sexual or other harassment or pursuing any claim of sexual or other harassment.

AFFIRMATIVE ACTION (WHERE REQUIRED BY LAW)

This firm has established a written affirmative action plan with respect to equal employment opportunity. This plan has been prepared in conformity with Executive Order 11246 and the implementing regulations of OFCCP, 41 C.F.R. Part 601 et seq., including Revised Order No. 4, as amended, 41 C.F.R. Part 602. This plan is designed to provide guidance to management with respect to the firm's commitment to full implementation of its EEO/affirmative action policy. The firm's official policy statement, signed by its president, is included in the plan. The firm's policy includes, without limitation, the following commitments:

It will be the policy of the firm, in accordance with all applicable laws, to recruit, hire, train and promote persons in all job titles without regard to race, color, religion, sex, age, disability or national origin or any other basis prohibited by applicable law.

All employment decisions shall be consistent with the principle of equal employment opportunity, and only valid qualifications will be required.

All personnel actions, such as compensation, benefits, transfers and social and recreational programs, will be administered without regard to race, color, religion, sex, age, disability or national origin, or any other basis prohibited by applicable law.

To assure compliance with the firm's affirmative action plan, ______, affirmative action officer, has been designated to administer and monitor the plan and make reports to senior management. The plan is available for inspection in accordance with applicable regulations.

AFFIRMATIVE ACTION REQUIREMENTS FOR GOVERNMENT CONTRACTORS IN THE CONSTRUCTION INDUSTRY

The following materials are designed to help construction employers performing government contracts to establish affirmative action programs for minorities, women, individuals with disabilities and protected veterans in compliance with requirements of the DOL's Office of Federal Contract Compliance Programs. The OFCCP has implemented regulations to enforce these affirmative action laws in Title 41, Chapter 60 of the Code of Federal Regulations, available at ecfr.gov. See Parts 60-1 implementing Executive Order 11246, Part 60-300, implementing affirmative action for protected veterans, and Part 60-741, implementing the Rehabilitation Act for qualified disabled workers. Government contractors and recipients of government financial assistance are required, among other things, to establish detailed affirmative action plans, engage in outreach efforts for minorities, women, individuals with disabilities and protected veterans, as well as follow specific recordkeeping requirements.

Affirmative action requirements specific to the construction industry can be found at 41 CFR Part 60-4. More detailed guidance for government construction contractors can be found in the OFCCP's Construction Contractors Technical Assistance Guide, available at dol.gov/sites/dolgov/files/OFCCP/Construction/508_cctag_12032020.pdf. As further explained there, nonconstruction supply and service government contractors may be required to perform additional types of statistical utilization analyses for minorities and women, comparing their employment percentages to workforce availability. Government contractors who perform both construction contracts and supply/service contracts should consult with legal counsel to determine which set of requirements applies to them.

Construction contractors' utilization goals are set by the OFCCP, and the agency requires construction contractors to adhere to a "16-step" affirmative action program, as follows:

MINORITIES AND WOMEN

Construction contractors must also meet the following specific steps established by the OFCCP:

a. Maintain a Harassment-Free Workplace: Contractors must have copies of memoranda to supervisory staff, or minutes or notes of staff meetings or EEO officer's meetings with supervisors, to inform them of the contractor's obligation to maintain a working environment free of harassment, intimidation and coercion. Have an EEO officer monitor the work environment.

b. Minority and Women Recruitment: Contractors must have a current list of recruitment sources for minority and women craft professionals. It must have copies of recent letters to community resource groups or agencies specifying the contractor's employment opportunities and the procedures one should follow when seeking employment. It must note the responses received and the results on the bottom or reserve side of the letters or establish a follow-up file for each organization notified.

c. Maintain Referral Lists: Contractors must have a file of the names, addresses, telephone numbers and crafts of each minority and woman application showing the date of contract and whether the person was hired and (if not) the reason; whether or not the person was sent to a union for referral and what happened; and (c) follow-up contacts when the contractor was hiring.

d. Union Relationships and On-the-Job Training: Contractors must immediately notify OFCCP when the union has not referred a woman or minority individual sent by the contractor. Contractors must develop on-the-job training opportunities or participate in training programs for the job areas which expressly include minorities and women. Supply copies of letters informing minority and women's recruitment sources of these programs.

e. Disseminate EEO: Contractors must have written EEO policies that include the name and contact information of the contractor's EEO officer and must (a) include the policy in any company policy manuals; (b) post a copy of the policy in any company bulletin boards (in the office and on all jobsites); (c) put in records, such as reports or diaries, that each minority and woman employee is aware of the policy, and that it has been discussed regularly at staff meetings: (e) make copies of newsletters and annual reports that include the policy; and (f) make copies of letter to unions and training programs requesting their cooperation in helping the contractor meet its EEO obligations.

f. Annual EEO Training: At least once a year, contractors must review EEO policies and affirmative action obligations with all employees responsible for hiring, assignment, layoff, termination or other employment decisions. Contractors must have written records (memoranda, diaries and minutes of meetings) identifying the time and place of meeting, persons attending, subject matter discussed and disposition of subject matter.

g. Disseminate EEO Policies: Contractors must have copies of (a) letters sent, at least every six months or at the start of each new major contract, to all recruiting sources (including labor unions and training programs) requiring compliance with the policy; (b) advertising that has the EEO "tagline" on the bottom; and (c) letters to all subcontractors and suppliers, at least at the time the subcontract is signed, requiring compliance with the policy.

h. Recruitment: Contractors must have written records of contracts (written communications, telephone calls or personal meetings) with minority and women's community organizations and recruitment sources and schools and training organizations specifying the date(s), individuals contacted, results of the contacts and follow-up. Contractors must have copies of letters sent to these organizations at least one month prior to acceptance of applications for training (apprenticeship or other) describing the opening, screening procedures and tests to be used in the selection process.

i. Encourage Referrals: Contractors must have copies of diaries, telephone logs or memos indicating contacts (written and oral) with minority and women employees requesting their assistance in recruiting other minorities and women and record results. If contractors normally provide after-school, summer and vacation employment, they must have copies of letters to organizations under item "H" describing those opportunities, as well as responses received and results noted on letters or in a follow-up file.

j. UGESP Compliance: Contractors must have evidence in the form of correspondence or certificates that all tests and interview and selection procedures used by the contractor, a craft union or joint apprenticeship committee meet the requirements in the OFCCP testing and selection guidelines.

k. Promotions: Contractors must have written records (memo, letters, personnel files, etc.) showing the company makes annual reviews of minority and women personnel for promotional opportunities and notifies these employees of training opportunities (formal or on-the-job) and encourages their participation.

l. Seniority Practices: Contractors must have evidence (letters, memos, personnel files, reports) that: (a) the activity under item "K" has been carried out; (b) any collective bargaining agreements have an EEO clause and the provisions do not operate to exclude minorities and women; (c) the EEO officer reviews all monthly workforce reports, hirings, terminations and training provided on the job; (d) the EEO officer's job description identifies his or her responsibility for monitoring all employment activities for discriminatory effects; and (e) the contractor has initiated corrective action whenever the contractor has identified as possible discriminatory effect.

m. Facilities: Ensure that all facilities and company activities are nonsegregated except that separate or single-user toilet and necessary changing facilities are provided to assure privacy between the sexes.

n. Nonsegregated Facilities: Contractors must incorporate the "Certification of Nonsegregated Facilities" for its federally involved contract documents into all subcontracts and purchase orders; have records that announcements of parties, picnics, etc., have been posted and have been available to all employees; have records that all employment benefits have been offered to all employees; and have written copies of contacts (written or verbal) with supervisory staff regarding the provision of adequate toilet and changing facilities to assure privacy between the sexes.

o. Minority and Women Subcontractor Solicitations: Contractors must have copies of letters or other direct solicitation or bids for subcontracts or joint ventures from minority or women contractors with a record of the specific responses and any follow-up the contractor has done to obtain a price quotation or to assist a minority or female contractor in preparing or reducing a price quotation; have a list of all minority or female subcontracts awarded or joint ventures participated in with dollar amounts; and have copies of solicitations sent to minority or women's contractor associations or other business associations.

p. Supervisor Performance Evaluations: Contractors must have copies of memos, letters, reports, minutes of meetings or interviews with supervisors regarding their employment practices as they relate to the contractor's EEO policy and affirmative action posture.

INDIVIDUALS WITH DISABILITIES AND PROTECTED VETERANS

In addition to the foregoing affirmative action steps for minorities and women, the OFCCP enforces affirmative action requirements for individuals with disabilities and protected veterans.

In 2013, the OFCCP issued two final rules revising section 4212 of the Vietnam Era Veterans' Readjustment Assistance Act and section 503 of the Rehabilitation Act, which requires federal contractors and subcontractors to maintain affirmative action and nondiscrimination plans.

For construction contractors, provisions in these rules require written documentation and tracking of workforce statistics to determine whether the percentage of disabled and veteran workers meet affirmative action requirements for federal contracts.

Under Section 503 of the Rehabilitation Act of 1973, as amended, and the implementing regulations in 41 CFR Part 60-741, contractors and subcontractors with a covered federal contract or subcontract valued in excess of $15,000 are required to take affirmative action steps to employ disabled workers. In addition, the regulations implementing Section 503 require that covered contractors and subcontractors with a government contract or subcontract of $50,000 or more and 50 or more employees develop and maintain a written Section 503 affirmative action program.

The nondiscrimination and affirmative action provisions of VEVRAA prohibit discrimination and require affirmative action programs in all personnel practices regarding covered protected veterans. As amended, this statute is no longer limited to veterans from the Vietnam era. VEVRAA now applies to disabled veterans, Armed Forces service medal veterans, recently separated veterans and other protected veterans who served during a war or in a campaign or expedition for which a campaign badge has been authorized.

In addition to prohibiting discrimination, these regulations require that covered contractors and subcontractors with a government contract or subcontract of $150,000 or more and 50 or more employees develop and maintain a written VEVRAA affirmative action program.

Additional information on Section 503 is available at dol.gov/ofccp/regs/compliance/section503.htm.

Additional information on VEVRAA is available at dol.gov/ofccp/regs/compliance/vevraa.htm.

Members are encouraged to consult with counsel on the provisions in Section 503 and VEVRAA.

Government contractors also should be aware of the OFCCP's final rule on "Prohibiting Discrimination Based on Sexual Orientation and Gender Identity by Contractors and Subcontractors," which prohibits federal contractors and subcontractors from discriminating against employees or applicants on the basis of sexual orientation and gender identity. Under the rule, contractors must include an updated equal opportunity clause in new or modified contracts, which can be found at dol.gov/ofccp/.

Finally, OFCCP's 2015 final rule on pay transparency requires covered government contractors to include a prescribed "pay transparency nondiscrimination provision" in any employee handbooks, as set forth at dol.gov/agencies/ofccp/faqs/pay-transparency.

PART XI | OCCUPATIONAL SAFETY AND HEALTH

CHECKLIST FOR DEALING WITH AN OSHA INSPECTION

- Determine which agency has jurisdiction.
- Designate a management team responsible for handling such investigations.
- Conduct a self-audit of each worksite for possible safety violations in advance of an OSHA inspection.
- Ensure all mandatory recordkeeping is current.
- Establish ground rules and scope of inspection at the opening conference when the inspector arrives.
- Consider whether to permit the inspection or demand an inspection warrant.
- Exercise the right to accompany the inspector during the inspection.
- Control the scope of the inspection where possible.
- Duplicate all photographs taken.
- Duplicate all measurements.
- Prepare managers for interviews and participate in them if possible.
- Avoid making admissions against interest.
- Do not be afraid to get competent legal help.
- Ask for document requests to be made in writing and establish a system to manage them.
- Obtain all possible information at the closing conference.

CHECKLIST FOR ESTABLISHING A SAFETY PROGRAM

POLICY STATEMENT ON SAFETY

The policy statement should be consistent with the firm's management philosophy. The policy should be dated and signed by the owner or chief executive officer, and updated on a regular basis, in keeping with the operations of the firm. All employees should be informed of the policy and it should be the first item in a firm's safety manual.

SAFETY PROGRAM OBJECTIVES

The safety program goals should be achievable, but demanding and measurable, so that their accomplishment is evident. They should be based on needs, problems or indicated trends. New goals should be set as often as necessary, or at least annually.

Sources of assistance in developing safety objectives would include the safety representative from your workers' compensation insurance carrier, the ABC National Environment, Health and Safety Committee or a private safety consultant if a firm does not have a trained safety staff person.

DEFINITION OF RESPONSIBILITIES FOR SAFETY

One person should be responsible for coordinating safety, regardless of other duties. In a small firm, it's possible one person may be a manager, supervisor and safety coordinator. This does not detract from the level of safety

performance that can be achieved or expected. The person must recognize the responsibility involved based on the job function at the time of involvement.

SAFETY RULES

Rules should be logical and enforceable, and presented in terms that are easily understood. Keep in mind that safety rules should specify employee safety responsibility, including to whom the rules apply, when they apply and how they apply.

NEW EMPLOYEE ORIENTATION

Each new employee should receive an orientation on the firm's operation and its policies on certain subjects, including safety. A record of the orientation should be placed in the employee's personnel file. The record should contain the date of the orientation, list of subjects covered, list of materials given to the employee and the name of the person doing the orientation.

SAFETY EDUCATION AND TRAINING

Many standards established by OSHA require the employer to train employees in the safety and health aspects of their jobs. Other OSHA standards make it the employer's responsibility to limit certain job assignments to employees who are certified, competent or qualified—meaning they have had special previous training in or out of the workplace.

Always maintain records of safety and health training. Records can provide evidence of the company's good faith to protect employees and comply with applicable regulations.

JOB INSPECTIONS

Periodic internal safety inspections are an important tool to monitor employee compliance with OSHA requirements. It is better to catch problems on the jobsite before an OSHA investigator shows up.

ACCIDENT INVESTIGATION

At the very least, all significant incidents should be investigated and have a report submitted. What constitutes a significant incident may vary but would generally involve an OSHA recordable injury or illness or an incident involving property damage. Even if no report is submitted, all incidents, including near misses, should be questioned using the same investigative techniques so corrective action may be taken to prevent a similar incident from occurring.

FIRST AID

The purpose of a first aid program is to treat very minor injuries and to be able to give basic treatment to employees with more serious injuries until medical assistance arrives or while the employee is being transported to a medical facility. OSHA requires that first-aid-trained personnel be present on a job if there is no infirmary, clinic or hospital in close proximity to the workplace.

PERSONAL PROTECTIVE EQUIPMENT

Personal protective equipment is essential for the protection of eyes, ears, face, hands and other body parts when working around hazardous machinery or materials. Employees must be told when PPE is required to be used, its benefits, its limitations and when and how it is to be replaced, as well as checked to see if they are medically capable of wearing the equipment and if it fits properly.

RECORDKEEPING AND DOCUMENTATION

As in all phases of company operations, it is necessary to accurately document, report and analyze accident dates, safety equipment, performance, environmental and hazard control and many other topics, including the following:

- ***Employer's First Report of Injury or Illness:*** This form, completed by the employer to report an employee injury or illness, is typically furnished by the insurance carrier's claims office or by the state workers' compensation division (when administered by a state fund). This form must be completed in all cases of accidental death or severe injury requiring more than jobsite first aid.
- ***Log and Annual Summary of Occupational Injuries and Illnesses (OSHA 300 and 300-A):*** Since 2015, OSHA has amended its Electronic Recordkeeping Rule a number of times. The recordkeeping requirements apply to all employers covered by the Occupational Safety and Health Act—even those that are exempt from maintaining injury and illness records. Contractors are required to notify OSHA within eight hours if there is a work-related fatality on the job and within 24 hours if an employee suffers a work-related hospitalization, amputation or loss of an eye. Employers can report incidents electronically through OSHA's web portal in addition to phone reporting options.

OSHA requires employers to use a series of three forms to record work-related injuries and illnesses: (1) the Log of Work-Related Injuries and Illnesses (OSHA Form 300); (2) the Injury and Illness Incident Report (OSHA Form 301); and (3) the Summary of Work-Related Injuries and Illnesses. Forms 300 and 301 should be filled out when a recordable injury occurs. Form 300A is an annual summary and must be submitted to OSHA, even if there were no recordable injuries.

The most recent amendments in 2023 now require employers in the construction industry to electronically submit 300A data if they: (1) have 250 or more employees (Appendix A of the regulation); or (2) have 20-249 employees (construction is an identified industry in Appendix A of Subpart E of the regulation). For more information, see osha.gov/recordkeeping/final-rule.

In addition, employers must also submit 300/301 data if their establishment has 100 or more employees at any time during the previous calendar.

HAZARD COMMUNICATION

OSHA'S Hazard Communication Standard, or HazCom, requires all construction contractors and builders to educate their employees about the hazardous chemicals they are exposed to in the workplace and the methods necessary to protect themselves.

Effective July 19, 2024, OSHA updated its regulation to improve how information about chemical hazards is given to affected employers. While many of the requirements of the updated regulation apply to chemical manufacturers and importers, construction contractors have until July 19, 2026, to implement any updates to workplace labels, their HazCom program and training, where necessary.

As many of the workplace labels and SDS will come from manufacturers, construction contractors should be aware to watch for new labels for chemicals they use in their businesses. Because compliance dates for the regulation will be phased in between Jan. 18, 2026, and Jan. 19, 2028, construction contractors should periodically review their safety data sheets on new shipments of chemicals, and update training if needed.

SAFETY DATA SHEETS

It is the responsibility of manufacturers, suppliers and distributors to provide SDSs with every shipment of hazardous substances. SDSs can vary in length from two to 20 pages, depending on the makeup of the substance. These documents should give a complete breakdown of the hazards associated with the products being used and are key to effective employee training. SDSs must be readily available to any employees who want to see them.

LABELS

Employers need to make sure that every incoming hazardous product is in a container with a label identifying the chemical with appropriate hazard warnings. If a product has a warning label but no SDS (or vice versa), employers must request either the label or SDS from the manufacturer, supplier or distributor.

EMPLOYEE TRAINING

Employers must inform and train not only employees actually exposed to hazardous substances during their routine job duties, but also any employee who could be potentially exposed from unexpected releases or emergency situations.

Generally, office personnel are not required to be trained because office products are generally exempt from OSHA's Hazard Communication Standard.

Employers are allowed to train employees by chemical categories. The task is to make employees aware of what they are working with. That means educating workers about:

- How to spot hazards;
- What the physical and health hazards are of that chemical;
- What they need to do to protect themselves; and
- The company's written hazard communication program.

WRITTEN HAZARD COMMUNICATION PROGRAM

Under HazCom, employers are required to have a written hazard communication program. During an OSHA inspection, an inspector will often request a copy of the program. Essentially, the written program includes a description of everything done to comply with HazCom. It must be made available to employees and employee representatives should they ask to see it.

RESPONSIBILITIES TO OTHER EMPLOYERS ON SITE

One of the most difficult parts of compliance for contractors is HazCom's multiemployer worksite requirements. These provisions require employers to inform employees about the hazards they may be exposed to by other employers working on the same site.

Other contractors working in the same area of the site, at the same time, must provide employers with:

- Information about the hazardous substances that employees may be exposed to;
- An explanation of the labeling system the other contractor is using;
- Information about the precautionary measures employees need to take to protect themselves during normal operating conditions and in emergencies; and
- The location of SDSs for substances brought to the site by other employers.

DRUG AND ALCOHOL CONTROL

LEGAL GROUND RULES FOR DRUG AND ALCOHOL CONTROL

Government contractors must comply with the Drug-Free Workplace Act. The act requires covered employers to maintain a policy prohibiting use, possession, manufacture, distribution, dispensation, possession or use of a controlled substance in the workplace. However, the act does not impose any drug testing requirements.

Some federal regulators, most prominently the U.S. Department of Transportation, have imposed strict drug testing regulations and protocols covering pre-hire, post-accident and random testing. In the construction industry, the type of workers most affected by these regulations are CDL-licensed truck drivers.

The Americans With Disabilities Act states that use of federally controlled substances is not a disability, meaning discipline and termination for such use is permitted by the act. However, an employer may not discriminate against a person who has a history of drug addiction. An employer may prohibit the illegal use of drugs and the use of alcohol in the workplace and may test for the illegal use.

The ADA considers alcoholism to be a disability protected against discrimination that is also entitled to reasonable accommodation. However, employers may still prohibit the use of alcohol in the workplace, may still require that employees not be under influence of alcohol in the workplace and hold alcoholic employees to the same performance standards as other employees.

Every state permits drug testing in some form, though each state has adopted different rules specifying which drug can be tested and what types of tests are permitted or restricted.

The most significant drug-related difference among the states is their treatment of marijuana use and testing. The majority of states now permit medical use of marijuana. A growing number of states also permit recreational use of marijuana. The states are split further over whether they restrict employers from testing for marijuana use and whether positive tests can result in refusal to hire and/or termination of employment. The majority of states continue to allow marijuana testing, but a growing minority of states restrict employers from testing, either for medical marijuana or, in a small number of states, for recreational marijuana. Construction employers should closely monitor marijuana drug testing developments in the states where they do business.

CHECKLIST FOR DRUG AND ALCOHOL CONTROL POLICIES

- Obtain top management's commitment to a firm, but fair, program to protect the safety, health and productivity of employees, as well as the security of products, facilities and other property of the firm from the dangers of drug and alcohol abuse in the workplace.
- Draft a comprehensive drug and alcohol control policy that is designed to maintain a safe working environment for employees and protect the firm's property, including the firm's intention to identify, treat and discipline drug and alcohol abusers. (If any employees are represented by a labor union, there may be a legal duty on the firm to notify the union prior to implementation of the provisions of this policy and give the union an opportunity to discuss the terms.)
- Review with labor counsel the legal pitfalls of enforcing the policy based on continuing changes to federal and state laws dealing with drug and alcohol testing, as discussed above.
- Conduct an educational workshop for all supervisory personnel before the policy is formally placed in effect. Discuss the effects of drug abuse on daily operations and on the firm's safety program, how to recognize and document the physical and psychological aspects of drug abuse, a description of drugs commonly abused, an introduction to drug paraphernalia and unauthorized items, potential places of drug concealment and application of the firm's policy and search procedures.
- Include a statement informing job applicants that they may be tested for drugs and alcohol, that they must sign their consent to the firm's access to any medical records pertaining thereto, and that the results of such testing may be one of the factors considered in determining whether an offer of employment will be made or whether future employment will continue.
- Revise the employee handbook and/or personnel policy manual to spell out the specific work rules for administering and enforcing the firm's drug and alcohol control policy.
- Contact local drug and alcohol rehabilitation centers and consider establishing an employee assistance program either in-house or through a competent outside private agency.

- Communicate the new policy to all employees and make clear that it will not become effective (including testing) for a reasonable, specified period of time. Such fair notice reduces potential moral problems and claims of unfair treatment and helps satisfy any due process claims.
- Determine whether testing for the presence of drugs that may have been used off-premises is desirable or necessary and which types of testing are desirable for which categories of employees.
- Review all sample collection and testing procedures to ensure fairness and conformance to governmental or contractual obligations.

ABC is a founding member of the Construction Coalition for a Drug- and Alcohol-Free Workplace. The group's mission is to provide employers with the resources necessary to implement drug and alcohol policies into their business practices, as well as eliminate all substance abuse-related incidents from the jobsite. Additional resource materials can be found at the CCDAFW website: drugfreeconstruction.org.

PART XII | WRONGFUL DISCHARGE LAW

LEGAL THEORIES UNDER WHICH DISCHARGE DECISIONS MAY BE SUBJECT TO CHALLENGE

Under the traditional common-law approach, the relationship between an employee and their employer generally has been held to constitute an implied contract of employment that is terminable at the will of either party, unless there is a written private employment contract or union contract to the contrary. Under this rule, the courts have long recognized that, in the absence of such a contract, employers may fire their employees for any cause or for no cause at all, so long as the discharge is not illegal under the NLRA or laws prohibiting discrimination.

In recent years, however, employees have persuaded the courts to reexamine this traditional common-law rule. As a result, employees are collecting damages or having their discharges overturned in a growing number of employee suits grounded on expanded notions of common-law contract rights and common-law torts. The new causes of action can adversely affect employers in a number of ways, including subjecting employer defendants to increased monetary damages, longer statutes of limitation and greater likelihood of jury trials.

IMPLIED PROMISE OF JOB SECURITY

These cases arise when employees have relied, to their detriment, on a verbal promise or implied promise from the employer. If, for example, an employee moves a great distance to take a job or takes a significant cut in pay on the employer's promise that they will be making substantially more within a very short time, an abrupt discharge might give rise to a cause of action.

INTERPRETATION OF EMPLOYEE HANDBOOKS AND PERSONNEL POLICIES/PRACTICES AS A CONTRACT

These cases may arise when the treatment of employees does not comport with the terms and conditions of employment set forth in a personnel manual. An increasing number of courts have found personnel manuals constitute binding employment contracts. Further, personnel practices, even when unwritten, may form the basis for an implied employment contract in some states.

VIOLATION OF PUBLIC POLICY

In these cases, liability results when the court finds that the employer's discretion to discharge an employee at will should be limited by an important public policy, such as where an employee was discharged for refusing to commit an illegal act. Many state and federal employment laws also contain specific prohibitions against employer actions that are found to retaliate against employees for filing claims under the employment laws.

INFLICTION OF EMOTIONAL DISTRESS

These cases generally arise when the employer's conduct in discharging the employee is extremely outrageous and causes severe emotional suffering. In such cases, the employee may sue for damages for the intentional infliction of emotional distress. For example, in one case, a cause of action was held to exist for the intentional infliction of emotional distress on a server by a restaurant manager who fired the servers in alphabetical order to find out who was stealing food. This is often a claim in situations where an employee has quit a job and claims constructive discharge due to harassment because of sex or race, etc.

DEFAMATION

An employer that discloses false information that tends to injure an employee's reputation to third parties may be subject to a defamation suit. Employers generally are protected by a qualified privilege regarding work-related statements about employees, in the absence of proof of malice. Some states hold the employer liable for defamatory discharge if it knew employees would have to give the employer's stated (false) ground for discharge to subsequent employers.

INVASION OF PRIVACY

Courts have held that an employer may invade the privacy of its employees in a number of ways. This claim may arise when the employer inquires into so-called private facts concerning the employee. Alternatively, the employee may file a privacy claim when confidential facts are publicly disclosed.

ANTI-DISCRIMINATION LAWS

As discussed above, the largest exception to the notion of at-will employment consists of the state and federal laws that prohibit discrimination or retaliation against employees in a wide variety of protected categories.

TERMINATION CHECKLIST

Chapter staff should not attempt to give legal advice if they are consulted by members seeking to fire employees or whose decisions have already been challenged. However, staff should know enough about state law to know when to recommend that a member seek counsel from the chapter attorney.

Also, the employer can be told to check its legal exposure by reviewing all discharges as follows:

- Review all discharges to ascertain whether any allegation that the employee is being retaliated against for exercising a legal right (such as accepting jury duty, filing complaints of discrimination, reporting violations by the company, etc.) could be raised because of the timing of the discharge.
- Review all discharges to ascertain whether, because of the timing of the discharge, an allegation could be made that the discharge was motivated by bad faith or malice, such as a desire to terminate an employee before the vesting of pension rights, or because the employee failed to succumb to the sexual advances of a supervisor or another co-worker.
- Carefully document all disciplinary action up to and including discharge.
- Review past similar incidents to maintain consistent discipline and avoid charges of discrimination.
- Do not overstate or understate the basis for disciplinary action. The former could lead to charges of defamation; the latter could result in waiving the right to rely on part of the grounds for termination or could lead to charges of pretext.
- Maintain confidentiality to the extent possible. Disclose facts relating to employee discipline only on a need-to-know basis within the workplace. Consider having only neutral references to prospective employers.
- Determine whether any accommodation of protected rights (e.g., religion, disability, etc.) is reasonable or necessary.
- Review your employee handbook with labor counsel to ascertain whether it includes loosely drafted provisions that could cause problems.

PART XIII | PERSONNEL POLICIES

THE EMPLOYEE HANDBOOK

Every employment-related lawsuit involves some aspect of the policies and practices applied by management in the workplace. These rules frequently are set forth in an employee handbook or personnel policies manual. During a trial, some management executive will be cross-examined on what these rules mean and how they are applied. The case may be tried before a jury, with both actual and punitive damages awardable. Verdicts against employers are running into the millions of dollars.

This type of litigation usually charges that a breach of contract occurs when an employer fails to follow the terms of its employee handbook or when an employee was damaged by reliance on management's promises expressly or implicitly set forth in the handbook or in some other personnel policy manual. Courts in most states have held that such employment policies and practices—particularly when pertaining to financial benefits or job security— can be contractually binding on the employer. These same courts have interpreted employee handbook provisions as a contractual limitation on the common-law managerial right to discharge employees at will.

As a result, workers are beginning to view their jobs as a vested property right, which has resulted in some firms eliminating their handbooks altogether. The question thus arises as to whether it is advisable to maintain an employee handbook and, if so, how an employer can best draft the handbook to maximize its employee relations benefits while at the same time minimizing the legal risks.

As a practical matter, a greater risk is posed by abandoning your handbook and relying on unwritten work rules, as the courts have held that oral representations to employees and established practices also can be contractually binding. These cases are difficult to defend because of the credibility gap in proving what management's policy or practice really was.

If workplace policies are clearly stated in writing, there can be no question about what they say. A well-drafted and consistently applied personnel policy manual or handbook can serve a number of other useful purposes as well.

For example, without such a manual, inadequate employee/management communications can result in workers not having any concept of corporate policies, not knowing the chain of command and not understanding the company's work rules. Supervisors will be unable to answer employee questions quickly and accurately. This will lead to erroneous interpretations of company policies, inconsistent applications of employee benefits and disciplinary action and, eventually, to costly lawsuits.

One of an employer's best defenses in a union-organizing campaign is the ability to counter the so-called security of a labor contract (as advertised by the union) with an employee handbook that similarly sets forth equal or better benefits, real job security and favorable work rules. Moreover, an excellent defense in equal employment opportunity cases raising allegations of disparate treatment is management's ability to prove that nondiscriminatory employment policies were established, communicated to employees and applied consistently. Finally, properly drafted disciplinary rules in a handbook can assist management in defending itself against lawsuits for wrongful or abusive discharge.

While the law concerning the interpretation and enforceability of employee handbooks is in a developing mode, three major drafting precautions can be gleaned from the cases to date.

- Employers must recognize that each provision of the handbook may be interpreted as contractually binding on management. It is essential to remove all provisions from the handbook that you do not intend to follow consistently.
- Because the potential contractual liability of the handbook may be negated by legally protective language, employers should include such disclaimers where consistent with their employee relations objectives. For example, the handbook should include a statement that it is not intended to be an express or implied contract of employment. The handbook also may state that employees can be discharged at will at any time, without prior notice or warning, at management's discretion.
- Recent NLRB rulings have caused many employers to reexamine their employee handbooks, particularly regarding policies relating to at-will employment, confidentiality of personnel information and investigations, social and electronic media and employee access policies, among others. The NLRB's role in scrutinizing handbooks is still evolving, but employers should be aware that even in a nonunion workplace, Section 7 of the NLRA has been deemed to protect the right of workers to engage in "protected, concerted activity for their mutual aid and protection." Therefore, according to the NLRB, any handbook policy that chills employee rights, even in the absence of a union, may be in violation of the act.

Depending on how strongly the handbook's legal caveats are worded, they may tend to undermine the human relations value of the handbook. In any event, legal counsel should always be obtained prior to publishing or changing an employee handbook because state laws may vary.

PART XIV | PERFORMANCE CLAUSES IN CONSTRUCTION CONTRACTS

Any lost time in construction is costly. Delays may be due to any number of reasons, including scheduling, materials shortages, loan disputes, etc. Because of the complexity involved in each situation causing performance delays, the parties involved have written various clauses that assume risks or attempt to limit liability for anticipated delays in construction.

Sometimes delays are caused by the owner's inability to furnish the site to the contractor by the agreed date. Site access may depend on the issuance of permits or obtaining easements or rights of way. Sometimes delays are caused by the owner's failure to furnish owner-supplied materials to the contractor by specified dates. Delays may be caused by poor coordination by the owner or the design professional. Some delays are caused by the necessity for correction of work caused by faulty design, or by incomplete plans and specifications. There may be delays caused by separate contractors, failure of the design professional to approve shop drawings or the owner's failure to pay progress payments despite issuance of certificates. Finally, delays almost always result from additions to the original scope of work.

Construction contracts usually contain a completion date as well as specified dates for completion for designated stages of the project. The date of project completion determines when the building, road, etc., can be used. While use is an important part of the value of a project, time delays are treated differently than other types of construction contract breaches. Time is not generally considered part of the basic exchange of values in a construction contract. The basic exchange is money given by the owner in exchange for the structure built by the contractor. In addition, the law has recognized that delays are common, if not inevitable, in construction projects. For these reasons, if the general contractor is delayed without a justifiable excuse, it should pay for whatever the delay has cost the owner but should not lose the right to complete the contract or to be paid for what has been completed.

The law has assisted owners in the difficult task of proving what a contractor delay has cost the owner. Generally, the parties are permitted to specify in advance how delay damages chargeable to the contractor will be computed.

If nothing is stated in the contract regarding possible disruptive events delaying performance by the general contractor, the law generally places most of those risks on the contractor. If a contractor has agreed to perform by a specific time, it has assumed the risk of most events that delay its performance.

The general contractor and subcontractors are likely to be excused for any delay caused by a natural catastrophe. If the soil conditions were different from those reasonably anticipated by the contractor, the firm might receive some relief in extreme cases of hardship.

Usually contracts contain "force majeure," or acts of God, clauses that consist of a catalog of events such as floods, tornadoes, earthquakes, fires, lockouts, etc. If these events occur and have a specified effect on the performance of the contractor (make performance impossible, impracticable or substantially hamper or interfere with performance), then the contractor will be excused to the extent these acts have delayed performance.

The result in any particular case will depend on the language of the clause, the gravity of the event, its unforeseen nature, the impact on the contractor's performance and whether the event was an assumed risk. Courts often go into the question of whether the exercise of reasonable care could have prevented the particular risk. For example, inclement weather may hamper the contractor's performance and make it more expensive; however, the impact

upon the contractor's efficiency may or may not be extreme. In such a case, the contractor is not likely to be given relief, despite some delay caused by the reduced efficiency.

Sometimes the parties agree on the effect of excused delay. For example, if the owner orders a change, it is advisable for the parties to try to agree on how the change will affect the contract price and the extension of time justified by the change order. If they cannot agree, the design professional usually makes the determination.

Contract clauses frequently require the contractor to notify the design professional in writing, within a specified period of time after the occurrence of the event causing a delay, if the contractor intends to claim an extension time. This notice usually is considered a condition precedent to awarding the extension. Even if the events were such as to merit an extension, failure to give notice often means that no extension of time will be given.

The American Institute of Architects' General Conditions of the Contract for Construction (A 201) in section 8.3.1 reads: "If the [General] Contractor is delayed at any time in the progress of the work by any act or neglect of the Owner or the Architect, or by any employee of either, or by any separate contractor employed by the Owner, or by changes ordered in the Work, or by labor disputes, fire, unusual delay in transportation, unavoidable casualties or any causes beyond the Contractor's control, or by delay authorized by the Owner pending arbitration, or by any cause which the Architect determines may justify the delay, then the Contract Time shall be extended by Change Order for such reasonable time as the Architect may determine."

PERFORMANCE CLAUSES FOR GENERAL CONTRACTORS

A general contractor's performance clause in its agreement with a subcontractor consists of a statement of the affirmative obligations of the subcontractor with respect to various aspects of the work to be performed. In addition, it may include language detailing more specifically what constitutes a breach of the subcontractor's affirmative obligations. It also may list specific remedies available to the general contractor in the event of a breach of an affirmative obligation imposed on the subcontractor.

Clauses that state "your workers will work in harmony with other workers on the job" have resulted in a great amount of litigation. Because the NLRB and the courts have interpreted that a union has a legitimate interest in ensuring that union employees aren't required to work shoulder to shoulder on a jobsite with nonunion employees pursuant to the harmony clause, all of this can be done without breach of contract remedy. To correct this situation, ABC National has suggested deletion of the harmony clause and insertion of the open shop clause, under which nonunion employees cannot be thrown off the jobsite without breach of contract.

In utilizing the sample provisions set forth herein, it is important that both the general contractor and the subcontractor review the clause with their legal counsel to ensure consistency with the other provisions of the contractual agreement, as well as conformity with any laws that may affect such an agreement. This provision deals solely with the subcontractor's obligation to supply an adequate number of employees to perform the work required to be done under the subcontract.

SHORT FORM

> "Subcontractor shall at all times supply a sufficient number of skilled workers to perform the work covered by the subcontract with promptness and diligence. Should any workers performing work covered by this subcontract engage in a strike or other work stoppage or cease to work due to picketing or a labor dispute of any kind, contractor may, at its option and without prejudice to any other remedies it may have, after 48 hours written notice to subcontractor, provide any such labor and deduct the cost thereof from any monies then due or thereafter to become due to subcontractor."

> [“Further, contractor may at its option, without prejudice to any other remedies it may have, terminate the employment of subcontractor for the work under this subcontract, and shall have the right to enter upon the premises and take possession for the purpose of completing the work hereunder of all subcontractor’s materials, tools and equipment thereon and to finish the work either with its own employees or other subcontractors; and in case of such termination of the employment by contractor, subcontractor shall not be entitled to receive any further payments under the subcontract or otherwise but shall nevertheless remain liable for any damages which contractor incurs. If the expenses incurred by contractor in completing the work shall exceed the unpaid balance due subcontractor, subcontractor shall pay the difference to contractor together with any other damages incurred by contractor as the result of subcontractor’s default. Contractor shall have a lien upon all materials, tools and appliances taken possession of, to secure the payment thereof.”]

> Note: The ***unbracketed*** portion of this clause constitutes a basic performance clause. The ***bracketed*** portion may be used in whole or in part by the contractor, depending on the facts and circumstances surrounding the particular project.

Performance clauses should be reviewed with legal counsel in relation to the entire agreement with a subcontractor to ensure there are no inconsistencies or conflicts with other provisions.

In the event the performance clause is attached to the AIA standard form of subcontract, it is recommended that the following provision be used to ensure conformity of the various contractual provisions: “In the event of any inconsistency between the provisions of this performance clause and the subcontract or the contract documents, the provisions of the performance clause shall prevail. Any provisions of the subcontract or the contract documents with respect to arbitration or determination of disputes by the Architect, Arbitrators or others, shall not apply to this performance clause.” The performance clause should be made a part of the subcontract document either by incorporation in its provisions in a logical place or by attachment as an exhibit that becomes a part of the subcontract.

PERFORMANCE CLAUSES FOR SUBCONTRACTORS

(PARTICULARLY FOR AGREEMENTS WITH UNION GENERAL CONTRACTORS)

In order for merit shop contractors to protect themselves when accepting contracts from union general contractors, they should be sure that the contract contains a clause similar to this:

> “Our firm operates as merit and open shop. We have figured this job at our usual rates for mechanics and will perform it with our own personnel.”

Acceptance of the contract by the general contractor assures that a subcontractor cannot be thrown off the job because of union pressure without the general contractor falling into a breach of contract.

PERFORMANCE CLAUSE FOR A CONTRACTOR'S PURCHASE ORDER WITH A SUPPLIER

> "Should there be any delay in the delivery of the equipment, material or supplies described in this purchase order due to any work stoppage, slowdown, strike, picketing, boycott or any other voluntary cessation of work, and which said delivery delay, in the judgment of the contractor, is causing or is likely to cause any unreasonable delay in the progress of the work to be performed at the construction jobsite, the contractor shall have the right to terminate this purchase order, after giving the supplier 24 hours' written notice of the intention of the contractor to claim such a default."
>
> ["The contractor in such event shall be authorized and empowered to cause the immediate delivery of such equipment, material or supplies by whatever method and alternate means of performance the contractor may deem expedient, and the reasonable cost of same shall be charged to the Supplier as money paid on the supplier's behalf on the account of the total purchase price. In the event the contractor fails to obtain such delivery within five days after it has declared the supplier in default, then the Supplier shall also be liable to the contractor for any damages which the contractor may sustain because of the delay in delivery, provided such delay is attributable to the supplier's default."]

Note: The ***unbracketed*** portion of this clause constitutes a basic performance clause. The ***bracketed*** portions (or some of them) may be used by contractors depending on the facts and circumstances surrounding the particular project. Before using this performance clause, it should be reviewed with legal counsel in relation to the entire agreement with the supplier to ensure there are no inconsistencies or conflicts with other provisions in the purchase order.

Many of these performance clauses may be superseded by union-only PLA requirements. Readers should refer to Part VII on government-Mandated PLAs.

PART XV | IMMIGRATION LAW ISSUES

Employers are required by the Immigration Reform and Control Act of 1986 to complete an employment eligibility verification form (I-9 Form) for each newly hired employee to ensure they are legally authorized to work in the United States. IRCA has three basic goals that must be always kept in mind when hiring new employees. First, IRCA prohibits the hiring of individuals who do not have a legal right to work in the United States. Second, IRCA requires the employer to complete a Form I-9 for all employees hired after Nov. 6, 1986. Third, IRCA prohibits discrimination against individuals who have a legal right to work in this country, based upon either national origin or citizenship/ immigration status.

Stiff penalties will be levied against any contractor found to have violated IRCA's employment verification provisions or anti-discrimination prohibitions. Fines for violations of the I-9 rules range from $281 to $2,789 per violation. In addition, there are criminal penalties for engaging in a pattern or practice of hiring illegal workers.

GENERAL RULES

Contractors should be mindful of some very basic compliance rules contained in the IRCA statute. The first is that every employee hired after Nov. 6, 1986, must complete a Form I-9. This does not mean that an employer must complete a Form I-9 for every individual who applies for a job, only those individuals who are actually hired. Once the employee is hired, an employee must complete Section 1 of the Form I-9 by the end of the first day of employment (when an employee is on the clock). The employer must complete Section 2 of the Form I-9 within three business days of employment after the first date of employment by having the employee provide the necessary documents to establish his or her legal right to work in the United States. Any employee who cannot establish a legal right to work within three business days must be terminated. Remember—do not count the first day they report to work and fill out the Form I-9 toward the three business days.

Second, an employer cannot refuse to hire an applicant who is not a U.S. citizen (unless the specific job requires such citizenship for legitimate reasons, usually determined in certain federal regulations) or a holder of a green card if that applicant can establish their legal right to work in this country. Likewise, employers may not refuse to hire individuals with time-limited work authorization. Employees with time-limited work authorization are entitled to work, albeit for a finite period of time. When faced with an applicant or employee who has time-limited work authorization, an employer will be required to re-verify his/her continued work eligibility on or before the date their employment eligibility expires. There are some categories of the Employment Authorization Document (time-limited) that do qualify for an automatic 180- or 540-day extension under certain circumstances. Plus, other employees on temporary protected status may receive automatic extensions from the secretary of U.S. Department of Homeland Security.

In order to ensure proper reverification, the employer must establish and maintain a reverification calendar to keep current on reverification obligations.

Third, completed I-9 Forms should be maintained in a separate file from individual personnel files.

PRACTICAL POINTERS FOR COMPLIANCE WITH I-9 REQUIREMENTS

Institute Companywide I-9 Completion Policies

Employers should institute companywide, consistently implemented policies regarding I-9 practices and procedures. If an employer follows an established companywide policy for every employee who is hired and every Form I-9 that is completed, the chances of a discrimination claim being filed under IRCA, or any discrimination being uncovered during the course of an audit, will be greatly diminished because it will be markedly more difficult for employees to claim that they were treated inconsistently based on their national origin or citizenship/immigration status.

Limit the Number of Employees With I-9 Completion Responsibilities

Employers should limit the number of individuals who have I-9 responsibilities. It is easier to train a smaller number of employees and having a smaller number of employees will promote consistency in the employer's I-9 practices.

Complete the Form I-9 on the New Employee's First Day of Work

In general, the best time to complete Section 1 of the I-9s is the new employee's first day of work. If it is discovered that a current employee was hired after November 1986 but does not have an I-9, the employer should proceed with caution, checking to make sure that a Form I-9 does not already exist for this person.

If not, then promptly create a Form I-9 for this person as soon as possible. Upon completing the Form I-9, put the current date on the form. Never backdate the form. Further, a margin notice should be inserted: "Created as a result of audit."

Maintain a Reverification System To Monitor Eligibility

For individuals who have time-limited work authorization, maintain a separate reverification system, either an automated electronic calendar or a simple paper calendar, with annotations as to the date of expiration of each employee's work authorization. The annotation should be made in the reverification system at the time the employee is completing the Form I-9. The reverification system should be monitored on a regular basis to ensure that every employee has valid work authorization upon expiration when required.

> Note: Do not reverify legal permanent resident cards, U.S. passports, U.S. passport cards or any List B documents.

Seek Legal Counsel in the Event of an Inspection

If a government investigator arrives at your facility, do not consent to the inspector proceeding with their inspection at that time and contact legal counsel immediately. By law, unless an inspector has an I-9 inspection notice, they must give the employer three days of notice before conducting an I-9 compliance audit. This is normally accompanied by a subpoena. A warrant would be treated differently, and employers must comply. Again, contact legal counsel.

E-Verify

Most government contractors are now subject to the E-Verify system. This rule requires covered government contractors to use the E-Verify system to confirm electronically that both their new hires and their existing employees assigned to government projects undertaken are lawfully authorized to work in the United States. In addition, covered contractors are required to E-Verify all new hires regardless of whether they are assigned to government contracts. Detailed information about the E-Verify program can be found at uscis.gov.

However, most nongovernment contractors are not required by law to use E-Verify. There are nine states which require employers to use E-Verify: Alabama, Arizona, Florida, Georgia, Mississippi, North Carolina, South Carolina, Tennessee and Utah. Additionally, some states require the use of E-Verify if contracting with state governments.

SECURING NONIMMIGRANT VISAS

H-1B CATEGORY REQUIREMENTS

Section 101(a)(15)(H) of the Immigration and Nationality Act, as amended, defines an H-1B worker as "an alien coming temporarily to the United States to perform services in a specialty occupation … and for whom the DOL secretary has determined and certified to the Attorney General that the prospective employer has an approved labor condition application under section 212(n)(1) of the Act." 8 USC 1101(a)(15)(H).

In order to obtain permission to employ an individual in H-1B status, an employer must first submit a labor condition application to the DOL attesting to certain requirements related to wages and working conditions. Upon certification of the application, the employer must file a petition with USCIS on behalf of the individual establishing that the position it seeks to fill qualifies as a specialty occupation and that the person it wishes to employ in that position possesses the necessary professional qualifications for employment in that occupation.

The H-1B non-immigrant visa category is intended for use by employers in the United States that seek to employ temporarily foreign nationals who will perform services in a "specialty occupation." These occupations are defined by statute and regulation as positions that require the theoretical and practical application of a body of highly specialized knowledge and the attainment of at least a bachelor's degree in a related academic discipline.

To establish eligibility, an individual must be shown to be a professional in his or her chosen field. A person will be considered to be a professional if that person's field is one for which a specific baccalaureate or higher-level degree is the usual minimum entry-level requirement and the person possesses qualifications that are equivalent to that minimum requirement. In any case, it is critical to establish the relationship between the stated responsibilities of the position offered by an employer and the requirement for a specific academic degree in that occupation, as well as the business-related need for an individual with that particular academic background.

H-2B VISAS FOR TEMPORARY OR SEASONAL NONAGRICULTURAL WORKERS

In order to be eligible to apply for H-2B visas for temporary nonagricultural workers, both the job offered by the employer and the employer's need for the specific alien must be temporary. The applicable regulation states that an "H-2B nonagricultural temporary worker is an alien who is coming temporarily to the United States to perform temporary services or labor, is not displacing United States workers capable of performing such services or labor, and whose employment is not adversely affecting the wages and working conditions of United States workers." Temporary services or labor under the H-2B classification refers to any job in which the petitioner's need for the duties to be performed by the employee(s) is temporary, whether or not the underlying job can be described as permanent or temporary. The petitioner's need, which must generally be one year or less, can be either a one-time occurrence, a seasonal need, a peak load need or an intermittent need.

The employer must establish that it has not employed workers to perform the services or labor in the past and it will not need workers to perform the services or labor in the future, or that it has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker.

To obtain approval of an H-2B petition, a process similar to labor certification must be completed. The employer must file an ETA-9142B application with the appropriate state employment service office and carry out basic recruiting, posting and advertising to fill the position(s) at issue. Once certification from the DOL has been received (or notification that no certification can be made), a petition (which may include multiple foreign workers) is filed with USCIS on Form 1-129.

The maximum period for which an alien can be admitted to stay in the United States in the H-2B category is three years. After having spent three years in the United States, an alien may not seek extension, change of status or be readmitted to the United States under the H or L nonimmigrant classification unless such alien "has departed and remained outside the United States for an uninterrupted period of three months before seeking readmission as an H-2B nonimmigrant."

Two one-year extensions of stay may be granted to H-2B temporary workers. However, each new Form 1-129 extension petition must be accompanied by a new labor certification or notice that certification cannot be made. An H-2B alien who is dismissed from employment for any reason by the employer before the end of the approved nonimmigrant stay must be provided return transportation costs abroad by the petitioner and the petitioner must notify USCIS within two workdays if the H-2B worker is a no show, absconds, is terminated or if they finish the labor or services more than 30 days earlier than the date listed on the H-2B petition.

OBTAINING PERMANENT RESIDENT STATUS FOR FOREIGN WORKERS

Employers often wish to offer permanent positions to key foreign employees. Permanent resident status provides foreign citizens with the right to live and work in the United States without time limitations. The two primary ways to become a permanent resident are through a family relationship with a U.S. citizen or an offer of permanent employment by a U.S. employer. It's important to keep in mind that obtaining permanent residence for a foreign worker based on an offer of permanent employment can be a complicated and protracted process—often requiring a significant commitment and investment of time and resources. In most cases, the process requires a permanent labor certification or PERM, including formal recruitment supervised by the government to determine whether there are qualified American workers available for the job, and followed by the filing of a preference petition with USCIS to initiate the final stage of adjustment to permanent resident.

The employer will coordinate the state prevailing wage requirements for the position. This will initiate the required test of the local labor market to determine whether a U.S. worker is willing, able, qualified and available to perform the same work that it has offered the foreign national employee, and whether his or her employment in that position will adversely affect the wages and working conditions of similarly employed American workers. The position must be certified by the DOL before it can proceed to the next stage.

> Note: This is a very broad discussion of general principles and requirements and must not be construed as definitive legal advice applicable in any specific matter. Facts and circumstances will vary from case to case, and adequate counsel can be provided only upon deliberate consideration of the needs and circumstances of an individual client.

PART XVI | CHAPTER APPRENTICESHIP TRAINING PROGRAMS

Apprenticeship training is vital to the success of merit shop construction and plays a critical role in ABC's all-of-the-above workforce development strategy addressing construction industry skilled labor shortages. An increasing number of ABC chapters have established employee workforce development programs on behalf of member (and nonmember) companies—including more than 450 government-registered apprenticeship programs across the country. Information on these programs is available at abc.org/grapmap.

Of note, policy enacted by local, state and federal governments is pushing apprenticeship requirements on certain private and government construction projects. For example, in August 2022, the ABC-opposed Inflation Reduction Act was signed into law by President Biden, establishing more than $270 billion in federal tax credits for private clean energy construction projects. These enhanced tax credits are conditioned on developers and their contractors meeting prevailing wage and government-registered apprenticeship requirements. This means increased access to government-registered apprenticeship programs will be critical for contractors on these projects, absent significant policy changes. For more information, see abc.org/ira.

Federal laws governing chapter training programs are complicated and many compliance steps must constantly be monitored. Keep in mind, state laws may differ and should be consulted in connection with any chapter apprenticeship program. However, state apprenticeship councils that have been given deferral authority by the U.S. DOL are required to conform to federal standards or else risk deregistration.

FEDERAL REGULATIONS GOVERNING APPRENTICESHIP AND TRAINING

The DOL's Office of Apprenticeship has established the basic criteria for approval of apprenticeship and other training programs. OA approval is required in order to be certified as a bona fide apprenticeship or training program, unless there is a State Apprenticeship Agency fulfilling that role. OA also will step in if it finds an SAA has unreasonably withheld certification.

The OA certification requirements are set forth at 29 C.F.R. Part 29 and require the following steps by the program sponsor:

- There must be a written plan for the program subscribed to by the sponsor.
- The plan must provide for employment and training of each apprentice in a skilled trade.
- The plan must include at least 2,000 hours of work experience or adopt a competency-based approach or an approved hybrid plan.
- The plan must outline the supervised work experience for its apprentices.
- The plan must provide for supplemental technical instruction of at least 144 hours per year.
- The plan must specify progressively increasing apprentice wage rates and a specific, approved ratio of apprentices to journeypersons.
- The plan must provide for periodic review of the apprentice's progress and document the review.
- There must be a reasonable probationary period, terminable by either side at any time.
- There must be adequate and safe equipment and safety training.

- There must be minimum qualifications for entry, including an age minimum of 16.
- There must be a written apprentice agreement incorporating the program's standards.
- Any advanced credit must be granted on equal terms.
- Training credit must be transferable within the program.
- There must be qualified training personnel and adequate on-the-job supervision.
- There must be a certificate for completing the program.
- The registering agency must be identified.
- The plan must provide for registering and deregistering the program itself, the apprentice agreements and any amendments.
- The plan must contain certain specific EEO requirements and must state that it will comply with applicable EEO laws.
- The plan must identify the person receiving and processing complaints.
- The plan must provide for proper recordkeeping of all required records concerning apprenticeship.

The EEO requirements of Part 30 were revised in 2016 to expand protections from discrimination to include a broader range of workers, including qualified individuals with disabilities, age (40 or older), sexual orientation and genetic information. The rules also modified the affirmative steps employers and sponsors must take to ensure equal opportunity in apprenticeship and established a new utilization goal of 7% for qualified apprentices with disabilities. The revised Part 30 EEO requirements are currently in effect for those states governed by the federal Office of Apprenticeship, while state apprenticeship agencies were given additional time to come into compliance with the new regulations.

EMPLOYEE RETIREMENT INCOME SECURITY ACT

Apprenticeship and training programs may also be subject to the Employee Retirement Income Security Act, 29 U.S.C. § 1001, et seq. ERISA establishes uniform federal regulation of all "employee welfare benefit plans." Such plans have been defined to include any plan, fund or program established or maintained by an employer (or association of employers) to provide apprenticeship and other training programs for the benefit of employees.

On the other hand, the DOL has declared that certain payments for employers will not be considered "employee welfare benefit plans" and are therefore not subject to ERISA. See 29 C.F.R. § 2510.3-1. These exempt payments include:

- Payroll practices: defined to include "payment of compensation on account of periods during which an employee performs little or no work while engaged in training" or "payment to employees on leave to pursue education."
- Industry advancement programs: defined to include programs maintained by an employer or association, which have no employee participants and provide no benefits to employees but act only as a conduit for funds to a true employee benefit plan.
- Unfunded scholarship programs: defined to include a scholarship program, including a tuition and education expense refund program, under which payments are made solely from the general assets of an employer.

Because a true apprenticeship program provides on-the-job training for the benefit of employees, and not merely paid time off or tuition for classroom education, most ABC chapter programs would appear to be covered by ERISA. If you are uncertain whether ERISA applies to your chapter program, be sure to seek counsel.

The federal ERISA law contains a preemption provision that is supposed to protect covered employee benefit programs from state law interference. However, in the case of *California Division of Labor Standard Enforcement v. Dillingham Construction, N.A., Inc.,* the Supreme Court limited the scope of ERISA preemption and permitted state governments to enforce certain regulations relating to apprenticeship plans under state prevailing wage laws. Even under the *Dillingham* decision, however, states are still prohibited from mandating ERISA-covered apprenticeship benefits.

Apprenticeship plan sponsors whose plans are covered under ERISA should comply with the following requirements:

- Every ERISA-covered plan must be in writing.
- The plan must be run by "fiduciaries" who owe a duty of care to the beneficiaries.
- All assets of the plan must be held in a trust, established by a written trust document and managed by trustees. (Trustees may be designated by the chapter board and may include board members to ensure continued cooperation with the chapter.)
- Employer contributions may be received in a variety of ways and need not be limited to ABC members. However, no plan assets may return to the contributing employers. (The assets must be held for the exclusive purpose of providing benefits to employee participants and defraying reasonable expenses of the plan.)
- Among other prohibited transactions, plan assets may not be transferred, sold or loaned to plan fiduciaries or any party in interest to the plan. (Reasonable administrative fees are permitted.)
- Bonding of plan fiduciaries may be required.
- Apprenticeship and training plans covered by ERISA must file reports with the U.S. government. Unlike most other types of ERISA plans, however, a special exemption permits apprenticeship plans to file a "short form" notice with the DOL. The notice needs to list only the name of the plan; the name of the plan administrator; the name and location of an office or person from whom an interested individual can obtain a description of the course of study; and a description of the enrollment procedure.
- If the short form is filed, no detailed financial reports (Form 5500) or summary plan description needs to be filed with the government or distributed to employees.

A number of extra administrative requirements result from ERISA coverage. Failure to comply can result in significant penalties. ABC has available a number of model trust documents for use by chapter apprenticeship plan sponsors and strongly recommends consultation with legal counsel to ensure total compliance with applicable law.

CREDITING CONTRIBUTIONS TO ABC APPRENTICESHIP PROGRAMS UNDER THE DAVIS-BACON ACT

Under the federal Davis-Bacon Act, 40 U.S.C. § 276a, employers performing public works projects are required to pay their covered employees a predetermined prevailing wage. In order to meet this requirement, the law gives employers credit for contributions to bona fide fringe benefit programs, including apprenticeship programs. Thus, contractors can be encouraged to contribute to chapter training programs in order to comply with the Davis-Bacon Act and at the same time serve the important goal of improving employee training.

The rules for receiving Davis-Bacon credit for apprenticeship program contributions are complex, and the penalties for noncompliance are severe. Chapters and employers should be aware of the following guidelines:

- Contributions must be made to a bona fide apprenticeship or training program (i.e., a program registered with the DOL's Office of Apprenticeship or a State Apprenticeship Agency).
- Only the actual costs incurred for the training program may be credited to the contractor.

- Costs of the program may be credited toward the contractor's other prevailing wage obligations, but only to the extent of the actual costs for training that contractor's employees.
- Costs incurred for training one classification of worker may not be used to offset costs required for training another classification (i.e., a contractor cannot claim credit for the costs of an electrical apprentice program to satisfy a prevailing wage requirement for carpenters).
- Contractors may take credit for cents-per-hour contributions to an apprentice program or may make a lump-sum payment. In the latter case, the lump-sum payment is converted into an hourly cash equivalent by dividing the lump sum by the total number of hours worked by journeypersons and apprentices in the trade being trained.
- If contributions for training are made only during Davis-Bacon work, and the contractor's employees work on private jobs during the period for which training benefits them, then the contractor must proportionately reduce ("annualize") the credit taken under the Davis-Bacon Act. This is calculated by dividing the amount contributed by the portion of the employee's total hours worked that year. For example, if a contractor has contributed $2,000 on Davis-Bacon work only, and an employee has worked 1,500 Davis-Bacon hours and 500 non-Davis-Bacon hours, the contractor should only take $1,500 of credit toward payment of the prevailing wage.
- Each contractor claiming Davis-Bacon credit for contributions must be prepared to document its costs per employee for the applicable training. The chapter training program should be prepared to assist the contractor in the cost accounting process.

Any ABC chapter that sponsors an apprenticeship program should audit its compliance with each of the aforementioned federal laws. In addition, it may be necessary to comply with state laws relating to the training process. Despite complicated procedures, merit shop apprenticeship training can be operated successfully, and it is vital to the continued vitality of nonunion construction.

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