AAMGA UNIVERSITY

Employment Practices and Insurance Exposures and Solutions

1. The Evolution of Non-Discrimination Laws

A. Civil Rights Act (1964) – Title VII

- The general law prohibiting discrimination in employment against minorities and females. The law requires equal opportunity in hiring, training, promotion and retention without regard to race, color, sex, religion or national origin. In addition, it requires employers to reasonably accommodate the religious beliefs of both applicants and employees.

B. The Equal Pay for Equal Work Act (1963) (EPA)

- This law is not about "equal opportunity." EPA mandates that men and women doing work that requires the same skill, effort, and responsibility be paid the same.

C. The Age Discrimination in Employment Act (1967) (ADEA)

- This law prohibits discrimination, based on age, in recruiting, hiring, terms, privileges, conditions and termination of employment for all persons 40 and older.

D. Americans with Disabilities Act (1990) (ADA)

- This law prohibits discrimination in recruiting, hiring, terms, privileges, conditions and termination of employment against individuals with a protected mental or physical disability who are otherwise "qualified". The law requires the employer to make "reasonable accommodations" to assist the disabled in the performance of essential functions of the job.

Representative Workplace Torts

- Retaliation
- Constructive discharge
- Breach of an employment contract
- Employment-related misrepresentation
- Wrongful failure to employ
- Wrongful failure to promote
- Wrongful discipline
- Wrongful deprivation of a career opportunity
- Wrongful failure to grant tenure
- Negligent evaluation
- Employment-related defamation
- Employment-related infliction emotional distress (P&S)
- Employment-related invasion of privacy
- Employment-related false imprisonment
- Employment-related coercion
- Loss of Consortium
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E. Uniform Services Reemployment Rights Act (USERRA)

- This law governs the employment and reemployment rights of all uniformed military members and requires both private and public employers to provide employees with leave to serve in military operations. It requires employee reinstatement upon the return from military duty to either a position they would have attained, their previous position or one with similar seniority, status and pay.

F. Common Law Private Injury Claims -

1. Defamation, Libel, Slander

2. Interference with Contractual Relation

3. Retaliatory Discharge

4. Invasion of Privacy

5. Interference with Prospective Economic Advantage

6. Negligent Hiring, Retention or Supervision

7. Negligent/Intentional Infliction of Emotional Distress

SECTION 1 – EMPLOYMENT – RELATED PRACTICES LIABILITY COVERAGE

A. Insuring Agreement

1. We will pay those sums the insured becomes legally obligated to pay as damages resulting form an "**injury**" to which this insurance applies. We will have the right and **duty to defend** the insured against any "**suit**" seeking those damages.

2. Other work-related verbal, physical, mental, or emotional abuse arising from "discrimination".

Definition I.

I. "Suit" means a civil proceeding in which damages because of "injury" to which this insurance applies are alleged, including"

1. An **arbitration proceeding** in which such damages are claimed and to which the insured must submit or does submit with our consent;

2. Any other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent; or

3. Any **administrative proceeding or hearing conducted by a governmental agency** (federal, state or local) having the proper legal authority over the matter in which such damages are claimed.

Definition G.

G. "Injury" means injury to your "employee" arising out of one or more of the following offenses:
   1. Demotion or failure to promote, negative evaluation, reassignment or discipline of your current "**employee**" or **wrongful refusal to employ**;
   2. Wrongful termination, meaning the actual or constructive termination of an "employee";
      a In violation or breach of applicable law or public; or
      b Which is determined to be in violation of a contract or agreement, other than any employment contract or agreement, whether written, oral or implied, which stipulates financial consideration if such financial consideration is due as the result of a breach of the contract;
   3. Wrongful denial or training, wrongful deprivation of career opportunity, or breach of employment contract;
   4. Negligent hiring or supervision which results in any of the other offenses listed in this definition.
   5. Retaliatory action against an "employee" because the "employee" has:
      a Declined to perform an illegal or unethical act;
      b Filed a complaint with a government authority or a "suit" against you or any other insured in which damages are claimed;
      c Testified against you or any other insured at a legal proceeding; or
      d Notified a proper authority of any aspect of your business operation which is illegal;
   6. Coercing an "employee" to commit an unlawful act or omission within the scope of that person's employment;
   7. Work-related harassment;
   8. Employment-related libel, slander, invasion or privacy, defamation or humiliation; or
   9. Other work-related verbal, physical, mental or emotional abuse arising from "discrimination".

The Regulatory Maze – Trapping the Uninformed

A. The problem with Jurisdictional Authority (Enforcement)

THE MAZE

Law	**Guidelines**
• **Congress**	• **Executive Branch Agencies**
• **Federal Courts**	• **EEOC**
• **State Courts**	• **Labor Department**

B. General Remedies

1. Title VII and Americans with Disabilities Act
   a. Wide-ranging injunctive relief such as mandatory promotions, hiring and promotion quotas

   b. Back-pay

   c. Attorney's fees

   d. Intentional discrimination results in **compensatory** and/or **punitive** damages up to $300,000. (Sliding scale from $50,000 to $300,000 based on number of total employees)

2. Equal Pay Act
   a. Back-pay

   b. "Liquidated damages" equal to the amount of back-pay

   c. No compensatory or punitive damages

C. Benchmark Employment Practices – Case Developments

1. Burden of Proof

a. Plaintiff must go beyond proving that an employer's stated legal reason for its actions were improper. Must also prove that bias was the employer's motivating factor. St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742 (1993), the 5/4 decision was a reframing of the standards of job bias set in 1973.

Two Million Dollar Jury Verdict Upheld in Disability Case

The Third Circuit Court of Appeals held that the cap on damages for claims filed under the Americans with Disabilities Act (ADA) did not apply to a $2,000,000 compensatory damages verdict awarded by a jury that did not apportion the damages amount between the plaintiff's state and federal claims. In Gagliardo v. Connaught Laboratories, Inc., the plaintiff, who suffered from MS, sued her employer for disability discrimination under the ADA and Pennsylvania Human Rights Act after the company fired her. The case was tried by a jury, who awarded her $2,000,000 in compensatory damages and $500,000 in punitive damages. The judge reduced the punitive damages award to $300,000 in accordance with the damages cap set forth in 42 USC § 1981 (a), but refused to lower the compensatory damages amount. (2002)

b. In Dessert Palace, Inc. v. Costa, the U.S. Supreme Court ruled that a plaintiff in a mixed motive discrimination case does not have to present direct evidence of discrimination to get the case to the jury. A mixed case is one where it is argued that the employer had both a legitimate and discriminatory reason for making an employment decision. The plaintiff must still prove that an unlawful employment practice was the motivating factor in the action taken. The employer can limit or eliminate damages by showing the complained of action would have been taken in the absence of the impermissible motivating factor. This solves a split among the federal appeals courts.

2. Employee Misconduct as Defense

    a. In an opinion dealing with one of the most contentious issues in employment discrimination law, the U.S. Supreme Court has ruled unanimously that employee lawsuits under the anti-discrimination laws cannot be completely dismissed just because the employer discovers prior wrongdoing by the employee that would justify termination. McKennon v. Nashville Banner Pub. Co., 115 S. Ct. 879 (1995). The court reasoned that the remedial scheme behind Title VII and the ADEA would not be served if an employee's prior wrongdoing shielded an employer that had violated those laws. However, the Court ruled that the employer and courts do not have to disregard evidence of wrongdoing. The Court held that employers who discover and prove employee misconduct should not have to reinstate or pay future damages to such employees, but they can be liable for back pay.

3. Reverse Discrimination

    a. Courts have refused to allow reverse discrimination in the absence of direct evidence or intentional discrimination.

    b. Definition: the exclusion of a member of a majority class not commonly discriminated against, to compensate for the traditional discrimination against a minority member. For example, management positions traditionally filled by members of the white race would be filled by African Americans, Asians, or Hispanics to the exclusion of any white candidates, even if the latter had seniority or were better qualified by reason of education, expertise, or temperament. It has been contended that such treatment, broadly known as affirmative action, is in violation of the equal protection clause of the Fourteenth Amendment

of the United States Constitution, as well as Title VII of the Civil Rights Act of 1964.

c. A reverse discrimination plaintiff must present evidence of background circumstances supporting the suspicion that the defendant is the unusual employer that discriminates against the majority. Murray v. Thistledown Racing Club, Inc., 770 F.2d 63 (6th Cir. 1985)., Harding v. Gray, 9 F.3d 150, 154 (D.C. Cir. 1993)

4. Individual Liability under Title VII

a. Federal Court Split – Title VII defines an "employer" to include "any agent" of an employer.

b. If facts support that a supervisor exercised sufficient supervisory authority over an employee to qualify as an "employer" under Title VII, that supervisor may be liable for any actionable discrimination in which he or she personally participated. Johnson v. University Surgical Group Assocs. Of Cincinnati, 871 F. Supp. 979 (S.D. Ohio 1994)

c. Even with split in federal courts, don't overlook the exposure!

5. Constructive Discharge

a. Majority Rule- In order to establish a claim for constructive discharge an employee does not have to show that the employer deliberately intended that the employee quit before the employer is liable.

b. The test is a "reasonable foreseeable consequence." Is there showing that the employer "made working conditions so difficult that a reasonable person would feel compelled to resign." Rupp v. Purolator Courier Corp., 45 F. 3d 440 (10th Cir. 1994)

What Constitutes A Supervisor?

The 2nd U.S. Circuit Court of Appeals in Mack v. Otis Elevator Co., on April 11, 2003 expanded the definition of a "supervisor" for the purpose of discrimination claims. In its ruling the court took the issue of "special dominance" over the other employees at a work site to be the controlling factor.

The 7th Circuit (Illinois) more concisely defined a supervisor as anyone with the authority to "hire, fire, demote, promote, transfer or discipline" an employee.

The case in the 2nd Circuit, will make it easier for employees to prevail against employers for the actions of supervisors. The case could very well create a "new class" of supervisors for whom employers are responsible. This action may well push the Supreme Court on to settle the definition of a Supervisor in the workplace. Previous Supreme Court decisions have dealt with the issue of the employers' vicarious liability for supervisors but not what constitutes a supervisor. (See Burlington Industries v. Ellerth and Faragher v. City of Boca Raton, 1988) – See Below

BURLINGTON INDUSTRIES v. ELLERTH

Kimberly Ellerth, a salesperson at one of Burlington's divisions, filed a Title VII action alleging that she had been sexually harassed which forced her constructive discharge. The harassing behavior was that of her supervisor who engaged in repeated boorish and offensive remarks and gestures, including threats to deny her tangible job benefits.

The Court held that under Title VII, *an employee who refuses the unwelcome and threatening sexual advances of a supervisor, yet suffers no adverse, tangible job consequences, may recover against the employer without showing the employer is negligent or otherwise at fault for the supervisor's actions, but the employer may interpose an affirmative defense*. The Court's specific language in its holding in Burlington is exactly the same as that in Faragher.

The Court takes the opportunity in this case to clarify its view regarding the distinction between quid pro quo and environmental harassment. Following mention of these concepts in the landmark Meritor Savings Bank v. Vincent

(1986) the lower courts and the EEOC, for the most part, followed the principle that an employer was subject to vicarious liability in the case of *quid pro quo* sexual harassment, but not in the case of environmental harassment. Thus, plaintiffs attempted to stretch the concept of *quid pro quo* harassment in order to reap the benefits of vicarious liability.

Ellerth did so in fashioning the question before the Court. The Court categorically rejected the notion that the *quid pro quo*/hostile environment distinction has any utility beyond making a rough demarcation between cases in which threats are carried out and those where they are not or where they are absent altogether.

In Meritor, according to the Court, the distinction was not discussed for its bearing upon an employer's liability for an employee's discrimination. As the cases developed after Meritor the standard of employer liability usually turned on which type of harassment occurred. In the Burlington case, the Court concluded that unfulfilled threats ought to be characterized as a hostile work environment claim, which requires a showing of severe or pervasive conduct. The issue of vicarious liability still remains.

The Court reviewed a number of imputed liability issues (scope of employment, master-servant, "apparent authority" standard, "aided in the agency relation" standard). Ultimately, the Court believed the concept of a "tangible employment action" is central.

"[W]e think it prudent to import the concept of a tangible employment action for resolution of the vicarious liability issue we consider here. A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities or a decision causing a significant change in benefits."

For Title VII purposes, a tangible employment action taken by the supervisor becomes the act of the employer. The Court states that it would be implausible to interpret agency principles to allow an employer to escape liability. Stated in a different way, where a tangible employment action occurs, the Court is adopting the old quid pro quo vicarious liability standard.

Of course, the more difficult and interesting question is whether the agency relation aids in commission of supervisor harassment, which does not culminate in a tangible employment action. The Court recognized that on the one

hand, a supervisor's power and authority invests his or her harassing conduct with a particular threatening character, "and in a sense, a supervisor always is aided by the agency relation." Quoting Justice Marshall in Meritor: "It is precisely because the supervisor is understood to be clothed with the employer's authority that he is able to impose unwelcome sexual conduct on subordinates." On the other hand, supervisors can commit harassing acts that are the same as a co-worker might commit and where the supervisor's status makes no difference. The Court then adopts the vicarious liability standard for supervisor's acts even where no tangible employment action results.

The Court concludes: "In order to accommodate the agency principles of vicarious liability for harm caused by misuse of supervisory authority, as well as Title VII's equally basic policies of encouraging forethought by employers and saving action by objecting employees . . . ." and goes on to adopt the identical holding as that expressed in Faragher. There is vicarious liability for all sexually harassing acts of supervisors, but an affirmative defense where those harassing acts do not culminate in a tangible employment action.

One final point: It is important to keep in mind that these decisions of the Supreme Court interpret federal statutes. Civil actions under California law, e.g., under Fair Employment and Housing Act, are not affected by these decisions. However, we might anticipate that in the future California courts will follow the lead of the U.S. Supreme Court in defining sexual harassment and the scope of employer liability.

III. Five Basic Unlawful Discrimination Theories

A. Disparate (Different/Unequal) Treatment (Intentional) - similarly situated or equally qualified persons receive unequal treatment.

B. Disparate Impact ("Fair in form, discriminating in operation") – A practice which may appear to be facially neutral, but its application falls harder on a protected group.

C. Stereotype Class Assumptions

D. Failure To Accommodate Religion Or Disability

E. Retaliation

1. Title VII prohibits employers from discriminating against their employees or applicants because those individuals have opposed any practice prohibited by Title VII, filed a Title VII charge, or participated in any way in a Title VII proceeding. (42 U.S.C. #2000 (e)- 2 (a) (1988).

Winning and Losing

48% of Plaintiffs Win

Average Defense Cost - $107,000

Win or Loss?

Disparate Treatment

Because of the difficulty in proving discrimination, disparate treatment can be proven with "direct evidence" or "indirect evidence". The Supreme Court established a four-part test when no "direct evidence" is available. The four parts are:

1. The employee or applicant is a member of a protected class by law;
2. The employee or applicant applied for or held a position for which the employee/applicant is qualified;
3. The employee or applicant was adversely affected by an employment decision; and
4. That other persons having the same qualifications and not members of a protected class were not adversely affected by the employer's action.

Proof of the four parts establishes a presumption of discrimination requiring the employer to offer evidence to rebut the presumption. (see benchmark case McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973))

Disparate Impact

Under this theory an employer can be held liable for discrimination even in the absence of an intent to discriminate. The Supreme Court has ruled that employment practices under Title VII must not only be fair in form, they must be non-discriminatory in operation. The federal court test for disparate treatment is:

1. The plaintiff must prove the employer uses a particular practice that causes disparate impact on the basis of race, color, religion, sex or national origin. (objective or subjective criteria)
2. The plaintiff must show that the practices have an adverse impact that falls more heavily upon members of a protected class than they do on those not in a protected class.
3. The plaintiff must show that the challenged practice caused a disparity.

Success in a disparate impact case hinges on a practice that does not have a justifiable "business necessity" defense. (see benchmark cases Griggs v. Duke Power, 401 U.S. 424 (1971), Ward's Cove Packing Co. v. Antonio, 490 U.S. 642 (1989) and Pietras v. Board of Fire Commissioners, 180 F3d 468 (2nd Cir. 1999))

IV. Scope of Regulation

A. The Age Discrimination in Employment Act

1. Protection for those forty (40) and over if employer employs twenty (20) or more.

2. Some states have statutes prohibiting age discrimination against all persons over the age of eighteen (18) or against any person.

3. Disparate Treatment- Focus is on whether an individual was treated differently from other similarly situated individuals because of his/her membership in a protected class.

    a. Requires proof of intent by direct or circumstantial evidence.

    b. ADEA covers disparate treatment.

4. Disparate Impact - Liability predicated on proof that a facially-neutral employment practice disproportionately affects a protected group.

    a. Does not require proof of discrimination

    b. Prior to the Supreme Court decision in March, 2005 ADEA did not recognize disparate impact. In Smith v. Jackson, MS., 2005 WL 711605 in a 5 - 3 decision the Court ruled the ADEA authorizes disparate impact claims. The application is narrower than that which is applied in a Title VII

Civil Rights claim. Reasonable factors other than age can be considered to preclude liability. **The employee must isolate and identify the specific employment practice responsible for the age-based discrimination**. In this case the plaintiff was not successful because he was unable to isolate and identify as required.

5. Willful Violation of ADEA (Double Damages)

    a. Liquidated damages equal to pecuniary losses.

    b. What is "willful"? Acting with knowing or reckless disregard.

Mathis v. Phillips Chevrolet, Inc.
U.S. App. LEXIS 21879 (7TH Cir. 2001).

In Mathis v Phillips Chevrolet,Inc. the Seventh Circuit Court of Appeals affirmed a district court ruling that an automobile dealership which could not demonstrate that it trained its hiring managers about age discrimination was liable for $50,000 in liquidated damages for its "willful" violation of the Age Discrimination in Employment Act (ADEA) (in addition to $50,000 in compensatory damages).

To avoid liability for liquidated damages, employers should follow the advice offered by the Supreme Court in its Kolstad ruling about punitive damages. Briefly stated, an ***employer has an affirmative defense to prove that it has made ongoing and effective efforts to avoid harassment and discrimination. Those efforts can include supervisory training; employee education about antidiscrimination; implementation of effective problem-resolution; posting of the employer's zero-tolerance policy prohibiting harassment; and additional preventive programs.***

Supreme Court Road Blocks Employers' Defense Under ADEA

In Reeves v. Sandersons Plumbing Products (2002) the Supreme Court, in a unanimous decision, made it more difficult to defend against ADEA lawsuits by ruling that an employer can be held liable even if the employer claims a legitimate, non-discriminatory reason for terminating a protected employee. The court stated that an employee must carry the burden on two points to succeed.

First, the employee must present a *prima facia* case of discrimination.

Second, the employee must offer sufficient evidence for a reasonable jury to decide the reason for dismissal was a pretext (motive) for discrimination.

The court indicated the mixed reason issue depends on a vary specific set of facts. In the instant case the court said "in appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose."

B. Sex Discrimination – Title VII Protection

1. Pregnancy Related Issues- No adverse action can be taken because of pregnancy, childbirth or related medical condition. Must treat as any other similarly - situated employee as to their ability or inability to work. (Title VII – as amended, 1978)

2. Paramours Advantage – Favoritism because of a romantic relationship is not a Title VII action. Dirksen v. City of Springfield, 842 F. Supp. 1117 (C.D. 11. 1994). However, the ruling rested on a boss who generally required women to provide sexual favors for promotion. A single federal court has disagreed with the majority.

3. Inadequate Mentoring – Where male employees are given guidance and support not available to women employees

there is a violation. Women must be provided the same career-enhancing opportunities. (Jensvold v. Shalala, 829 F. Supp. 131 (D. Md. 1993)

4. Sexual Harassment

    a. Women do not need to show severe psychological injury to prevail. It is sufficient if the workplace is an abusive working environment because of sexual ridicule, intimidation or insult. Harris v. Forklift Systems, Inc. 114 S. Ct. 367 (1993) and Meritor Savings Bank FSB v. Vinson, 477 U.S., 57 (1986).

    b. Plaintiff need only show a threat of economic loss were she not to comply with the supervisor's sexual demands. (Karibian v. Columbia University, 14 F. 3d 773 (2nd Cir. 1993)

    c. Same Sex Harassment - Split by Districts

5. Remedial Action by Employer - Mitigation

    a. Must be prompt and effective

    b. Well-defined policy against sexual harassment communicated to all employees.

SEX DISCRIMINATION

INSULTS-INNUENDOES-ABUSIVE ENVIRONMENT

Remedial Action

Prompt Mitigating Action – Investigate

Meet With Parties – Non-Punitive Transfers

In Oncale v. Sundowner Offshore Services Inc., the Supreme Court identified three ways that a same-sex harassment plaintiff could prevail:

1) he or she could present evidence that the alleged harasser was homosexual and therefore motivated by sexual desire;

2) he or she could present evidence that the harasser was motivated by a "general hostility" to men (or women if the plaintiff is a women) in the workplace;

3) he or she could present evidence of differential treatment of the sexes in the workplaces in which both sexes were present.

C. Race Discrimination – National Origin – Title VII

1. English Only Rule or Dual Language Rule
2. Lack of Command of English Language
3. Disparate Treatment vs. Impact
4. Grooming and Dress

D. Reduction in Force

1. Worker Adjustment and Retraining Notification Act (WARN)
a. Employers with 100 plus full-time employees or 100 plus who work a combined total of at least 4,000 non-overtime hours per week.
b. Various notification rules are stipulated by the law.

E. Americans With Disabilities Act (July 26, 1992, 1994)

1. Title 1 – Addresses disability-based discrimination against "qualified" persons with a disability.

2. What organizations must comply? 15 or more employees

3. Wide Scope – Hiring/Termination/Promotion/Discipline – <u>All Employment Practices</u>

4. Who is an individual with a disability

    a. Physical or mental impairment that substantially limits one or more major life activity.
    b. Record of such an impairment
    c. Regarded as having such an impairment
    d. Must be otherwise qualified for a particular job.

5. Statutorily Excluded Conditions

- Homosexuality
- Bisexuality
- Transvestism
- Transsexualism
- Pedophilia
- Kleptomania
- Pyromania
- Exhibitionism
- Voyeurism
- Gender identity disorders
- Sexual behavior disorders
- Compulsive gambling
- Psychoactive substance disorders (current illegal drug use)

6. The Burning Issue – What is a disability protected by ADA? Disability vs. ADA Disability

    a. No formal definition in the law

b. Case-by-case legal decisions defining impairments which limit one or more "major life activity"
c. EEOC identified non-protected conditions

7. Substantial Limitation – Impairment which prevents an individual from performing a "major life activity" or when the condition significantly restricts an individual's ability to perform the activity.

8. "Qualified Individual" – Must be able to complete essential functions of the job.

   a. Regular and dependable attendance is a valid requirement. Jackson v. Veterans Admin., 22F. 3d 277 (11th Cir. 1994). Employee with numerous sporadic absences was not "otherwise qualified."

   b. Complete disability which precludes an individual from working in any job is not protected. Larkins v. Ciba Vision Corp., 858 F. Supp. 1572 (N.D. Ga 1994)

   c. Employer can adopt a standard that employees not pose a direct threat to their own safety/health or the safety of others. (Primary areas addressed by case law are in the health care industry, motor vehicles/equipment operations and public safety jobs.) Bradley v. Univ. of Texas M.D. Anderson Cancer Ctr., 3 F. 3d 922 (5th Cir. 1993), HIV- infected healthcare worker in surgical unit poses a direct threat to the health of others.

9. Reasonable Accommodations

   The term reasonable accommodation means:

   (i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or

(ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or

(iii) Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.

Examples of reasonable accommodations may include, but are not limited to:

(i) Making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(ii) Job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities.

WHO IS ADA DISABLED?

1. Person with a physical/mental impairment that substantially limits one or more "major life activities".

2. Person with a record of such impairment.

3. Person regarded by employer as being disabled.

YES	NO
Cancer	**Broken Bones**
Heart Disease	**Temp. Non-Chronic Illness**
AIDS (HIV Positive)	**Temp. Recovery from**
Diabetes	**Injury/Surgery**
TB – MS – MD	**Obesity**
	Pregnancy

"MAJOR LIFE ACTIVITIES"

Walking	Sitting
Breathing	Standing
Seeing	Lifting
Hearing	Reading
Learning	Caring for Oneself
Working	Performing Manual Tasks
Speaking	

1) Harper v. Virginia Electric & Power Co., 831 F. Supp. 1300 (E.D. VA 1993). Employee requested that a complete floor of his employer's offices be made smoke-free because he had bronchial asthma. The employer refused but did accommodate by separating smoking and nonsmoking employees and making certain other ventilation improvements. The court ruled that ADA imposes no duty to adopt a requested accommodation when the disabled employee is capable of performing all essential job functions without accommodation. *Plaintiff must show that he was unable to perform in the absence of a smoke-free building*.

2) Buckingham v. United States, 998 F. 2d. 735 (9th Cir. 1993). A postal worker with AIDS requested a transfer to work a location closer to a clinic where he could get better medical treatment. The court ruled the employer must make reasonable accommodations to enable the employee to obtain treatment for their disability. *The employer may not interfere with action or inaction, with the employee's efforts to lead a normal life*.

Life Activities

On January 8, 2002, the United States Supreme Court issued a unanimous opinion that will further hinder individuals asserting disability discrimination claims against employers under the Americans with Disabilities Act ("ADA"). In **Toyota Motor Manufacturing, Kentucky, Inc. v. Williams** ("Toyota Motor"). The Court limited the term "disability" to include only those which affect daily life activities rather than those activities which only are necessary to perform a certain job. "When addressing the major life activity of performing manual tasks, the central inquiry must be whether the claimant is unable to perform the variety of tasks central to most people's daily lives, not whether the claimant is unable to perform the tasks associated with [the claimant's] specific job," the Court stated. As examples of such tasks, the Court referred to bathing, brushing one's teeth, and ability to perform household chores.

Seniority-Based Policy

U.S. Supreme Court rules ADA does not require an employer to violate Seniority Based Policy.

In U.S Airways v. Barnett, U.S. No. 00-1250 (5-4 decision) the High Court held the ADA ordinarily does not require an employer to violate a seniority-based policy to transfer a qualified disabled employee to another position as a reasonable accommodation. The Court ruled that the plaintiff has the burden of proving a requested accommodation is reasonable. If an accommodation is on its face unreasonable, the employee must establish special circumstances that make the otherwise unreasonable accommodation reasonable.

Indefinite Leave Not Reasonable

The Eleventh Circuit Court of Appeals dismissed a former employee's claim under ADA because his request for indefinite leave was not a reasonable accommodation. (Wood v. Green, 2003)

Light Duty Requests – Caution!!!

- Essential job function
- Restructuring or Marginal function

- Undue Hardship

    1. Impact on other employees
    2. Pure cost-benefit analysis is not the test
    3. Milton v. Scrivner, Inc. 53 F3d. 1118 (10th Cir. 1995). Court ruled that ADA does not require accommodation that would result in other employees having to work harder or longer hours.
    4. Negative morale impact alone is not an "undue hardship".

- EEOC – Reasonable Accommodation Fact Sheet (Feb. 4, 2002) (www.eeoc.gov)

- Medical Exams or Inquiries – Caution!

    a. "Disability-related" questions – Applicant cannot be asked about the existence, nature or severity of a disability
    b. Post-offer medical exam allowed if required of all in same job category
    c. Prior occupational injuries
    d. Rejection must be "job related and consistent with business necessity." (42 U.S.C. 12112 Ch). Stringent-assessment of risk based on individualized, objective evidence.

- Substance Abuse and ADA

    a. Limited protection for alcoholism and drug addiction
    b. Current illegal drug use does not qualify.
    c. Addiction to lawfully used drugs is protected.

Undue Hardship

An Action Requiring Significant Difficulty or Expense in Light of Seven (7) Factors;

1. Nature and cost
2. Financial resources of the employer (facility)
3. Number of employees at the facility in question
4. Effect on expenses and resources (impact) on the facility
5. Overall size of employer
6. Type of operations to include composition, structure and functions of the work force along with geographic, administrative or fiscal relationship.

Reasonable Accommodations

Modifications or adjustments, **short of undue hardship**, that enable applicants and employees with disabilities to have equal opportunities.

Equal Opportunity In:

- Application and Employee Selection Process
- Benefits and Privileges of Employment
- Workplace (Station) Access

Cases

1. "Qualified Individual" must request accommodation. **Miller v. National Casualty Co**., (1995 U.S App. Lexis 20-90, 8th Cir., July, 1995)
2. Employer must know about Disability to be found liable. **RGH v. Abbot Laboratories**, 4 A.D. Cts, (BNA) 289 N.D. 111. 1995)
3. "Qualified Individual" does not have right to accommodation of choice. Employer must act in "**Good Faith**" in responding to accommodation requests and action. No timelines set by ADA. **Vande Zande v. Wisconsin Dept. of Admin**., (851 F. Supp 353, W.D. Wis., 1994)
4. Employer not required to remove essential functions from job to accommodate an individual with a disability. **Bolstein v. Reich**, 3 A.D. Cts. (BNA) 1761 (D.D.C. 1995)

5. Employer not required to hire someone to perform essential job functions that a disabled employee is unable to perform**. Johnston v. Morrison, Inc**. 849 F. Supp. 777 (N.D Ala. 1994).
6. Employer not required to give indefinite leave to enable an employee with a disability to overcome limitations that prevents employee from performing his job. **Myers v. Hose**. (50 F. 3rd 278) 4th Cir. 1995) Additional leave. EEOC not in agreement on blanket policy. What about FMLA?
7. Reassignment to a vacant position if employee is qualified is expressly recognized. 42 U.S.C. 12111 (9) (B) (Supp. V 1993). Not a make position requirement. Cannot violate rights of other employees.

e. Rehabilitated employees or employees inn a current rehabilitation program no longer using illegal drugs are protected. McDaniel v. Mississippi Baptist Medical Center, 869 F. Supp. 445 (S.D. Miss. 1994).

f. Alcoholic is not protected if intoxicated on the job or condition adversely affects productivity. 42 U.S.C. § 12114 (c) (Supp. V. 1993)

g. Distinction – Action based on alcoholism per sevs. Employment action based on alcohol-related misconduct.

- ADA Damages
    - Actual
    - Punitive
    - Future Earnings
- Title 111 – Public Access Issue
    - Mandates equal access to public areas owned, operated or leased by any entity except those controlled by religious organizations or private clubs. Government covered by Title 11. (Property Exposure)

- Commercial property coverage forms typically read **"we will not pay for loss or damage caused directly or indirectly by the enforcement of any ordinance or law regulating the construction or repair of any property."**

- Since ADA is a federal law, exclusions such as the above apply.

- Add Commercial Property Program Ordinance or Law (ISO-CP 04 05) Part "C". Rule 38.D – Division Five, ISO-CLM.

- BOP- "Ordinance or Law Coverage" (ISO-BP 04 46). Choice of Protection. Coverage 1 – Loss to Undamaged Portion of Building; Coverage 2 – Demolition Cost Coverage or; both.

- Problem – How much?

F. Family and Medical Leave Act (1993)

1. Applies to employers with 50 or more employees

2. "**Eligible Employee**" is an individual who has been employed for at least 12 months/1,250 hours. (Does not have to be consecutive).

3. Employee Rights and Obligations

   a. Unpaid leave for 12 workweeks during any 12 month period. Twelve month period can be defined in one of four methods.
   b. Group health plan must be continued at same benefit level and under same conditions.
   c. Reinstatement at the end of leave unless "**Key Employee**" exception applies.
   d. Provide 30 day notice if practicable or otherwise as soon as practicable.

4. Qualifying Situations
    a. Newborn Child – Adoption/Foster Care
    b. Serious health condition (Spouse, Son, Self, Daughter, Parent)

5. Intermittent Leave

6. Damages and Fines

G. Third-Party Coverage – Growing Exposure

1. Claims made by non-employees such as customers who allege an employee engaged in wrongful conduct, normally sexual harassment/discrimination or racial discrimination. [The benchmark case was against Denny's Restaurant]

2. Typical EPL policy language, without endorsement, does not extend this coverage and "harassment" and "discrimination" are specifically excluded on a CGL by CG 21 47 or the equivalent in non-ISO forms.

3. Third-party actions can be a two edged sword – Employee to customer or customer to employee.

Sexual Harassment by Customers

A Pizza Hut franchise recently was held liable for the sexual harassment of a Pizza Hut waitress by two customers. In Lockard v. Pizza Hut Inc., the United States Court of Appeals for the Tenth Circuit affirmed a jury's award to the waitress of $200,000 in compensatory damages. This decision could signal a significant expansion of liability for employers operating in service industries.

The appellate court reasoned that employers who *"condone or tolerate the creation of a hostile work environment should be held liable regardless of whether the environment was created by a co-worker or a customer."* After the waitress-plaintiff requested to be removed from the customers' table, management ordered the waitress to continue serving the customers. When the waitress-plaintiff subsequently was "grabbed sexually," the franchisee became liable because it had "the knowledge and means" to prevent the incident. Thus, management should treat all such allegations as very serious, warranting prompt investigation and appropriate preventive or remedial actions.

The parent franchisor was not held liable as there was no evidence (1) that it played any role in implementing or carrying out the policies and procedures of the franchisee, (2) that it controlled the day-to-day employment decisions for the franchisee, (3) that it made final employment decisions for the franchisee, or (4) as to the degree of interrelatedness between the franchisor and franchisee.

V. Managing the Exposures

A. Risk Management Plan – Document Plans

1. Uniform Employment Application (watch the questions!)
2. Specific and Complete Job Descriptions
3. Personnel Manual
4. Provide consistent management positions.

a. Establish required/acceptable conduct prior to a problem arising. (harassment, discrimination, termination, workplace behavior).
b. Describe procedure for employees to use in the event of a complaint.
c. Communication company policy on employee benefits.
d. Post mandated federal, state or local governmental notices.
e. Make sure manual is consistent with bylaws, board policy and other organizational documents.
f. Have your manual reviewed and edited by an experienced, full-time labor law attorney.

5. Uniform and Complete Personnel Files

a. Performance is a KEY issue!
b. Formal and honest review based on established standards that have been communicated in advance

6. Training and Policy Reinforcement Materials/Meetings

VI. Employment Practices Liability Underwriting and Insurance

A. The Underwriting Mix Factors

1. Hot Five Exposure States: CA, IL, MI, NJ, TX
2. Standard Industry Code
3. Employee Census
4. Financial Condition
5. Prior Claims or Complaints
6. Employment Practices Policy/Manual
7. Turnover/Termination Ratio (3-5 year period)
8. Re-Engineering/Layoff Plans – Past Actions
9. Historical Background of Organization (Business Philosophy and Culture)
10. Reliance on Psychological Profiling of Applicants or Employees

B. The Product – Structure

1. Stand Alone or Add On Coverage?

THE GOOD AND THE BAD
Stand Alone EPLI

GOOD	BAD
Generally Broader Coverage	An Additional Policy
Rick Management/Loss Prevention Services	Higher Cost
Easy to Design Self-insurance Options	An Additional Claim Philosophy
No Shared Limit	
Easy to Design Defense/Attorney Option	

Added to D & O

GOOD	BAD
Lower Cost	Shared Limit
Single Claim Philosophy	Coverage Not as Broad
One Less Liability Policy/Easy to Administer	

Added to CGL or Umbrella

GOOD	BAD
Lower Cost	Coverage Not as Broad
One less Policy/Easy to Administer	Different Triggers
Single Claim Philosophy	No Defense Option
Multiple policies provide the possibility of stacking limits/Good or Bad?	

C. The Product – Marketplace Opportunities

1. ISO – Employment-Related Practices Liability Coverage Form (EP 00 01 02)
2. Proprietary Admitted Policies
3. Proprietary Non-Admitted Policies

D. Coverage Analysis of Key Policy Provisions- ISO EP 00 01 02

1. Insuring Agreement

    a. Duty to pay based on "**legally obligated to pay**" language
    b. Duty to defend any "suit"
    c. Consent to settle condition
    d. Coverage and defense within policy limits
    e. "Injury" must take place in "Coverage Territory"
    f. Offense arises out of "injury" after Retro Date
    g. Claim first made during the policy period
    h. Thirty (30) day automatic Extended Reporting Period
        - Except if covered by other insurance
        - Even if "other coverage" limits are exhausted
    i. Continuous "injury" to same person is single claim as first reported

2. Exclusions
    a. Criminal, Fraudulent or Malicious Acts (Any insured)
    b. Contractual Liability
    c. Workers Compensation and/or Similar Laws
    d. Violation Of Laws Applicable to Employers (With Exceptions)
        - Title VII
        - ADA
        - ADEA
        - EPA
        - Pregnancy Discrimination Act of 1978
        - Immigration Reform Control Act of 1986
        - FMLA
        - Similar State or Local Statutes, Rules or Regulations
        - Any "claim" for retaliatory action

    e. Strikes And Lockouts

3. Supplementary Payments

    a. Pre-judgment interest within limits
    b. Post-judgment interest within limits

4. Section II – Who is an Insured

a. As declared in the Declarations:

- Individual and spouse
- Partnership or joint venture (partners and members)
- Limited liability company (members and managers)
- Organizations not a partnership, joint venture or limited liability company ("executive officers" and directors)

b. Named insured's "employees"
c. Named insured's former "employees" (unless otherwise excluded) only for offenses while employed

However, this insurance does not apply to "injury" arising out of failure to comply with any accommodations for the disabled required of you, or any expenses incurred as the result of physical modifications made to accommodate any person pursuant to ADA or similar state or local statutes, rules or regulations to the extent that they prescribe responsibilities or duties concerning the same acts or omissions.

Caution

Watch out for punitive damages exclusions. A Rand Corporation study on employment related verdicts found that punitive damages were awarded 17% of the time. [Mean amount of $2,689,003 and the median amount of $194,180.] If punitive coverage is buy-back, watch out for a sublimit.

To obtain coverage in jurisdictions not allowing punitive damages to be paid by an insurance contract the policy must have **most favored jurisdiction** language. That will generally allow payment if one of four situations exists:

1. Location where the insurer is domiciled or maintains its principal place of business.
2. Location where the act giving rise to the award occurred.
3. Locations where the insured is incorporated or maintains its principal place of business.
4. Location where damages were awarded.

Be sure to advise the client that even with this language there may be legal action designed to bar the payment of punitive damages. It is still a sound purchase.

Wage & Hour Law Violations

Many policies have exclusions for "**Violation of Laws Applicable to Employers**" and then provide some give-backs. One key law not normally given back is the Fair Labor Standards Act (FLSA) which addresses wage and hour rules on overtime pay for nonexempt employees. Employers with large numbers of nonexempt employees have been hit with high damage verdicts. Farmers Insurance got hit for over $90 million for not paying adjusters overtime. Taco Bell was hit with $13 million. U-Haul paid $7.5 million. FLSA was amended favorably for nonexempt employees in 2004. Coverage for this exposure is not likely to be offered. Therefore, employers must know who is and who is not exempt and keep good time records. A disclosure about this gap in protection would be a good idea in both the proposal of coverage and policy delivery letter. The class action aspect is seen to be catastrophic by underwriters. A class action exclusion may also be used to avoid the large wage and hour claim.

d. Until the 90th day for any organization newly acquired or formed with ownership or majority interest except:
    - Partnership
    - Joint venture
    - Limited liability company
    - Prior acts

5. Section IV. – Deductible

    a. Applies to Damages and "Defense Expense"
    b. Company option to pay up front to effect settlement and collect from insured

6. Section V. – Conditions

    a. Bankruptcy
    b. Consent To Settle
    c. Duties In The Event Of A "Claim" Or An Incident That May Result in "Injury"

- Record specifics of claim and date received
- Notification in writing as soon as possible
- Send copies of pertinent documents
- Authorize company to obtain records and information
- Cooperate in investigation, settlement and/or defense
- Assist company in the enforcement of any rights against other parties for liability to insured
- No voluntary payment, assumption or expense without written consent
- Incident report for actions which may result in "injury" (not considered notice of "claim")

7. Other Insurance

    a. Primary and shares with other primary specifically designed to provide coverage arising out of an "injury". (Equal shares or by limits)

8. Premium

9. Separation Of Insureds

10. Transfers Of Rights Of Recovery Against Others To Us

11. If You Are Permitted To Select Defense Counsel

    a. Mutual agreement or court order
    b. Company retains right to settle, approve or disapprove of settlement and appeal
    c. Insured must continue to follow required duties condition and direct defense counsel to inform and cooperate with company counsel
    d. If defense is under a reservation of rights basis, insured must keep record of "defense expenses" for purpose of allocation

12. Transfer Of Duties When Limit Of Insurance Is Used Up

13. Section VI- Extended Reporting Period (ERP)

    a. Right in event of cancellation or non renewal for any reason
    b. Renewal or replacement with insurance that has Retro Date later than existing policy or to an occurrence policy
    c. Three year period by endorsement for additional premium
    d. "Injury" must have occurred during policy period and after any Retro-date
    e. Written request for ERP must be within 30 days after policy expiration or the effective date of cancellation, whichever comes first
    f. ERP not effective (even if requested) unless:
        - Additional premium is paid
        - All other premiums or deductible amounts due are paid

    g. ERP may not be cancelled
    h. Premium determination:
        - Under rules and rates of company
        - Will not exceed 200% of the existing policy premium
        - Provides Supplemental Limit of Insurance equal to dollar amount shown in the Declarations in effect at the end of the policy period

E. Non ISO Policy Form Issues For Consideration

1. Indemnification Form
2. Separate "Legal Expense Reimbursement" limit
3. Coinsurance
4. Punitive Damage Exclusion
5. Application As Warranty
6. Awareness Provision or Condition (May be within insuring agreement)
7. Counterclaim Expense
8. Limited Definition of Insured

Appendix A

EEOC Statistics

The table below reflects EEOC enforcement suits filed and resolved in the federal district courts over the past ten years. The table divides the suits by the various statutes enforced by the EEOC and provides aggregate data on monetary relief obtained. *Note that many EEOC suits are brought on behalf of multiple aggrieved individuals.* The lawsuits are filed under the various statutes enforced by the Commission:

	FY 1997	FY 1998	FY 1999	FY 2000	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007
All Suits Filed	332	414	465	329	428	370	400	421	416	403	362
Merits Suits	300	374	438	292	388	342	366	378	381	371	336
Suits with Title VII Claims	182	254	341	236	289	268	298	297	295	294	268
Suits with ADA Claims	83	87	55	29	66	44	49	46	49	42	46
Suits with ADEA Claims	42	44	47	33	42	39	27	46	44	50	32
Suits with EPA Claims	4	10	9	9	14	12	12	5	13	10	7
Suits filed under multiple statutes[1]	11	19	13	14	19	19	19	14	17	22	16
Subpoena and Preliminary Relief Actions	32	40	27	37	40	28	34	43	35	32	26
All Resolutions	243	331	350	440	362	381	381	380	378	418	387
Merits Suits	214	295	320	407	321	351	351	346	338	383	364
Suits with Title VII Claims	132	189	211	315	232	266	275	277	259	295	297
Suits with ADA Claims	49	73	74	53	48	65	50	43	41	50	40
Suits with ADEA Claims	38	38	51	41	39	26	35	34	45	50	35
Suits with EPA Claims	7	4	7	6	15	9	13	9	12	8	14
Suits filed under multiple statutes	12	9	22	8	12	15	21	14	18	17	18
Subpoena and Preliminary Relief Actions	29	36	30	33	41	30	30	34	40	35	23
Monetary Benefits ($ in millions)[2]	114.7	95.6	98.7	52.2	49.8	56.2	146.6	168.6	104.8	44.3	54.8

	FY 1997	FY 1998	FY 1999	FY 2000	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007
Title VII	95.0	62.0	49.2	35.0	33.6	29.2	85.1	158.5	98.0	34.3	38.9
ADA	1.1	2.8	2.9	2.9	2.3	15.1	2.3	2.5	3.4	2.8	2.4
ADEA	18.0	29.8	42.8	13.8	3.1	1.4	57.8	5.4	2.4	5.1	3.1
EPA	0.0	0.0	0.0	0.2	0.2	0.2	0.0	0.0	0.0	0.0	0.2
Suits filed under multiple statutes[3]	0.5	1.0	3.8	0.4	10.7	10.3	1.5	2.3	1.0	2.1	10.2

1 Suits filed under multiple statutes are also included in the tally of suits filed under the particular statutes.
2 The sum of the statute benefits in some years will be less than total benefits for the year due to rounding.
3 Monetary benefits recovered in suits filed under multiple statutes are counted separately and are not included in the tally of suits filed under any particular statute.

Note that to improve the clarity and completeness of the data on our litigation activities, we have changed the format for presenting the count of cases filed and resolved by statute. Previously, cases were included in a statute's count only if that statute was the only statute involved. Suits filed under multiple statutes were listed in a separate "concurrent" category. The new format includes suits under each statute alleged, resulting in some suits being counted in more than one statute. There is no longer a concurrent category.

In addition, recent data validation efforts have caused changes in some of the counts, and in the annual amounts of monetary benefits.

Sexual Harassment Charges
EEOC & FEPAs Combined: FY 1997 - FY 2007

The following chart represents the total number of charge receipts filed and resolved under Title VII alleging sexual harassment discrimination as an issue.

The data in the sexual harassment table reflect charges filed with EEOC and the state and local Fair Employment Practices agencies around the country that have a work sharing agreement with the Commission.

The data are compiled by the Office of Research, Information and Planning from data compiled from EEOC's Charge Data System and, from FY 2004 forward, EEOC's Integrated Mission System.

	FY 1997	FY 1998	FY 1999	FY 2000	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007
Receipts	15,889	15,618	15,222	15,836	15,475	14,396	13,566	13,136	12,679	12,025	12,510
% of Charges Filed by Males	11.6%	12.9%	12.1%	13.6%	13.7%	14.9%	14.7%	15.1%	14.3%	15.4%	16.0%
Resolutions	17,333	17,115	16,524	16,726	16,383	15,792	14,534	13,786	12,859	11,936	11,592
Resolutions By Type											
Settlements	1,178	1,218	1,361	1,676	1,568	1,692	1,783	1,646	1,471	1,458	1,571
	6.8%	7.1%	8.2%	10.0%	9.6%	10.7%	12.3%	11.9%	11.4%	12.2%	13.6%
Withdrawals w/Benefits	1,267	1,311	1,299	1,389	1,454	1,235	1,300	1,138	1,146	1,175	1,177
	7.3%	7.7%	7.9%	8.3%	8.9%	7.8%	8.9%	8.3%	8.9%	9.8%	10.2%
Administrative Closures	6,908	6,296	5,412	4,632	4,306	3,957	3,600	3,256	2,808	2,838	2,804
	39.9%	36.8%	32.8%	27.7%	26.3%	25.1%	24.8%	23.6%	21.8%	23.8%	24.2%
No Reasonable Cause	7,172	7,243	7,272	7,370	7,309	7,445	6,703	6,708	6,364	5,668	5,273
	41.4%	42.3%	44.0%	44.1%	44.6%	47.1%	46.1%	48.7%	49.5%	47.5%	45.5%

Reasonable Cause	808	1,047	1,180	1,659	1,746	1,463	1,148	1,037	1,070	797	767
	4.7%	6.1%	7.1%	9.9%	10.7%	9.3%	7.9%	7.5%	8.3%	6.7%	6.6%
Successful Conciliations	298	357	383	524	551	455	350	311	324	253	282
	1.7%	2.1%	2.3%	3.1%	3.4%	2.9%	2.4%	2.3%	2.5%	2.1%	2.4%
Unsuccessful Conciliations	510	690	797	1,135	1,195	1,008	798	726	746	544	485
	2.9%	4.0%	4.8%	6.8%	7.3%	6.4%	5.5%	5.3%	5.8%	4.6%	4.2%
Merit Resolutions	3,253	3,576	3,840	4,724	4,768	4,390	4,231	3,821	3,687	3,430	3,515
	18.8%	20.9%	23.2%	28.2%	29.1%	27.8%	29.1%	27.7%	28.7%	28.7%	30.3%
Monetary Benefits (Millions)*	$49.5	$34.3	$50.3	$54.6	$53.0	$50.3	$50.0	$37.1	$47.9	$48.8	$49.9

Title VII of the Civil Rights Act of 1964 Charges
FY 1997 - FY 2007

The following chart represents the total number of charge receipts filed and resolved under Title VII.

Receipts include all charges filed under Title VII as well as those filed concurrently under the ADA, ADEA, and/or EPA. Therefore, the sum of receipts for all statutes will exceed total charges received.

The data are compiled by the Office of Research, Information and Planning from data reported via the quarterly reconciled Data Summary Reports and compiled from EEOC's Charge Data System and, from FY 2004 forward, EEOC's Integrated Mission System.

	FY 1997	FY 1998	FY 1999	FY 2000	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007
Receipts	58,615	58,124	57,582	59,588	59,631	61,459	59,075	58,328	55,976	56,155	61,159
Resolutions	62,533	60,888	59,085	57,136	54,549	56,392	52,227	51,355	46,885	44,228	53,631
Resolutions By Type											
Settlements	2,272	2,657	3,748	4,828	4,493	5,362	5,215	5,365	4,991	5,165	6,423
	3.6%	4.4%	6.3%	8.5%	8.2%	9.5%	10.0%	10.4%	10.6%	11.7%	12.0%
Withdrawals w/Benefits	1,924	1,767	2,084	2,251	2,201	2,188	2,188	2,151	2,405	2,373	2,907
	3.1%	2.9%	3.5%	3.9%	4.0%	3.9%	4.2%	4.2%	5.1%	5.4%	5.4%
Administrative Closures	17,405	16,114	14,265	11,439	10,766	9,791	9,225	8,563	7,255	7,143	9,475
	27.8%	26.5%	24.1%	20.0%	19.7%	17.4%	17.7%	16.7%	15.5%	16.2%	17.7%
No Reasonable Cause	38,731	37,792	35,614	33,822	32,075	34,671	32,418	32,646	29,344	27,178	32,123
	61.9%	62.1%	60.3%	59.2%	58.8%	61.5%	62.1%	63.6%	62.6%	61.4%	59.9%
Reasonable Cause	2,201	2,558	3,374	4,796	5,014	4,380	3,181	2,630	2,890	2,426	2,703
	3.5%	4.2%	5.7%	8.4%	9.2%	7.8%	6.1%	5.1%	6.2%	5.5%	5.0%

Successful Conciliations	568	671	859	1,091	1,177	1,060	747	697	788	618	840
	0.9%	1.1%	1.5%	1.9%	2.2%	1.9%	1.4%	1.4%	1.7%	1.4%	1.6%
Unsuccessful Conciliations	1,633	1,887	2,515	3,705	3,837	3,320	2,434	1,933	2,102	1,808	1,863
	2.6%	3.1%	4.3%	6.5%	7.0%	5.9%	4.7%	3.8%	4.5%	4.1%	3.5%
Merit Resolutions	6,397	6,982	9,206	11,875	11,708	11,930	10,584	10,146	10,286	9,964	12,033
	10.2%	11.5%	15.6%	20.8%	21.5%	21.2%	20.3%	19.8%	21.9%	22.5%	22.4%
Monetary Benefits (Millions)*	$88.7	$78.0	$113.1	$142.4	$141.1	$141.7	$138.7	$128.6	$146.0	$126.5	$220.0

** Does not include monetary benefits obtained through litigation.*

Charge Statistics
FY 1997 Through FY 2007

The number for total charges reflects the number of individual charge filings. Because individuals often file charges claiming multiple types of discrimination, the number of total charges for any given fiscal year will be less than the total of the eight types of discrimination listed.

The data are compiled by the Office of Research, Information and Planning from data reported via the quarterly reconciled Data Summary Reports and compiled from EEOC's Charge Data System and, from FY 2004 forward, EEOC's Integrated Mission System.

	FY 1997	FY 1998	FY 1999	FY 2000	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007
Total Charges	80,680	79,591	77,444	79,896	80,840	84,442	81,293	79,432	75,428	75,768	82,792
Race	29,199	28,820	28,819	28,945	28,912	29,910	28,526	27,696	26,740	27,238	30,510
	36.2%	36.2%	37.3%	36.2%	35.8%	35.4%	35.1%	34.9%	35.5%	35.9%	37.0%
Sex	24,728	24,454	23,907	25,194	25,140	25,536	24,362	24,249	23,094	23,247	24,826
	30.7%	30.7%	30.9%	31.5%	31.1%	30.2%	30.0%	30.5%	30.6%	30.7%	30.1%
National Origin	6,712	6,778	7,108	7,792	8,025	9,046	8,450	8,361	8,035	8,327	9,396
	8.3%	8.5%	9.2%	9.8%	9.9%	10.7%	10.4%	10.5%	10.7%	11.0%	11.4%
Religion	1,709	1,786	1,811	1,939	2,127	2,572	2,532	2,466	2,340	2,541	2,880
	2.1%	2.2%	2.3%	2.4%	2.6%	3.0%	3.1%	3.1%	3.1%	3.4%	3.5%
Retaliation - All Statutes	18,198	19,114	19,694	21,613	22,257	22,768	22,690	22,740	22,278	22,555	26,663
	22.6%	24.0%	25.4%	27.1%	27.5%	27.0%	27.9%	28.6%	29.5%	29.8%	32.3%
Retaliation - Title VII only	16,394	17,246	17,883	19,753	20,407	20,814	20,615	20,240	19,429	19,560	23,371
	20.3%	21.7%	23.1%	24.7%	25.2%	24.6%	25.4%	25.5%	25.8%	25.8%	28.3%
Age	15,785	15,191	14,141	16,008	17,405	19,921	19,124	17,837	16,585	16,548	19,103
	19.6%	19.1%	18.3%	20.0%	21.5%	23.6%	23.5%	22.5%	22.0%	21.8%	23.2%

Disability	18,108	17,806	17,007	15,864	16,470	15,964	15,377	15,376	14,893	15,575	17,734
	22.4%	22.4%	22.0%	19.9%	20.4%	18.9%	18.9%	19.4%	19.7%	20.6%	21.4%
Equal Pay Act	1,134	1,071	1,044	1,270	1,251	1,256	1,167	1,011	970	861	818
	1.4%	1.3%	1.3%	1.6%	1.5%	1.5%	1.4%	1.3%	1.3%	1.1%	1.0%

APPENDIX B

The Top 5 Things Every UFO Member Should Know About EPLI Insurance and Some Other Key Information

Employment Practices Liability Insurance (EPLI) may be a relative bargain in the continued "soft" insurance market and employers should consider adding or increasing insurance coverage to protect against employment claims. EPLI insurance is somewhat quirky and the following are some considerations when evaluating policies:

1. **Coverage:** EPLI policies typically cover claims of wrongful discharge, workplace harassment and discrimination. Many offer a more comprehensive list of covered acts, including negligent hiring/supervision/evaluations, invasion of privacy, defamation and intentional infliction of emotional distress. Coverage typically applies to claims made by full time employees so as to exclude those by part-timers, temporary, seasonal and independent contractors. In comparing policies, look for one that has the most expansive coverage.

2. **Exclusions.** EPLI policies exclude many claims based on the statute that creates the legal right or the activity that gives rise to the claim. Exclusions apply to the
    1. Fair Labor Standards Acts;
    2. National Labor Relations Act;
    3. Worker Adjustment and Retraining Notification Act (WARN);
    4. Consolidated Omnibus Budget Reconciliation Act (COBRA);
    5. Employee Retirement Income Security Act (ERISA);
    6. Occupational Safety and Health Act (OSHA);
    7. costs associated with providing "reasonable accommodation" under the Americans with Disabilities Act (ADA);
    8. claims arising out of downsizing, layoffs, workforce restructurings, plant closures or strikes.
    9. Punitive damages are most always excluded.
    10. Carefully evaluate the excluded claims in light of your business practices. In the case of multi-state operations, be aware that some state laws create substantial employment rights that must also be evaluated under the policy language.

3. **Policy Limits and Deductibles:** Policy limits and deductibles usually apply on a per claim and aggregate basis. For example, coverage may be limited to $250,000 for each separate claim with an overall aggregate cap of $1 million for all claims. Employers must formulate their insurance goals in setting the appropriate deductibles and limits. Some employers view EPLI insurance as catastrophic coverage and are willing to accept a high deductible that allows them to handle smaller claims themselves. However, other employers are looking for more blanket coverage.

4. **Defense Costs, Selection of Counsel and Settlement**: Defense costs are usually included within the EPLI policy's limits, which has good and bad points.
    1. Many times, the legal expense is the largest cost to an employer in dealing with merit less claims. However, including defense costs means that every dollar an employer spends defending a claim reduces the amount available for settlement or to pay a judgment.
    2. Since the existence of insurance coverage must be disclosed as part of discovery in most law suits, a plaintiff's attorney will factor insurance coverage into his or her case evaluation.
    3. The defense cost feature may influence plaintiffs' counsel to try to settle early, rather than force an employer to incur litigation costs that will only erode the insurance dollars available for potential settlement.
    4. Employment claims often have significant employee relations ramifications making settlement a particularly important issue.
    5. Insurers view employment claims the same as any other insurance matter by evaluating only the potential for liability and the amount of damages.
    6. The employer and insurer may be at odds over settling a case. EPLI policies address this stalemate by either giving the insurer the right to settle without the employer's approval or, more frequently, giving an employer control over settlement, but adding a "hammer clause". These clauses are designed to limit the insurer's potential exposure if the policyholder passes up an opportunity to settle a claim recommended by the insurer. Hammer clauses provide that if there is an offer to settle a claim that the policyholder refuses accept, then the insurer will not be liable for a subsequent settlement or judgment in excess of a rejected settlement amount.

5. **Policy Types and Insurance Company Notification**: EPLI policies are typically written on a "claims made" basis meaning that the claim must be incurred during the coverage period and reported to the insurer during an extended reporting period. Since employment actions may take years to turn into a claim, an employer may be left with no coverage if the policy is dropped or tail coverage isn't purchased. Untimely notice to an insurance carrier can void coverage for and employment claim.

Risk Management in Employee Terminations: Sometimes the How is as Important as the Why.

What motivates a terminated employee to sue his or her employer is a complex issue. The manner in which an employee is "fired" is at least as likely to lead to a lawsuit as the "reason" given for his or her termination. Many lawyers spend all their time on justifying the reasons for why an employee is being let go which are important because they form the basis for the legal defense. However, not getting sued at all is better for an insured rather than having a great defense.

Planning both the "How" and the "Why" of an employee termination are extremely important. Managing the manner of termination reduces the risk of lawsuits and incidents of workplace violence. The following are ten on handling a workplace termination:

- **Treat the employee with dignity and respect.** Don't get personal in the termination meeting.
- **Avoid humiliation.** Don't make the employee do the walk of shame or leave your business under circumstances that lead others to think he or she stole from you or committed some other serious misconduct. There are numerous cases where the employee's major motivation for suing is being lead to an exit escorted by a security guard while carrying a cardboard box containing personal items. Allow the employee to come back later to collect personal affects or clean out an office or locker.
- **Select an appropriate time and location.** Avoid times and locations that are highly visible to other employees. Many employers select the end of the business day at the end of the work week, but this may be the wrong time for employees who may need access to support services like the EAP.
- **Consider giving a reason.** When asked in a deposition why an employee sued, the most common answer is that "I was never given a reason for being fired." There may be legal circumstances for avoiding an explanation, but they are rare. Formulate a reason and articulate it to the

employee. Reserve some latitude to supplement the reason, but at least have some explanation. Once given, don't debate its merits, but listen to the employee's response. You might hear something that makes you reconsider your decision, like "this all started when I refused to sleep with my supervisor".

- **Plan your communication.** Consider scripting what you will say and formulate responses to typical questions, like "Can I resign." Don't text message termination or layoff decisions unless there is just no other way to communicate. Consider a follow up letter that gives your reasons and preserves your right to supplement it with additional reasons. Don't blame the decision on others like the "home office" or "management".
- **Agree on a Reference, if possible.** If the employee knows what the company will say in response to a reference request, then he or she can address it in an interview or on an application. If the reference is inconsistent then the employee won't get a new job and will be more likely to sue the company.
- **Offer Assistance like the EAP or Outplacement.** Consider resources that may help an employee with emotional problems or assist them in a job search.
- **Protect your employees and business assets.** Plan the termination to protect your employees from violence in the workplace and your business assets from sabotage or damage, but don't overreact. Armed guards and lock changing may not be necessary. Retrieving keys, credit cards, passwords and canceling computer access are.
- **Communicate with remaining employees.** Plan some formal communication with other employees and individuals outside the company. This is difficult and uncomfortable, but necessary.
- **Control the rumor mill.** Don't allow gossip to incorrectly communicate any information.

Let's face it, it's a bad situation. But it is one that can be made worse through poor communication. Respect and empathy go a long way.

In 2007, 82,792 charges were filed by employees with the Equal Employment Opportunity Commission (EEOC). According to the EEOC, this is the most charges received by the federal agency since 2002 and the largest annual increase (9 percent) since the early 1990s. In 2007, the EEOC also recovered $345 million in monetary relief on behalf of aggrieved employees.

Significantly, for the first time, retaliation surpassed sex-based discrimination as the second-most filed charge. In addition to these EEOC statistics, a 2006 study conducted by the Society for Human Resource Management (SHRM) revealed that approximately 60 percent of employers have been involved in some type of employment related lawsuit, and over 90 percent of those suits result from termination or other discharge of employees.

Notes